

Interest Group on

INTERNATIONAL ORGANIZATIONS

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

WINTER 1999 NEWSLETTER

A MESSAGE FROM THE CHAIR

It is a pleasure to present the Winter 99 issue of the Newsletter of the ASIL International Organizations Interest Group. During the past year, we have made an effort to increase the substantive content of the Newsletter. This issue, which is our largest ever, contains articles about nonpayment of U.S. arrears to the United Nations, responsibility for war crimes in Kosovo, and copies of the testimony of Ambassador Scheffer and others before the Senate Foreign Relations Committee's recent hearings about the International Criminal Court. Special thanks go to our Newsletter editor, Bryan MacPherson, for making this publication possible.

With the "ASIL year" now half over, there are several developments concerning our interest group that I'd like to bring to your attention.

! On March 19, 1999, our interest group will be the principal co-sponsor of an international conference entitled "*Competing Competition Laws: Do we need a Global Standard?*" in Boston. See p.2 for the program.

! The Interest Group is planning a luncheon program about the failure of the United States to pay its arrears to the U.N. for the ASIL Annual Meeting (March 24-27 in Washington). The theme of the Annual Meeting is "On Violence, Power, *Money*, and Culture: Reviewing the Internationalist Legacy."

! For the past two years, our interest group's newsletter has been available to world-wide viewing at the internet website of the New England School of Law's Center for

International Law and Policy. The ASIL has recently established a hyperlink between the Interest Group page of the ASIL Website (<http://www.asil.org>) and our Interest Group Website (<http://www.nesl.edu/center/asil.htm>). ! The Chairs of the five subcommittees we established in 1997 have once again provided submissions for this newsletter on issues relating to the International Law Commission, the International Criminal Court, the International Court of Justice, international conferences, and Non-Governmental Organizations.

How to Log onto our Int'l Organizations Chat Room

The Interest Group's Internet "Webboard Conference" enables members to electronically discuss salient issues relating to international organizations. To log on to our new international organizations chat room:

- (1) Using Internet Explorer or Netscape, enter <http://www.nesl.edu>
 - (2) At the bottom of the NESL home page, scroll down the "quick jumps" and click on "WebBoard - Student/Faculty Discussion."
 - (3) The first time you use the WebBoard, you'll need to click on "New User" and fill out the form with an easy to remember password. The next time you enter the WebBoard, just log in with your password.
 - (4) The "Conferences" are listed on the left side. Click on the conference designated "ASIL—International Organizations." Expand the subject heading by clicking on the plus sign. Each conference expands, and if someone has replied to a message the plus sign will allow expansion so you can see the whole "threaded discussion." Merely double-click on the subject line to see the message.
 - (5) To begin a new discussion topic, click on POST.
- For help using the WebBoard, contact Sandy Lamar at (617) 422-7331.

! Videotapes of our panel—*A Simulated Appeal of the Karadzic Case Before the ICTY*—from the 1998 ASIL Annual Meeting are available for \$10. Please contact me if you would like to purchase a copy.

! In response to several requests from our members, we've set up a "Webboard Conference" to enable interest group members to electronically discuss salient issues relating to international organizations.

A t t h e International Organizations Interest Group's last Business Meeting held during the 1998 ASIL Annual Meeting, I agreed to stay on as Chair of the Interest Group for another year. But we need a volunteer to serve as Vice-Chair/Chair Elect for 1999-2000. If you are interested or would like to recommend someone else please contact me at (617) 457-3009. E-mail: mscharf@fac.nesl.edu.

I look forward to seeing you at the Annual Meeting in Washington in March!

— Prof. Michael P. Scharf, Chair

CONFERENCE — COMPETING COMPETITION LAWS: DO WE NEED A GLOBAL STANDARD?

The International Organizations Interest Group will co-sponsor an international conference entitled "Competing Competition Laws: Do we need a Global Standard?" which

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will be held at the New England School of Law in Boston on Friday, March 19, 1999. The other co-sponsors are the American Bar Association's International Institutions Committee, the American Branch of the International Law Association, the United Nations Association, and the International Law Students Association.

Conference panelists include Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit; Ambassador Hugo Paeman, Head of Delegation, EU Mission to the United States; Hans-Ulrich Petersmann, consultant to the WTO competition panel; Dr. Thomas Baxter, New York Federal Reserve; Judge Christopher Bellamy, European Union Court of First Instance; David Vaughan, QC, Counsel to *Factortame*; Joseph Griffin of Morgan, Lewis & Bockius (former head of its Brussels office); Eleanor Fox, Walter Denenberg Professor of Trade Regulation at NYU; Russel Weintraub, John Connelly Chair of Jurisprudence, University of Texas School of Law; Professor Lawrence Lessig of Harvard Law School, Special Master, Microsoft Litigation; Professor Don Wallace of Georgetown's International Law Institute; Professor Harold Maier, David Daniels Allen Distinguished Chair in Law, Vanderbilt University School of Law; and Professor David Gerber, Chicago-Kent College of Law, author of *Law and Competition in Twentieth Century Europe*.

Among the questions the panelists will address are: Can the United States and European Union collaborate on a competition standard? What might a world standard look like? Who would enforce it—the WTO or a newly created international institution? For more information, contact Michael Scharf.

THE 50TH SESSION OF THE INTERNATIONAL LAW COMMISSION

Gregory H. Fox*

The International Law Commission held its Fiftieth Session in Geneva from April 20 to June 12, 1998, and in New York from July 27 to August 14. The bifurcated session was made necessary by the Rome Conference on an International Criminal Court, which met during the Commission's mid-summer recess. Joao Clemente Soares of Brazil served as Chair.

Although the Commission debated six topics during its 1998 session, two stood out: state responsibility and reservations to multilateral treaties.¹ Not only are both topics the subject of intense controversy, but the Commission succeeded in making substantial progress in clarifying divisive yet important questions in each area.²

State Responsibility: State responsibility has been on the ILC's agenda since 1949, having outlived four successive Special Rapporteurs. Although the Commission had finished its first reading of a full set of draft articles in its 1997 session, significant streamlining and alteration was felt necessary if the articles were to be widely accepted by U.N. member states. To this end, the Commission appointed James Crawford of Cambridge University to serve as the fifth special rapporteur for the topic.³ The discussion in Geneva this summer revolved around suggestions made in Professor Crawford's first report.

Article 19 on State Crimes was the most controversial.⁴ While most members agreed that the current formulation of Article 19 had severe flaws, the Commission divided into two broad camps when it came to recommending new courses of action. One group argued that the concept of state crimes is fundamentally flawed and ought to be removed entirely. These opponents argued, *inter alia*, that state practice (including the case law of the International Court) does not support the notion of crimes committed by states, and that stigmatizing entire societies as "criminal" because of acts committed by their leaders is a dangerous idea. These commissioners supported deletion of the state crimes article and the adoption of a single,

graduated notion of wrongfulness that would apply to all violations of primary rules of international law.

Proponents of Article 19 not only contested the probity of state practice, but argued that it is simply inappropriate to lump severe and widespread violations of human rights (such as _____ p.4.

* Senior Fellow, Orville H. Schell, Jr. Center for International Human Rights, Yale Law School. Chair ILC Committee

¹ The other four topics were (i) international liability for injurious consequences arising out of acts not prohibited by international law; (ii) state succession and its impact on the nationality of natural and legal persons; (iii) diplomatic protection; and (iv) unilateral acts of States.

² The Commission's report appears as U.N. Document A/53/10, and is also available on the United Nations web site.

³ Professor Crawford had served as Special Rapporteur for the drafting of a statute for a permanent International Criminal Court, a task he is widely regarded as completing with exceptional skill and expeditiousness.

⁴ Draft article 19 provides in full:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere and the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

genocide) with more mundane violations of rules not regarded as *mala in se*. These Commissioners also argued that the ILC had for 20 years proceeded on the assumption that state crimes would be part of its final recommendations on state responsibility, and that the Commission should not now deviate from that path. They argued that while current Article 19 might be reformulated, the concept of state crimes ought to remain in the draft articles.

The Special Rapporteur suggested a compromise: the formation of a working group that would remove the idea of state crimes as *such* from the draft articles but analyze the related concepts of *jus cogens* norms and obligations *erga omnes*. The full Commission would then revisit the question of state crimes after completing the rest of its work on state responsibility, asking whether rules on those two concepts, as well as other provisions of the draft articles, had adequately addressed the problems embodied in the idea of state crimes. After much debate, the Commission eventually adopted a modified form of this proposal, agreeing to form a working group, remove the concept of state crimes from further consideration during its work on state responsibility, but not take a position on whether state crimes themselves do or do not exist. The Commission also agreed that in future sessions it would engage in more detailed examination of *jus cogens* norms and *erga omnes* obligations

The Commission also considered a number of draft articles on the question of when conduct may be attributable to a state. These were discussed with a minimum of divisiveness and passed on to the drafting committee. Of particular interest is the article attributing acts of an insurrectionist movement to the state which the movement later comes to govern. Members agreed that responsibility attaches at the moment insurrectionists gain effective control over the territory of a state, regardless of the movement's degree of legal control.

Reservations: The second major topic was reservations to treaties. Special Rapporteur Alain Pellet presented his third report, along with a set of draft guidelines setting out key definitions of concepts involved in treaty

reservations. Most importantly, Professor Pellet fused together definitions of "reservation" from the three Vienna Conventions to produce the following composite definition:

"Reservation" means a unilateral statement, however phrased or named, by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.

The Commission provisionally adopted this definition, along with guidelines on the object of reservations, instances in which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying of territorial application of a treaty and reservations formulated jointly. Professor Pellet also provided commentary on each of the guidelines.

**1998-1999 INTERNATIONAL
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U.S. NON-PAYMENT OF U.N. DUES

Michael P. Scharf

As a consequence of repeated withholdings and nonpayment of assessed dues over the past decade, the United States now owes the U.N. over 1.5 Billion dollars (which constitutes more than sixty percent of the debt of all member states). The United States faces the imminent prospect of losing its vote in the U.N. General Assembly pursuant to Article 19 of the U.N. Charter since its arrearage now exceeds the amount of the contributions due from it for the preceding two full years.

Last fall, the Senate Foreign Relations Committee declared that the U.N. Charter "in no way creates a 'legal obligation' on the U.S. Congress to authorize and appropriate" the money to pay U.N. dues. The Senate Foreign Relations Committee's statement reflects a dangerous misunderstanding of the nature of U.S. obligations under the U.N. Charter and international law. The United States is in fact under a binding international legal obligation to pay in full its assessed contributions to the regular budget and peacekeeping budget of the United Nations. This obligation stems from Article 17 of the United Nations Charter.

The U.S. freely agreed to pay its assessments when the Senate ratified the U.N. Charter, making it part of the supreme law of the United States. At that time, the U.S. joined the other members of the Organization to set the U.S. assessment at 25 percent for the general budget and 31 percent for the peacekeeping budget, which reflected the U.S. share of the world economy at that time. Moreover, at the insistence of the United States, the U.N. annual budgets are adopted by consensus, meaning the United States can unilaterally block U.N. spending if it chooses. Similarly, the U.S. wields control over the U.N.'s peacekeeping budget through the exercise of its veto power in the Security Council, which must approve all peacekeeping operations. But, according to the negotiating record of the U.N. Charter, the decision of the International Court of Justice in the *Certain Expenses* case, and prevailing state practice (including frequent statements

by the United States), once assessments are adopted under Article 17, they are binding.

The Vienna Convention on the Law of Treaties (which the United States recognizes as the authoritative guide to current treaty law and practice), states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Although U.S. courts have held that a later act of Congress may supersede an earlier treaty obligation when the two conflict for purposes of domestic law, the treaty obligations nevertheless remain on the international plain, and violations of those obligations continue to be violations of international law.

For over thirty-five years, the U.S. Congress, Republicans and Democrats alike, had adhered to a bipartisan consensus that the United States had a legal duty to pay whatever assessments, to be used for whatever purpose the collective membership of the United Nations determines are owing, and that it could not unilaterally "pick and choose" among the activities that the organization decides to communally fund. During the Reagan Administration, however, the United States first began to fall behind in its payments to the U.N, unilaterally withholding its share of funds budgeted for what it then considered objectionable organizations and programs. The Kasenbaum-Solomon amendment and the Gramm-Rudman-Hollings Act of 1985 resulted in further reductions in U.S. appropriations to the U.N. Recognizing that these withholdings were not valid under international law, the Bush Administration adopted a five-year repayment plan, but in 1994 Congress reneged.

During the Clinton Administration (which also adopted a five-year repayment plan), the situation has grown even worse, with the United States in 1998 failing for the first time in history to appropriate any funds whatsoever for the United Nations due to an amendment to the appropriations bill prohibiting U.S. funding for overseas family planning programs leading to a presidential veto. Last

month, President Clinton vetoed a \$926 million appropriation to pay U.S. arrears to the United Nations, saying an unrelated antiabortion restriction left him no choice.

Responding in part to U.S. pressure (and the necessities of getting by with less), in the last few years the United Nations has significantly cut its staff, streamlined its bureaucracy, reduced its programs, established an office of Inspector General, and cut out millions of dollars of redundancy and waste. It is much closer to becoming the fiscally responsible organization that the United States has demanded. But the U.S. debt has grown so large that it is seriously disrupting the work of the United Nations, instead of moving it toward further reform.

As a result of the United States' failure to meet its financial obligations, the U.N. is now facing its most serious financial crisis. According to Joseph E. Connor, U.N. Under-Secretary-General for Administration and Management, the United Nations is "on the financial brink, lacking both stability and liquidity." According to Connor, an American who previously headed the prestigious Price Waterhouse accounting firm, the U.N. will soon be unable to pay its employees, carry out humanitarian operations, and could be driven to bankruptcy.

For a typical example of how the financial crisis brought on by the United States effects important U.N. operations, one can look to the experience of the U.N.'s International Criminal Tribunal for the Former Yugoslavia. The Tribunal was established to investigate atrocities committed during the Balkan conflict and bring those responsible to justice in order to promote reconciliation and lasting peace in the troubled region. In the summer of 1995, the U.N. was literally running out of cash and the supply of funds to the Tribunal slowed to a trickle. As a consequence (and despite voluntary contributions by the United States and others), the office of the prosecutor lacked money to investigate the massacre of 8,000 civilians at the U.N. "safe area" of Srebrenica. The Office was also precluded from recruiting lawyers and investigators, or renewing contracts of current personnel, due to restrictions imposed by the Secretary-General in the face of the fiscal crisis. Evidence already gathered from refugee

interviews began to pile up unsifted and untranslated. As a consequence, the work of the Tribunal experienced serious delays. In the context of the former Yugoslavia, justice delayed translated into peace denied.

A fiscally healthy United Nations benefits the United States in many ways. The U.N. provides a world-wide forum in which the U.S. elicits support for its policies, interests and values, and it establishes world-wide programs to advance those policies, interests and values. It provides a means for settling disputes peacefully, providing humanitarian relief, furthering human rights and promoting economic and social development. When dispute settlement requires the use of force, the United Nations provides international legitimacy and support for U.S. actions and for sharing of the burden, as it has during the Persian Gulf crisis and the conflict in Bosnia. It is ironic that the United States is damaging the United Nations through nonpayment just when the United Nations has been best demonstrating its ability to serve U.S. purposes.

In addition to crippling the important work of the United Nations, the failure of the United States to pay its arrears has undercut a variety of U.S. diplomatic efforts—with our negotiating partners ever more frequently refusing to make concessions to a country which they say has become the world's biggest "deadbeat" nation. According to U.S. Secretary of State Madeleine Albright, "the debt undermines our leadership position in the [United Nations], making it harder for the President or his representatives to bend other members to our will." This was a theme that emerged repeatedly at the Rome Diplomatic Conference for a Permanent International Criminal Court in July 1998.

The United States now faces the prospect of losing its vote in the General Assembly as a result of its 1.5 billion dollar arrearage. Under Article 19 of the United Nations Charter, "a member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years." Given the economic and military importance of the

United States, the United Nations might find a way to avoid (or defer) applying Article 19; but that such action would even be considered is an embarrassment to our country and symptomatic of our loss of influence due to our arrears. Furthermore, if

☞ p.7.

WAR CRIMES IN KOSOVO: INDICT SLOBODAN MILOSEVIC

Paul Williams

The killing of hundreds of civilians, including many women and children, in Kosovo this year, raises yet again the question of why the Yugoslav War Crimes Tribunal has not indicted Mr. Slobodan Milosevic for his continuing role in orchestrating the massacre in the territory of the former Yugoslavia.

Despite ordering and supervising the slaughter of over 200,000 civilians in Bosnia and Herzegovina, Mr. Milosevic was granted de facto immunity as the War Crimes Tribunal accepted the Clinton Administration's argument that he represented the keystone to any lasting peace in Bosnia. To justify this inaction, the Clinton Administration contended that although Mr. Milosevic could reasonably be perceived as aiding and abetting war crimes and complicity in the commission of genocide, there was no "smoking gun" direct order bearing his signature.

Yet, now that peace has begun to take hold in Bosnia, Mr. Milosevic has lost any shield of

paying the arrears in full. But there is a disconnect between the views of the public and the Congress on this issue. If the United States is to remain a leader in its commitment to the rule of law and to maintain its influence on the world stage, unilateral nullification of U.S. obligations to the U.N. by congress and/or the executive branch must become the lawlessness of the past.

political utility. This development, coupled with the fact that Mr. Milosevic has now orchestrated the commission of crimes against humanity in his own country by forces under his direct command, expose him to immediate indictment by the War Crimes Tribunal.

As an acknowledgment of the prima facie culpability of Mr. Milosevic, the War Crimes Tribunal recently issued a press release indicating that it exercised jurisdiction over the events in Kosovo, and that although they occurred as a result of an internal conflict, individuals ordering or participating in the commission of atrocities could be found liable for crimes against humanity. Notably, crimes against humanity include killing and torturing civilians; unjustified military attacks against civilian populations; depriving civilians of their right to a fair trial; the wanton destruction of civilian property; and persecution based on political, racial, and religious grounds.

The immediate next step of the War Crimes Tribunal should be to issue a public indictment of Mr. Milosevic based on his responsibility for the heavily armed, systematic attacks on Kosovo's ethnic Albanian civilians, which have led to their being hung, summarily executed, burned and tortured. In many reported instances, mothers have seen their children murdered,

U.N. Dues - continued —

the United Nations chooses not to act under Article 19, there is a very real danger that other countries will begin to treat their U.N. assessments as voluntary, and the financial basis of the organization would quickly dissolve.

The most recent national opinion poll demonstrates that the American public recognizes the important role played by the United Nations. Public support for the United Nations (72 percent) is at its highest point since 1959. The public also recognizes the importance of the U.S. legal obligation to pay its debt to the organization. By a three-to-one margin, the Americans surveyed favored

and children have seen their fathers hunted and shot.

As President of the Federal Republic of Yugoslavia (FRY), Mr. Milosevic is directly responsible for the crimes against humanity committed in Kosovo as he exercises power, influence and control over the Serb military, the police forces of the Ministry of the Interior, and many Serb paramilitary forces who committed those atrocities. By virtue of the FRY's political and military command structure, which designates the President of the FRY as the chair of the Supreme Defense Council, Mr. Milosevic is guaranteed a formal and active role in military and police planning, strategy, and the execution of their activities. Without Mr. Milosevic's direct order, it would not have been possible for the helicopter gunships, light tanks, and armored personnel carriers of the military and police forces to carry out coordinated and well executed attacks on the homes of Albanian villagers in Kosovo.

Mr. Milosevic is also criminally responsible for the Kosovo atrocities under the doctrine of command responsibility. As the civilian commander of the military and police forces, Mr. Milosevic holds an affirmative legal obligation to prevent his forces from committing, encouraging, or enabling others to commit crimes against humanity in Kosovo. Rather than directing his forces to protect the human rights of innocent civilians, it appears from the systematic nature of the slaughter that Mr. Milosevic intended for his forces to commit these atrocities in order to serve as a warning to other Kosovo-Albanians that any further moves to assert their rights for internal self-determination would result in an ethnic cleansing of the region.

Moreover, Mr. Milosevic is criminally responsible for aiding and abetting the

atrocities committed by Serb paramilitary forces. Mr. Milosevic's nationalist and xenophobic rhetoric calling for an ethnically pure Serbia, along with his material and political support for Serb paramilitary units operating in Kosovo, incited and enabled them to carry out gruesome atrocities, including the murder of at least one pregnant woman and a number of children.

The way toward peace in the former Yugoslavia is to bring about an end to Mr. Milosevic's illegitimate and immoral regime. To expedite this task, the War Crimes Tribunal must summon the political will to act upon the evidence of Mr. Milosevic's most recent crimes against humanity and bring him to justice. If the Tribunal fails to act now, it will undoubtedly soon be overwhelmed with all the evidence it could desire as Mr. Milosevic's program of ethnic cleansing and genocide in Kosovo unfolds.

SENATE FOREIGN RELATIONS COMMITTEE HEARINGS ON THE PERMANENT INTERNATIONAL CRIMINAL COURT

At the end of the six-week Rome Diplomatic Conference, on July 17, 1998, 120 countries (including virtually all of the United States' allies) voted in favor of the Treaty

containing the Statute for an International Criminal Court. The United States joined China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries voting in

opposition to the Treaty. Twenty-one countries abstained. For ICC documents see: <http://www.un.org/icc/>

On July 23, 1998, the Senate Foreign Relations Committee held hearings to determine why the United States voted against the International Criminal Court and to ascertain future U.S. policy with respect to the Court. The hearings began with a statement by Senator Jesse Helms (R-North Carolina), who urged the Administration to take the following steps in opposition to the establishment of an international criminal court: First, that it announce that it will withdraw U.S. troops from any country that ratifies the International Criminal Court Treaty. Second, the U.S. must never vote in the Security Council to refer a matter to the Court's jurisdiction. Third, the U.S. must block any organization in which it is a member from providing any funding to the International Criminal Court. Fourth, the U.S. must renegotiate its Status of Forces Agreements and Extradition Treaties to prohibit our treaty partners from surrendering U.S. nationals to the International Criminal Court. Finally, the U.S. must provide no U.S. soldiers to any Regional or International Peacekeeping operation where there is any possibility that they will come under the jurisdiction of the International Criminal Court. According to Senator Helms' these measures would ensure that the Treaty will be "dead on arrival."

Following speeches by Senator Rod Grams (R-Minnesota), Senator Dianne Feinstein (D-California), Senator John Ashcroft (R-Missouri), and Senator Joseph Biden (D-Delaware), the Committee heard testimony from David Scheffer, Ambassador-at-Large For War Crimes Issues; John Bolton, Senior Vice President of the American Enterprise Institute; Attorney Lee Casey, and Professor Michael Scharf. In addition, Richard Dicker of Human Rights Watch was permitted to submit written testimony for the record. The testimony of Ambassador Scheffer, Michael Scharf, and Richard Dicker are reproduced in full below.

**Statement of David J. Scheffer
Ambassador-at-Large for War Crimes
Issues & Head of the U.S. Delegation to the**

U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court

Mr. Chairman, thank you for the opportunity to address the Committee on the developments in Rome this summer relating to the establishment of a permanent international criminal court. As you know, I had the pleasure of being joined by a number of Committee staffers during the Rome conference and I am sure they brought back to you their own perspectives on the negotiations.

Mr. Chairman, no one can survey events of this decade without profound concern about worldwide respect for internationally recognized human rights. We live in a world where entire populations can still be terrorized and slaughtered by nationalistic butchers and undisciplined armies. We have witnessed this in Iraq, in the Balkans, and in central Africa. Internal conflicts dominate the landscape of armed struggle today, and impunity too often shields the perpetrators of the most heinous crimes against their own people and others. As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind. One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice.

That is why, since early 1995, U.S. negotiators labored through many Ad Hoc and Preparatory Committee sessions at the United Nations in an effort to craft an acceptable statute for a permanent international criminal court using as a foundation the draft statute prepared by the International Law Commission in 1994. Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its

operation. But we always knew how complex the exercise was, the risks that would have to be overcome, and the patience that we and others would have to demonstrate to get the document right. We were, after all, confronted with the task of fusing the diverse criminal law systems of nations and the laws of war into one functioning courtroom in which we and others has confidence criminal justice would be rendered fairly and effectively. We also were drafting a treaty-based court in which sovereign governments would agree to be bound by its jurisdiction in accordance with the terms of its statute. How so many governments would agree with precision on the content of those provisions would prove to be a daunting challenge. When some other governments wanted to rush to conclude this monumental task—even as early as the end of 1995—the United States pressed successfully for a more methodical and considered procedure for the drafting and examination of texts.

The U.S. delegation arrived in Rome on June 13th with critical objectives to accomplish in the final text of the statute. Our delegation included highly talented and experienced lawyers and other officials from the Departments of State and Justice, the Office of the Secretary of Defense, the Joint Chiefs of Staff, the U.S. Mission to the United Nations, and from the private sector. America can be proud of the tireless work and major contributions that these individuals made to the negotiations.

Among the objectives we achieved in the statute of the court were the following:

- ! An improved regime of complementarity (meaning deferral to national jurisdictions) that provides significant protection, although not as much as we had sought.
- ! A role preserved for the U.N. Security Council, including the affirmation of the Security Council's power to intervene to halt the court's work.
- ! Sovereign protection of national security information that might be sought by the court.
- ! Broad recognition of national judicial procedures as a predicate for cooperation with the court.
- ! Coverage of internal conflicts, which comprise the vast majority of armed

conflicts today.

- ! Important due process protections for defendants and suspects.
- ! Viable definition of war crimes and crimes against humanity, including the incorporation in the statute of elements of offenses. We are not entirely satisfied with how the elements have been incorporated in the treaty, but at least they will be a required part of the court's work. We also were not willing to accept the wording proposed for a war crime covering the transfer of population into occupied territory.
- ! Recognition of gender issues.
- ! Acceptable provisions based on command responsibility and superior orders.
- ! Rigorous qualifications for judges.
- ! Acceptance of the basic principle of state party funding.
- ! An Assembly of States Parties to oversee the management of the court.
- ! Reasonable amendment procedures.
- ! A sufficient number of ratifying states before the treaty can enter into force, namely 60 governments have to ratify the treaty.

The U.S. delegation also sought to achieve other objectives in Rome that in our view are critical. I regret to report that certain of these objectives were not achieved and therefore we could not support the draft that emerged on July 17th.

First, while we successfully defeated initiatives to empower the court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections. In particular, the treaty specifies that, as a precondition to the jurisdiction of the court over a crime, either the state of territory where the crime was committed or the state of nationality of the perpetrator of the crime must be a party to the treaty or have granted its voluntary consent to the jurisdiction of the court. We sought an amendment to the text that would have required both of these countries to be party to the treaties or, at a minimum, would have required that only the consent of the state of nationality of the perpetrator be obtained before the court could exercise jurisdiction. We asked for a vote on our proposal, but a motion to take no action

was overwhelmingly carried by the vote of participating governments in the conference.

We are left with consequences that do not serve the cause of international justice. Since most atrocities are committed internally and most internal conflicts are between warring parties of the same nationality, the worst offenders of international humanitarian law can choose never to join the treaty and be fully insulated from its reach absent a Security Council referral. Yet multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.

Mr. Chairman, the U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies. But serious risks remain because of the document's provisions on jurisdiction.

Our position is clear: Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the U.N. Charter. Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone, everywhere in the world. There will necessarily be cases where the international court cannot and should not have jurisdiction unless the Security Council decides otherwise. The United States has long supported the right of the Security Council to

refer situations to the court with mandatory effect, meaning that any rogue state could not deny the court's jurisdiction under any circumstances. We believe this is the only way, under international law and the U.N. Charter, to impose the court's jurisdiction on a non-party state. In fact, the treaty reaffirms this Security Council referral power. Again, the governments that collectively adopt this treaty accept that this power would be available to assert jurisdiction over rogue states.

Second, as a matter of policy, the United States took the position in these negotiations that states should have the opportunity to assess the effectiveness and impartiality of the court before considering whether to accept its jurisdiction. At the same time, we recognized the ideal of broad ICC jurisdiction. Thus, we were prepared to accept a treaty regime in which any state party would need to accept the automatic jurisdiction of the court over the crime of genocide, as had been recommended by the International Law Commission in 1994. We sought to facilitate U.S. participation in the treaty by proposing a 10-year transitional period following entry into force of the treaty and during which any state party could "opt-out" of the court's jurisdiction over crimes against humanity or war crimes. We were prepared to accept an arrangement whereby at the end of the 10-year period, there would be three options—to accept the automatic jurisdiction of the court over all of the core crimes, to cease to be a party, or to seek an amendment to the treaty extending its "opt-out" protection. We believe such a transition period is important for our government to evaluate the performance of the court and to attract a broad range of governments to join the treaty in its early years. While we achieved the agreement of the Permanent Members of the Security Council for this arrangement as well as appropriate protection for non-party states, other governments were not prepared to accept our proposal. In the end, an opt-out provision of seven years for war crimes only was adopted.

Unfortunately, because of the extraordinary way the court's jurisdiction was framed at the last moment, a country willing to commit war crimes could join the treaty and "opt out" of

war crimes jurisdiction for seven years while a non-party state could deploy its soldiers abroad and be vulnerable to assertions of jurisdiction.

Further, under the amendment procedures states parties to the treaty can avoid jurisdiction over acts committed by their nationals or on their territory for any new or amended crimes. This is protection we successfully sought. But as the jurisdiction provision is now framed, it purports to extend jurisdiction over non-party states for the same new or amended crimes.

The treaty also creates a *proprio motu* or self-initiating prosecutor who, on his or her own authority with the consent of two judges, can initiate investigations and prosecutions without referral to the court of a situation either by a government that is party to the treaty or by the Security Council. We opposed this proposal, as we are concerned that it will encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion.

In addition, we are disappointed with the treatment of the crime of aggression. We and others had long argued that such a crime had not been defined under customary international law for purposes of individual criminal responsibility. We also insisted, as did the International Law Commission in 1994, that there had to be a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state. The statute of the court now includes a crime of aggression, but leaves it to be defined by a subsequent amendment to be adopted seven years after entry into force. There is no guarantee that the vital linkage with a prior decision by the Security Council will be required by the definition that emerges, if in fact a broadly acceptable definition can be achieved. We will do all we can to ensure that such linkage survives.

We also joined with many other countries during the years of negotiation to oppose the inclusion of crimes of terrorism and drug crimes in the jurisdiction of the court on the grounds that this could undermine more effective national efforts. We had largely

prevailed with this point of view only to discover on the last day of the conference that the Bureau's final text suddenly stipulated, in an annexed resolution that would be adopted by the conference, that crimes of terrorism and drug crimes should be included within the jurisdiction of the court, subject only to the question of defining the relevant crimes at a review conference in the future. This last minute insertion in the text greatly concerned us and we opposed the resolution with a public explanation. We said that while we had an open mind about future consideration of crimes of terrorism and drug crimes, we did not believe that including them will assist in the fight against these two evil crimes. To the contrary, conferring jurisdiction on the court could undermine essential national and transnational efforts, and actually hamper the effective fight against these crimes. The problem, we said, was not prosecution, but rather investigation. These crimes require an ongoing law enforcement effort against criminal organizations and patterns of crime, with police and intelligence resources. The court will not be equipped effectively to investigate and prosecute these types of crimes.

Finally, we were confronted on July 17th with a provision stipulating that no reservations to the treaty would be allowed. We had long argued against such a prohibition and many countries had joined us in that concern. We believed that at a minimum there were certain provisions of the treaty, particularly in the field of state cooperation with the court, where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty.

Mr. Chairman, the Administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty. In the meantime, the challenge of international justice remains. The United States will continue as a leader in supporting the common duty of all law-abiding governments to bring to justice those who commit heinous crimes in our own time and in the future. The

hard reality is that the international court will have no jurisdiction over crimes committed prior to its actual operation. So more ad hoc judicial mechanisms will need to be considered. We trust our friends and allies will show as much resolve to pursue the challenges of today as they have to create the future international court.

**Statement of Michael P. Scharf
Professor of Law and Director of the
Center for International Law and Policy,
New England School of Law**

Good morning, Mr. Chairman and distinguished Senators. Going into the Rome Diplomatic Conference, both the U.S. Congress and the Administration in principle recognized the need for a permanent international criminal court. Any discussion of what happened in Rome must begin by recalling the case for such an institution.

In his book, "Death by Government," Professor Rudi Rummel, who was nominated for the Nobel Peace Prize, documented that 170 million civilians have been victims of war crimes, crimes against humanity, and genocide during the 20th Century. We have lived in a golden age of impunity, where a person stands a much better chance of being tried for taking a single life than for killing ten thousand or a million. Adolf Hitler demonstrated the price we pay for inaction. In a speech to his commanding generals on the eve of his campaign into Poland in 1939, he dismissed concerns about accountability for acts of genocide by stating, "Who after all is today speaking about the destruction of the Armenians." He was referring to the fact that the Turkish leaders were granted amnesty in the Treaty of Lasauanne for the genocidal murder of one million Armenians during the First World War. After the Second World War, the international community established the Nuremberg Tribunal to prosecute the Nazi leaders and said "Never Again!"—meaning that it would never again sit idly by while crimes against humanity were committed. Fifty years ago, the U.N. began work on the project to establish a permanent Nuremberg Tribunal.

But because of the cold war, the pledge of "never again" quickly became the reality of

"again and again" as the world community failed to take action to bring those responsible to justice when 2 million people were butchered in Cambodia's killing fields, 30,000 disappeared in Argentina's Dirty War, 200,000 were massacred in East Timor, 750,000 were exterminated in Uganda, 100,000 Kurds were gassed in Iraq, and 75,000 peasants were slaughtered by death squads in El Salvador. Just as Adolf Hitler pointed to the world's failure to prosecute the Turkish leaders, Radovan Karadzic and Ratko Mladic were encouraged by the world's failure to bring Pol Pot and Idi Amin to justice for their international crimes.

Then, in the summer of 1992, genocide returned to Europe just when the U.N. Security Council was freed of its cold war paralysis. Against great odds, a modern day Nuremberg Tribunal was established in The Hague to prosecute those responsible for atrocities in the Former Yugoslavia. Then a year later, genocide reared its ugly head again, this time in the small African country of Rwanda where members of the ruling Hutu tribe massacred 800,000 members of the Tutsi tribe. In the aftermath of the bloodshed, Rwanda's Prime Minister-designate (a Tutsi) pressed the Security Council: "Is it because we're Africans that a similar court has not been set up for the Rwanda genocide." The Council responded by establishing a second international war crimes Tribunal in Arusha, Tanzania.

With the creation of the Yugoslavia and Rwanda Tribunals, there was hope that ad hoc tribunals would be set up for crimes against humanity elsewhere in the world. Perhaps Saddam Hussein would be the next target of international justice. Genocidal leaders and their followers would have reason to think twice before committing atrocities. But then something known in government circles as "Tribunal Fatigue" set in. The process of reaching agreement on the tribunal's statute, electing judges, selecting a prosecutor and staff, negotiating headquarters agreements and judicial assistance pacts, and appropriating funds turned out to be too time consuming and exhausting for the members of the Security Council. A permanent international criminal court was universally hailed as the solution to

the problems that afflict the ad hoc approach.

So what went wrong in Rome? Why did the United States Delegation feel compelled to join a handful of rogue States such as Iran, Libya, and Iraq in voting against the statute for a Permanent International Criminal Court, while all of our allies (except Israel) voted in favor of the Court?

Rome represented a tension between the United States, which sought a Security Council-controlled Court, and most of the other countries of the world which felt no country's citizens who are accused of war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court. The justification for the American position was that, as the world's greatest military and economic power, more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world. The United States' unique position renders U.S. personnel uniquely vulnerable to the potential jurisdiction of an international criminal court. In sum, the Administration feared that an independent ICC Prosecutor would turn out to be (in the words of one U.S. official) an "international Ken Starr."

The rest of the world was somewhat sympathetic to the United States' concerns. What emerged from Rome was a Court with a two-track system of jurisdiction. Track One would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all states to comply with orders for evidence or the surrender of indicted persons under Chapter VII of the U.N. Charter. This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda. The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor. This track would have no built in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court's statute.

During the Rome Conference, the delegations reluctantly accepted a number of proposals advocated by the United States

which would protect it from the potential exposure to the second track of the Court's jurisdiction. Thus, the following protective mechanisms were incorporated into the Court's Statute at the urging of the United States:

First, the Court's jurisdiction under the second track would be based on a concept known as "complementarity," which was defined as meaning the court would be a last resort which comes into play only when domestic authorities are unable or unwilling to prosecute. At the insistence of the United States, the delegates at Rome added teeth to the concept of complementarity by providing in Article 18 of the Court's Statute that the Prosecutor has to notify states with a prosecutive interest in a case of his/her intention to commence an investigation. If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the State's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber.

Second, Article 8 of the Court's Statute specifies that the Court would have jurisdiction only over "serious" war crimes that represent a "policy or plan." Thus, random acts of U.S. personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction.

Third, Article 15 of the Court's Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. And the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

Fourth, Article 16 of the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. While this does not amount to the individual veto the United States had sought, this does give the United States and the other members of the Security Council a collective veto over the Court.

The United States Delegation played hard ball in Rome and got just about everything it wanted. These protections proved sufficient

for other major powers including the United Kingdom, France and Russia. But without an iron clad exemption for U.S. servicemen, the United States felt compelled to force a vote, and ultimately to vote against the Court. The final vote on the Statute was 120 in favor, 7 against, with 21 abstentions.

The ICC Statute will come into force when 60 countries ratify it, which given the overwhelming vote in favor, should be within a relatively short period of time. Where does that leave us? Within five years the world will have a permanent international criminal court even without U.S. support. As a non-party, the U.S. will not be bound to cooperate with the Court. But this does not guarantee complete immunity from the Court. It is important to understand that U.S. citizens, soldiers, and even officials could still be indicted by the Court and even arrested and surrendered to the Court while they are visiting a foreign country which is party to the Court's Statute.

Moreover, by failing to sign the Statute, the U.S. will be prevented from participating in the selection of the Court's prosecutor and its judges. The most important question, which cannot be answered at this time, is whether the United States will be prevented from utilizing the first track of the Court's jurisdiction: that is, Security Council referral of cases.

The worst thing about the U.S. decision to break consensus and vote against the permanent international criminal court, is that the Rome conference will end up sending a mixed message to future war criminals and genocidal leaders. The U.S. action may be viewed as evidence that the world's greatest power does not support the international effort to bring such persons to justice. A future Adolf Hitler may point to the U.S. action in telling his followers that they need not fear being held accountable.

In sum, it is my opinion that the U.S. lost far more than it gained by voting against the ICC Statute in Rome. Given the overwhelming number of countries which support the ICC, an attempt to prevent the Statute from coming into force would be extremely costly and ultimately futile.

Statement by Richard Dicker

of Human Rights Watch

The urgent need for this International Criminal Court (ICC) has been underscored by the spectacular failure of national court systems to hold those accused of the most serious crimes under international law accountable for their acts. The United States had strongly supported the courts' creation up until the final negotiations. A foundational principle of this Court is that it will only operate in situations where a national jurisdiction is "unable or unwilling" to bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. Before the ICC could try a case, the Court's Prosecutor must prove that the national authorities were acting "with the intent to shield an individual from international criminal responsibility." This threshold provides a strong safeguard against unnecessary prosecutions.

Human Rights Watch, one of the world's largest non-governmental monitors of violations of human rights and the laws of war, believes this Court has tremendous potential to deter atrocities and provide justice to the victims of the world's most heinous atrocities. It is for this reason that we profoundly regret the failure of the United States to sign the treaty. It is misguided and indeed, contrary to this nation's interest in world peace and justice.

The Claim that the statute is "overreaching" in that it purports to bind non-States Parties through the exercise of jurisdiction over their nationals is a gross mischaracterization. To begin with, it does not "bind" non-States Parties or impose upon them any novel obligations under international law. What it does do, is permit the ICC to exercise jurisdiction over the nationals of non-States Parties where there is a reasonable basis to believe they have committed the most serious international crimes. There is nothing novel about such a result. The core crimes in the ICC treaty are crimes of universal jurisdiction — that is, they are so universally condemned, that any nation in the world has the authority to exercise jurisdiction over suspects and perpetrators, *without the consent of that individual's state of nationality*. Thus, in the extremely unlikely event that a U.S. service person were to commit such a crime abroad,

that state would be able to investigate and prosecute the individual without U.S. consent.

Nor is there anything unusual about the conferral of jurisdiction over nationals of non-State Parties through the mechanism of treaty law. The United States is party to a dozen antiterrorism treaties that provide universal jurisdiction for these crimes, and empower States Parties to investigate and prosecute perpetrators of any nationality found within their territory. The United States has exercised jurisdiction over foreigners on the basis of such treaties, without the consent of their state of nationality. Indeed, the United States extradites and surrenders its own citizens all the time to be tried by foreign courts that are not subject to the United States Constitution or its Bill of Rights. There is no Constitutional impediment to this, and indeed, there would be no such hurdle to the surrender of U.S. nationals to an international tribunal either. The one innovation of the ICC treaty is that it similarly allows states on whose territories these crimes were committed to allow the ICC to proceed in lieu of the state itself. Given that the ICC will follow the highest international standards of procedural fairness and protection of defendants' rights, this may often be preferable to having the accused tried in a foreign national court.

It is of more than semantic importance to underscore that non-States Parties are not "bound" by the ICC treaty. The treaty does not impose any duty on non-States Parties that they are not already bound to fulfil. All nations are already obligated to investigate and punish anyone who commits genocide, crimes against humanity, or the most serious war crimes, and this fact is reflected in the treaty's complementarily provisions that bar the ICC from acting where a state is taking up this task. Although it is possible for citizens of a non-State Party to come before the ICC, the state itself incurs no new obligations, and indeed, not even the obligation of cooperation with the Court, unless the referral comes from the Security Council itself.

The United States, in particular, objected to the inclusion of the consent or ratification of the state on whose territory the crime was committed as satisfying the preconditions to jurisdiction, and proposed that only the state of nationality of the suspect be able to satisfy

the precondition through its consent or ratification of the treaty. Such a narrow door to the ICC's exercise of its powers would exclude virtually any world-class criminal. No one imagines Saddam Hussein consenting to his own prosecution for war crimes committed in Kuwait.

In fact, such a narrow basis for the exercise of jurisdiction would have operated as a powerful disincentive for states to ratify the treaty—a sort of "poison pill" to ensure the ICC never became operational. If refraining from ratifying the Court's statute were the one sure-fire way of guaranteeing that no citizen was ever the subject of an ICC prosecution, many states would think long and hard about ratifying made at all. It would not make sense, therefore, for the United States to stake its position vis-a-vis the Court on the issue if it otherwise favored joining the treaty.

In contrast, the current formulation that allows either the state where the crime was committed or the state of the suspect's nationality to act as the "door" to jurisdiction provides an additional incentive to ratification. Governments that want to insure redress should they ever be invaded and subjected to these atrocities can ratify this treaty, secure in the knowledge that this "insurance" will only operate should their nation be rendered incapable of enforcing justice in its own courts.

The United States has also objected to the power of the prosecutor to act independently to initiate the investigation of matters on the basis of information from sources such as victims, United Nations personnel, or non-governmental groups, arguing that this would overwhelm the prosecutor and transform the office into a human rights ombudsperson. Yet it advanced no solution to this problem, though many have been suggested, including panels of experts to screen out frivolous or marginal cases. And indeed, the United States succeeded in imposing a powerful check on the prosecutor's power to commence investigation of a matter by subjecting it to a rigorous process of challenge by an affected State and review by successive levels of the ICC—all without prejudice to the State's ability to also challenge the investigation of any individual suspect's case.

In fact, the United States won myriad concessions at the negotiations that are reflected throughout the body of the treaty, in terms of the threshold definitions of crimes, and the opt-out provision for war crimes generally that constrict the reach of the Court to a considerable degree and make the chances of prosecution of a United States citizen extremely remote indeed. It is notable that other world powers with troops widely deployed abroad, such as France, the United Kingdom and Russia, did not see this treaty as exposing their nationals to frivolous or malicious prosecutions; and it is our hope that the United States will ultimately come to this point of view.

* * *

ICC Committee Report

John L. Washburn

Following the Senate Foreign Relations Committee Hearings on the ICC, the viability of the Court created by the Rome Statute and the United States position on it were extensively reviewed and debated at numerous academic and professional symposia and conferences, and in the press. The September-October issue of the ASIL Newsletter featured an article by David Scheffer, U.S. Ambassador-at-large for War Crimes Issues and head of the U.S. delegation in Rome, explaining the U.S. opposition to the Rome Statute. ASIL President Thomas Franck's accompanying column expressed strong concern over excessive military influence on U.S. policy toward the land mines and ICC treaties. The IO Interest Group and ICC Committee chairs both participated in panels relevant to the ICC at the International Law Association conference in mid-November.

In the course of these events, there was evidence of a shift in the U.S. approach from the stern warnings of vigorous U.S. opposition issued just after Rome, to an appeal for dialogue and a mutual search for solutions. This is being addressed to other governments and to American non-governmental organizations. The change was confirmed by Ambassador Scheffer's speech during the October 21-22 debate in the Sixth Committee (Legal) of the General Assembly on a resolution to convene the U.N. Preparatory Commission on the ICC. While acknowledging that the U.S. "[does] not presume that we have all the answers," he asked that, in addition to the issues already in its mandate, the Preparatory Commission "afford the opportunity for governments to address their more fundamental concerns" so that "new solutions" might emerge. It appears that the resolution, under negotiation as this was written, will provide for this opportunity, while leaving scant opening for the possibility of revising the Rome Statute.

The Preparatory Commission is expected to meet during 1999 in mid-February, late July – early August, and late December, and in March 2000. It is to draft proposals for rules of procedure and evidence, for further definitions

of elements of crimes as guidelines to the ICC judges, and for administrative, budgetary, management, and logistical arrangements for the Court. ASIL members are participating in an ABA-sponsored task force to write rules of procedure and evidence to be presented to the Preparatory Commission. ICC Committee members will attend the Preparatory Committee's sessions and we urge other ASIL members to join them. The Commission's responsibilities are uniquely lawyers' work. They offer us a one-time-only chance to bring our practical experience and professional skills to bear in completing and solidifying the extraordinary and exhilarating triumph for the rule of law the Rome Statute represents.

We wish Committee Co-Chairman Steven Gerber well in his new assignment in Sarajevo as counsel to the Human Rights Bench of the new Bosnian judiciary.

* * *

Editor's Comment

The Statute provides a mechanism for adding future crimes and the Conference recommended that this mechanism be invoked in the future to add terrorism and drug related crimes to the Court's jurisdiction. The U.S. opposed their inclusion because it believed that they are best dealt with by national courts. The utility of expanded jurisdiction is, however, highlighted by the current controversy surrounding Turkey's request that Italy extradite accused terrorist Abdullah Ocalan. If states were permitted to submit such cases to the court on a case-by-case basis it could substantially reduce international discord and friction caused by such extradition requests. The U.S. also argued that the ICC would not have the resources to investigate such crimes. However, it would not need to do so in most cases as national authorities could investigate the crimes and turn the results over to the court.

— Bryan F. MacPherson

RECENT DEVELOPMENTS AT THE ICJ

Ingrid Persaud & Richard M.J. Thurston*

There have been developments in seven cases on the docket of the ICJ as pending and in the sole case listed as being under deliberation.

In the last edition of this newsletter, we reported on *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v.U.K.). See 92 AM. J. INT'L L. at 503 for a well-written analysis of the Court's February 27 ruling that it would decide on questions of the lawfulness of the actions criticized by Libya. The only new development are the orders of March 30th fixing December 30, 1988, as the time limit for the U.S. and U.K. to file their counter-memorials.

Oil Platforms (Islamic Republic of Iran v. U.S.) arises out of Iran's claim that the destruction by U.S. warships of three Iranian offshore oil production complexes in 1987 and 1988 constituted a fundamental breach of various provisions of the Treaty of Amity

* Co-chairs, ICJ Committee

between the two states and of international law. In 92 AM. J. INT'L L. at 508, the author presents a very thought-provoking discussion of the emerging jurisprudence on counterclaims and its implication on the procedural jurisprudence of the Court. On May 26, the Court extended the time for filing Iran's Reply to the counterclaim by the U.S. (found admissible on March 10, 1998) alleging that Iran had engaged in actions detrimental to maritime commerce to December 10, 1998, and for filing the Rejoinder of the U.S. to May 23, 2000.

On April 1, 1998, the Court ordered a further round of written pleadings in *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahrain). Proceedings were instituted in July 1991 by Qatar in respect to certain disputes with Bahrain concerning the sovereignty over the Hawar Islands and the delimitation of maritime

areas. The origin of this dispute stems from decisions taken by the British government during the period of its presence in Bahrain and Qatar.

In *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), ICJ President Stephen M. Schwebel decided on October 7 that Hungary was to file by December 7, 1998, a written statement on its position on the request for an additional judgment that Slovakia submitted on September 3. In that request, Slovakia maintained that Hungary has been unwilling to implement the judgment the Court delivered on September 25, 1997. That judgment found that both parties had breached their legal obligations to each other and called upon them to negotiate in good faith to achieve the objectives of the 1977 Budapest Treaty on the construction and operation of dams on the Danube River and the Gabcikovo-Nagymaros barrage system.

The Court found on June 11, 1998, that it has jurisdiction in *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria). Nigeria had challenged the admissibility of Cameroon's claims and had raised eight preliminary objections to the Court's jurisdiction. The Court ruled Cameroon's claims admissible and rejected outright seven of the eight preliminary objections. The Court decided that it could not rule on the eighth objection because to do so would require it to deal with the merits of Cameroon's request. The Court concluded that contrary to the arguments presented by Nigeria, a justiciable dispute exists.

Application of the Vienna Convention on Consular Relations (Paraguay v. U.S.) arises from the arrest and conviction of Angel Francisco Breard, a Paraguayan citizen, for attempted rape and murder. He was executed on April 14, 1998, following the denial of appeals by both Paraguay (alleging violations of the Vienna Convention) and Mr. Breard (that he was not notified of his right to communicate with Paraguayan consular officials and Paraguay was not notified of his detention). The basis of Paraguay's claim is that the United States violated the Convention by offering no assistance to Paraguay in exercising its rights under the Convention. See 92 AM. J. INT'L L. at 517 for a more

extensive discussion of the facts of this case. On June 8 the Court extended the time-limit for filing Paraguay's Memorial to October 9, 1998, and for filing the U.S. Counter-Memorial until April 9, 1999.

The final case pending on the docket, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, is a request for an advisory opinion submitted on August 5, 1998 by ECOSOC. It relates to a difference of opinion between the U.N. and Malaysia over the interpretation of Art. VI § 22 of the Convention on the Privileges and Immunities of the United Nations. At issue is whether a Special Rapporteur, Mr. Dato' Param Cumaraswamy, is liable for alleged defamatory comments made during the course of an interview with a magazine which led to the filing in Malaysian courts of four lawsuits seeking \$112 million in damages. The U.N. has informed the Malaysian government that because Mr. Cumaraswamy's words were spoken in the course of his mission, he is "immune from legal process with respect thereto." The Malaysian government did not oppose the submission of the matter to the Court and will make its own presentations.

Public hearings on the issue of jurisdiction were completed on June 17 in the sole case currently under deliberation, *Fisheries Jurisdiction* (Spain v. Canada). The dispute arises out of the boarding on March 9, 1995, by a Canadian patrol boat (the *Cape Roger*) on the high seas of the *Estal*, a Spanish fishing boat. The application filed by Spain claims that Canada violated international law principles dealing with freedom of navigation and freedom of fishing on the high seas, as well as the exclusive jurisdiction of a flag state over its ships on the high seas. Canada contends that the Court lacks jurisdiction because a Canadian reservation made in its declaration accepting compulsory jurisdiction of the Court for "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area . . . and to the enforcement of such measures." Written proceedings in the jurisdictional phase were concluded on May

10 and the oral proceeding were conducted between June 9—17.

For those of us who teach public international law, the *Fisheries Jurisdiction* case is, in the opinion of this reporter (Thurston), a superb addition to our course syllabus. I would like to cite in particular the oral arguments delivered by Canada on June 15. A number of legal issues were addressed by the agents for

☞ p.21.

Five-Year Review of the Vienna Declaration & Program of Action: The Ottawa Global NGO Forum

George E. Edwards*

Introduction: Human Rights NGOs continue to play a vibrant and crucial role in the promotion and protection of human rights globally. In 1998, human rights NGOs remain actively engaged in traditional advocacy and service work. But this year has presented NGOs with unique challenges, leading them to join efforts on multiple extraordinary projects:

! NGOs have collaboratively planned celebrations around the globe to commemorate the fiftieth anniversary of the Universal Declaration of Human Rights on December 10, 1998.

! NGOs formed the largest “delegation” at the Rome Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court.

! NGOs mobilized to participate in the United Nations 5-Year Review of the 1993 Vienna Declaration and Program of Action (VDPA). Those efforts culminated at a June 1998 global NGO forum, held in Ottawa, Canada, at which international NGOs adopted the Ottawa Declaration and Program of Action—Vienna Plus Five Review (ODPA). The impact of NGOs—and the ODPA—on the VDPA review process is far-reaching, as U.N. Secretary General Kofi Annan considered the NGO input in his U.N. General Assembly 5-year VDPA follow-up report this Autumn.

Each of these NGO activities, and each of the multitudinous other NGO 1998 projects, merits full discussion, with accolades for contributions to the promotion and protection of human rights. However, herein I single out the Ottawa process that contributed to the Vienna 5-year review.

Why the Ottawa Global NGO Forum and ODPA Review of Vienna? In the last decade, the United Nations convened several world conferences and summits to address troubling

Conference at Rome, and the Global NGO Forum in Ottawa. [gedwards@indiana.edu]

world issues as the Millennium approaches. One such meeting was the 1993 World Conference on Human Rights held in Vienna. At that conference, 171 nations unanimously adopted the VDPA which reaffirmed the commitment of the U.N. and the world to the principles enshrined in the Universal Declaration of Human Rights. The VDPA provided that in five years, the U.N. Secretary General would be invited to present a report to the 53rd session of the U.N. General Assembly outlining progress made in global implementation of the VDPA. The VDPA also invited NGOs, nations, U.N. organs and agencies, and national institutions to present views to the Secretary General for consideration in his report.

Many NGOs accepted the VDPA's invitation. More than 900 NGOs (along with 95 inter-governmental organizations) made direct and indirect submissions to the Secretary General. Many provided input to the U.N. VDPA review process through participation in the June 1998, Ottawa NGO forum that drafted the ODPA.

Lead up to the ODPA: Dozens of NGOs organized to canvass civil society for contributions to the VDPA review process. Those spearheading organizations, from different geographic areas and with different substantive focuses, operated as an international organizing committee that sought effectively to marshal NGO input. Regional and national meetings were held in strategic locations—including Katmandu, Johannesburg, Quito, and Canada—where NGO input was solicited and discussed. The results of those and other brainstorming exercises, for included in the ODPA debate.

Participation in the Ottawa NGO Forum: The Ottawa conference was open to any NGO—national, regional or local. Nearly 400 representatives attended, representing more than 150 NGOs attended, from all corners of

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the globe. NGO voices in Ottawa were deep and broad. They represented a diverse cross-section of cultures, nationalities, races, genders and sexual orientations, and economic backgrounds. Funding was available for some participants who would not otherwise have been able to participate. But it is unfortunate that more voices from developing countries could not have been represented. Participants also included government representatives (mostly Canadian) and representatives of inter-governmental organizations, such as the U.N. Discussants and speakers included Bacre Waly Ndaiye (New York Director of the Office of the UNHCHR), Gay McDougall (Committee on the Elimination of All Forms of Racial Discrimination), Paulo Sergio Pinheiro (U.N. Special Rapporteur on Burundi), Ambassador Chowdhury (U.N. Commission on Human Rights Bureau Representative for Asia), Hon. Lloyd Axworthy (Canadian Minister of Foreign Affairs), Jose Ramos Horta (Nobel Laureate and Keynote Speaker), and His Holiness the Dalai Lama (Video Statement). Their participation deepened the idea exchange.

The Ottawa Proceedings: Delegates enjoyed three days of intense consultations, strategizing and drafting, in plenary sessions, thematic and regional working groups, and caucuses. The dozen or more thematic groups focused on wide-ranging topics, including: effectiveness and access to United Nations mechanisms; human rights defenders; economic, social and cultural rights; violence, gender and bodily integrity; rights of persons with disabilities; rights of first nations and indigenous peoples; rights of the child; sexual orientation and human rights; rights of refugees and displaced persons; impunity and the ICC; torture; workers' rights; human rights education; national institutions; and the right to communicate. Regional caucuses included: Asia Pacific; Africa and the Middle East; Europe; and Latin America.

Each working group and caucus produced a report and recommendations. In addition, numerous declarations, resolutions and statements were adopted by the smaller groups and the plenary. These included: country specific recommendations on Burma, Bhutan, Tibet, Palestine, and Hong Kong. Delegates adopted a Decision on NGO

Coordination and Follow-up which requested, *inter alia*, Human Rights Internet (a key sponsor/host of the Forum) to facilitate the promotion of Ottawa recommendations, disseminate information about the ODP, and establish liaisons with organizations involved with the other world conferences that would promote cooperation and foster integration of human rights concerns.

Significant Themes/Forum Observations:

The discussions were hearty, the negotiations intense. The final report—the ODP—is comprehensive. It would do injustice to the Forum and the ODP to attempt to summarize the proceedings or the report. However, it is informative to highlight some observations of the process and the final product:

! **Organization & fluidity:** The Global Forum was well-conceived, well-organized, and well-received. The Forum was fluid, both substantively and logistically.

! **Action-oriented process & product:** Representatives of NGOs, governments, and IGOs gathered to debate the status of human rights protections and to identify successes and deficiencies in the VDP implementation. The exchange of ideas in the ODP negotiation and drafting process helped crystallize and focus issues, and rendered the ODP a coherent document that would inform the VDP review process. It includes concrete, task-oriented recommendations (plans of action) that will with hope not fall on deaf ears within the United Nations system.

! **Participation by Non-NGOs:** The presence and participation of government and U.N. representatives suggests that ODP recommendations will certainly be considered.

! **Comprehensive, but necessarily incomplete:** The Forum was comprehensive and focused on a broad range of thematic and regional issues. The ODP reflects that breadth. But, time was short. Even with the preliminary meetings that were held strategically around the globe, three days were hardly enough to work through the many, often controversial, issues. The final report may not have adequately included dissenting views, and because a wealth of working groups and caucuses ran concurrently, some critical views may have been lost since delegates could only attend

one meeting at a time.

! **Recognition of success & failures of the VDPA:** It is sometimes easy for NGOs to overlook successes and focus on failures of the system. However, the ODPa offers a balanced, informed critique of the VDPA and gains credibility by recognizing progress under the VDPA. That progress includes creation of the post of the Office of the High Commissioner for Human Rights, the upgrading of the OHCHR in New York, growing operationalization of human rights programs, and mainstreaming of human rights issues within the U.N. system. But, as the ODPa concludes, much remains to be done to ensure full realization of human rights protection for all.

! **Recognition that NGOs have responsibilities too:** The ODPa recognized that not only does the U.N. play a crucial role in implementing the VDPA, but that NGOs also have responsibilities. The Forum called upon NGOs to accept additional challenges and recommended, for example: that (i) “NGOs, and international NGOs in particular, expand their mandates to focus more on economic, social and cultural rights”; (ii) “NGOs systematically share their experiences about utilizing the U.N. and regional human rights mechanisms in the promotion of economic, social and cultural rights and about the impact of NGO interventions on national compliance”; (iii) “NGOs strengthen links between larger, international organizations and smaller, local or national NGOs”; and, (iv) “NGOs push for non-discrimination based on sexual orientation.” NGO acceptance of responsibility strengthens the ODPa, and boosts the credibility and commitment of NGOs.

U.N. ODPa Follow-up: The ODPa along with submissions from hundreds of NGOs and individuals were transmitted to U.N. Secretary General Kofi Annan. On November 2, 1998, Mr. Annan tendered to the U.N. Third Committee (Social, Humanitarian and Cultural) transmitted the final report of Mary Robinson, the UNHCHR, on implementation of the VDPA (Doc A/53/372). Many suggestions and recommendations contained in the ODPa were contained within the materials transmitted to the Third Committee. Is that a sign that the voices of civil society

are being heard at the highest levels of the U.N.? I say, “Yes.” However, despite this apparent success, the work of NGOs is not, and never will be, over. NGOs must continue to take action—ordinary and extraordinary—to help ensure that universal human rights for all is more than rhetoric, and becomes a reality.

In the meantime, congratulations to the organizers of the Ottawa Global NGO Forum, and to the delegates, for a job well done!

ICJ - continued —

Canada, including the issues of liberal versus restrictive interpretation of the Canadian declaration and reservation, the natural meaning of the words, the necessity that the Court distinguish between the jurisdictional and merits phases of a case, and the validity of the Canadian reservation. The agents for Canada made reference to the Convention on the Law of the Sea and to several cases previously heard by the Court. The Canadian arguments are made succinctly and in a crisp style that belies the assumption that written and oral argumentation present to the ICJ are invariably turgid and ponderous. Of course, whether the Court has been persuaded by the Canadian arguments remains to be seen.

NEWS FROM MEMBERS

Publication: Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L L. 1 (1998).

NEWSLETTER SUBMISSIONS NEEDED

This newsletter's success depends upon material being submitted by our members. Any items of interest to members are welcome, including articles, letters to the editor, announcements of events, employment opportunities (paid or volunteer) in international law, etc. Submission by February 20 will ensure full consideration for the next issue. Earlier submission is encouraged. Submit material for publication to: Bryan MacPherson,

915 S. 19th St., Arlington VA 22202. E-mail:
bryan.macpherson@hq.doe.gov. Phone: (202)
426-1571.

I prefer that longer works, in particular, be submitted by e-mail or on IBM compatible disk (in ASCII, WordPerfect, or Word). For anything sent by e-mail, do not assume I have received it unless you receive a conformation. Ideas about how to make the newsletter of greater value to members would also be appreciated.

WE WANT TO HEAR FROM YOU!

We wish to publish news of our members' activities. Please let us know what you have been doing by completing the following form and sending it to me (or sending me an e-mail message containing the information). In addition, please contact me or Interest Group Chair Michael Scharf if you would like to become active in the Interest Group.

Name:

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