court can accomplish little, especially if its fundamental purpose is to promote international mores that discourage impunity. Success will be realized when the aversion to impunity is internalized by the domestic legal systems of all states. The test of that success is not a large docket of cases before the ICC, but persistent and comprehensive domestic criminal proceedings worldwide, facilitated by progress in a variety of contexts toward discouraging international crimes and avoiding impunity.

JONATHAN I. CHARNEY

THE UNITED STATES AND THE STATUTE OF ROME

As is well-known, the United States, at the conclusion of the Rome Diplomatic Conference in 1998, voted against the Statute of Rome,[1] which would establish a permanent international criminal court (ICC)—separate and apart from the United Nations. The ICC would have jurisdiction to try individuals—but not states—for the most serious crimes of international concern: genocide, war crimes, crimes against humanity, and possibly aggression, if the latter can be satisfactorily defined at a later date. The final vote in 1998 was 120 (in favor)-7 (against), with the United States in the minority in the company of Iran, Iraq, China, Israel, Sudan, and Libya, and in opposition to all its European allies and all its NATO allies. In view of the 120 affirmative votes at Rome and subsequent events, it seems altogether likely that the Statute of Rome will attract the necessary sixty ratifications and the new court will be brought into existence without the support of the United States, perhaps as early as 2002.

Since 1998 the American negotiating team has made extraordinary efforts to secure modifications in the statute that would "enable it to sign the treaty," first by suggesting amendments in the text, later by proposing "agreed interpretations" of certain provisions in the text, and more recently by seeking clauses in the "relationship agreement" between the proposed new court and the United Nations that would exempt certain U.S. nationals from the application of the court's jurisdiction so long as the United States is not a party or unless the United States gives it consent on a case-by-case basis. All of these suggestions have been rejected—sometimes peremptorily—by the so-called like-minded group, which became the dominant voting bloc at Rome and remains united in opposition to the U.S. position.

As these words are being written, the United States government seems poised to reject early participation in the establishment of a permanent international criminal court, as contemplated by the historic treaty concluded at Rome in July 1998.[2]

The long-term effects of this rejection are very serious for the court and perhaps even more serious for the United States, which will be persisting in not-so-splendid isolation from the most important international juridical institution that has been proposed since the San Francisco Conference in 1945.

The short-term effects will be that the United States, which has repeatedly and publicly declared its support in principle for a permanent international criminal court, will not become a member of the Assembly of States Parties and thus will not participate in shaping the court

[1] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, *corrected* Nov. 10, 1998, and July 12, 1999, *obtainable from* <http://www.un.org/law/icc/index.html>, *reprinted in* 37 ILM 999 (1998) (uncorrected version) [hereinafter Statute of Rome or Rome Statute].

[2] Although President Clinton on December 31, 2000, authorized signature of the Rome treaty, he did so with a statement reiterating "concerns about significant flaws in the treaty" and announcing "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001).

in its early formative years. In these early years, such important questions as approval of the Rules of Procedure and Evidence and the Elements of Crimes, the implementation of due-process protections for the accused, and the relationship of the court to the United Nations will be decided. Nor will the United States participate in the selection of the first group of judges and prosecutors for the ICC or be eligible to propose one of its nationals for a seat on the court.

The assembly will also be the forum in which the states parties will negotiate the definition of aggression, which, if achieved, will authorize the court to *exercise* jurisdiction over individuals charged with the crime of aggression, a fundamental national-security issue of paramount concern to the United States and its nationals in the military services.

It is the thesis of this editorial comment that the United States, despite the valiant and in many cases successful efforts of a talented and dedicated team of negotiators, has seriously misjudged its negotiating leverage in demanding the exemption of certain U.S. nationals from the jurisdiction of the new court and is in danger of suffering a further loss of credibility if it rejects the statute and with it the practical advantages the treaty provides for protecting the interests both of its nationals as individuals serving their country abroad and of U.S. national security. These points are not based on sentimental devotion to a vague and ill-defined internationalism but, rather, on a pragmatic analysis of the interplay between the proposed international court and customary international law. As is more fully developed in the succeeding paragraphs, I am convinced that these twin interests—the one personal; the other national—are better protected if the United States becomes a party to the Statute of Rome than if it stands aloof.

I. The Distinction Between Jurisdiction and the Exercise of Jurisdiction

Under the Statute of Rome, the proposed new court would be accorded a rather modest, residual, treaty-based jurisdiction to try and punish individuals for the three most serious international crimes: genocide, war crimes, and crimes against humanity. Aggression may be added to the list of crimes if it can be satisfactorily defined.

However, the actual *exercise* of this jurisdiction under the treaty is severely restricted by subsequent provisions of the statute, which are intended to assure that primacy of jurisdiction is retained either by the territorial sovereign or by the state of nationality of the accused unless that state is "unwilling or unable genuinely to carry out the investigation or prosecution."[3] Thus, the statute is drafted so as to fit within the classic international law jurisdictional framework: (1) a nation has jurisdiction over criminal acts occurring within its sovereign territory regardless of the nationality of the offender; and (2) a nation has jurisdiction over its nationals regardless of the place where they commit an offense against its law. Often the two bases of jurisdiction overlap and are concurrent.

It is important to note that the statute does not take any jurisdiction away from the state on whose territory a crime is committed. Thus, the primacy of its territorial jurisdiction is recognized. So, also, is the primacy of nationality jurisdiction recognized vis-à-vis the ICC. But the primacy of both these traditional bases of jurisdiction is subject to a single qualification, namely, that the state be willing and able "genuinely to carry out the investigation or prosecution."

Under the Rome Statute, the power to make the determination as to unwillingness or inability is vested ultimately in the pretrial or the trial chamber of the court, but made subject to many qualifications and ultimately to interlocutory appeal to the five-judge appellate chamber of the court.

[3] Statute of Rome, *supra* note 1, Art. 17.

II. The Principal United States Objection

The principal objection raised by the administration both at the Rome Diplomatic Conference, and immediately thereafter at the earliest meetings of the Preparatory Commission, was that American nationals, particularly members of the armed services, could in certain contingencies be subjected to trial in the new court without the specific consent of the United States. In the more recent meetings of the Preparatory Commission, the objection was narrowed. A later formulation of the objection is that the Rome Statute provides for the exercise of jurisdiction over certain nationals of a *nonparty* state without the specific consent of that state.

Thus, the U.S. negotiators have sought to insert a clause in the "relationship" agreement between the United Nations and the court that would provide that the new court will not attempt to exercise jurisdiction over nationals of a nonparty state if such nationals are acting under the overall direction of the *nonparty state*, or unless the court obtains, on a case-by-case basis, the consent of the nonparty state of nationality of the accused. The effect of such a clause would be to grant such U.S. nationals a de facto exemption from the exercise of jurisdiction by the new court so long as the United States was not a party to the Rome Statute. As a matter of course, nationals of other nonparty states would also be exempt from the new court's jurisdiction if the United States exemption were accepted. Thus, this provision would exempt not only U.S. nationals, but also the nationals of rogue states, which are most likely to produce or to harbor war criminals in the future and which are the least likely to consent to having their nationals tried by the ICC. The exemption would mean that the most notorious war criminals would continue to be immune from the jurisdiction of the new court.

For this reason, and principally for this reason, most of our European allies, and all the NATO allies except Turkey, have found the United States proposal unacceptable. This was true, for example, when the proposal was offered at the meetings of the Preparatory Commission in March and June 2000. From the point of view of our European allies, it is bad enough that the exemption has sometimes come as a rather strident demand for American exceptionalism, which reinforces their innate suspicion that the United States is giving way to hegemonic ambitions. They find it the more objectionable because it virtually guarantees that the court would be unable to exercise jurisdiction over nationals of rogue states who, through lack of caution or otherwise, happen to come into the custody of the court and are unlikely in any event to belong to a state that is party to the Rome Statute. Thus, this exemption is doubly offensive to our NATO and European allies, which, together with a much larger number of states, make up the "Group of Like-Minded States"; this group is prepared to accept the Rome Statute without modification. As of this writing, more than twenty-five of the sixty ratifications necessary to bring the Rome Statute into force have been deposited.[4]

In addition, the United States cannot look forward to solving its problems with the statute by means of reservations, since none are permitted by the terms of the treaty.[5]

The latest formulation of the proposed exemption for certain nationals also indicates that the United States does not expect to become a party to the Rome treaty anytime soon and is simply seeking, in the words of its principal negotiator, a way to be a "good neighbor" to the court until such time in the future as political conditions are more favorable for United States acceptance of the court. Moreover, the current formulation of the U.S. exemption is based on a very controversial view of customary international law; namely, that customary international law forbids—or at least does not authorize—a treaty-based international court to exercise jurisdiction over the nationals of a nonparty state when acting under the direction of such a nonparty state. This view of customary international law has been

[4] See the Web site *supra* note 1 for a current report on the status of ratifications and other information on the ICC.
[5] Statute of Rome, *supra* note 1, Art. 120.

repeatedly asserted by administration spokesmen in support of United States objections to the treaty, but—remarkably—that assertion has never been backed up by citation of legal authority, or by an opinion of the legal adviser of the Department of State, or the attorney general.

Most international lawyers have rejected this view of customary international law on the simple basis that while a nonparty *state* is not itself bound to accept an assertion of jurisdiction over itself unless it has consented, the same is not true of its *nationals* if they commit offenses in the territory of a state that is a party. In the latter case, the national who commits an offense within the territory of any state is subject to that state's territorial jurisdiction—and would be so subject if there were no treaty at all. No rule of customary international law prohibits the territorial sovereign from exercising its jurisdiction directly over the offender, even if acting under the direction of a nonparty state; nor from extraditing the offender to another country—even to a country of which the accused is not a national.

By the same logic, the territorial sovereign would seem to be free to extradite an offender to an international court, where he might receive a fairer trial than in the courts of the country where the offense was committed. Indeed, that is clearly one of the principal advantages to be derived from becoming a party to the international criminal court. After all, the proposed court will be obliged to respect the due-process protections that, largely at American insistence, were written into the Statute of Rome and that will be reinforced by the Rules of Evidence and Procedure, which will apply to the ICC's proceedings. With few exceptions, international, treaty-bound, due-process protections are likely to be more extensive in an ICC trial than those that would be available to the accused if tried by an individual country exercising territorial jurisdiction in one of its national courts.

As indicated earlier, the principal American objection to the treaty is that it gives the new court authority to exercise jurisdiction over U.S. nationals—and especially those in military service—without the specific case-by-case consent of the United States. Only very late in the negotiations did the United States introduce this objection as a fundamental obstacle to its acceptance of the treaty. As indicated by the vote at Rome, the objection was viewed by nearly all the other delegations as inconsistent with the main purpose of the treaty, i.e., to deprive war criminals of the impunity they have heretofore enjoyed by virtue of the protection of their states of nationality.

The U.S. objection is all the more surprising because the United States has historically taken the lead in advocating the creation of such a court to carry forward the modernization of international criminal law, a task begun at Nuremberg and contemplated by the Genocide Treaty, to which the United States is a party along with most of the rest of the world. In addition, the United States has been a foremost supporter of the ad hoc war crimes tribunals established by the Security Council for Yugoslavia and Rwanda.

Moreover, the objection seems to be based on a misconception; namely, that if the ICC is defeated and does not come into existence or if the United States refuses to join, its nationals will be protected from being subjected to a foreign jurisdiction. The fatal misconception in this line of reasoning is that, in the absence of some kind of agreement, the jurisdiction of the state in which the offense is committed will prevail over any other claim of jurisdiction. Territorial jurisdiction prevails over jurisdiction based on nationality.

In World War II as well as in World War I, the United States exercised exclusive court martial jurisdiction over its military forces abroad by agreement with the Allies. But after World War II, our NATO allies were not willing to grant exclusive jurisdiction *in peacetime* to U.S. forces stationed in Europe. The NATO Status of Forces Agreement was negotiated to solve this problem. It provides for a sharing of jurisdiction that gives the sending state the primary jurisdiction to try its military personnel for "offenses arising out of any act or omission done in the performance of official duty" or against another member of the armed

forces;[6] all other offenses fall to the primary jurisdiction of the host state. But the two jurisdictions are concurrent; neither preempts the other and there are liberal provisions for waiver.

The inescapable point here, however, is that, without some agreement, the territorial sovereign will have an unfettered right under customary international law to exercise jurisdiction over those who commit offenses against its law in its territory, and this is true whether or not the offender is acting under the direction of the nation to which he owes allegiance.

This most basic principle of international law, as succinctly stated in 1812 by Chief Justice Marshall, is: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself."[7]

Exactly the same principle was applied more recently by the Supreme Court in rejecting a 1957 challenge to the constitutionality of the Japanese Administrative Agreement, which, following the NATO precedent, allows the United States to exercise jurisdiction over act-of-duty offenses and *inter se* offenses committed by its military personnel in Japan. Without the Agreement, United States military personnel would be subject to the unfettered jurisdiction of Japan.[8]

From a pragmatic point of view, what the Rome Statute would provide is a treaty-based alternative to the territorial jurisdiction of the foreign state in which our military personnel may have committed one of the "core international crimes" such as genocide, war crimes, and crimes against humanity. Under this alternative, such offenses will be subject to the exercise of the ICC's jurisdiction, but that jurisdiction may not be exercised if the United States, as the state of nationality of the accused, asserts its primary jurisdiction under the "complementarity provisions" of the statute.

These complementarity provisions are broadly framed. Only if the United States is "unwilling or unable" genuinely to investigate or prosecute its nationals is the international criminal court authorized to exercise its residual jurisdiction. The United States can hardly be expected to allow this theoretical contingency to arise; it will always assert its own jurisdiction in preference to allowing the new court to exercise jurisdiction over U.S. nationals accused of genocide, war crimes, or crimes against humanity. Thus, the Rome Statute affords American military personnel the best available assurance of the benefits of an American trial. Without an agreement, there will be no such assurance.

A second and important aspect of the administration's objection to the treaty is that, if, for example, the ICC exercises jurisdiction over a member of one of the military services or over a civilian official such as the secretary of defense, who orders an air attack on a foreign country, the ICC will place itself in the position of passing judgment on the legality under international law of U.S. national-security decisions. In this way, such decisions would be judged as to legality indirectly by the ICC, not by the Security Council in which the United States has a veto.

This objection resembles United States objections to the role of the so-called independent prosecutor, who at various times has been described by administration spokesmen as likely to become "the most powerful man in the world." This is a very great overstatement of his role. He will have far less authority under the treaty than the typical county prosecutor or district attorney in the United States. He will have far less power than the international prosecutor for the Yugoslav and Rwanda International Criminal Tribunals. He will have no independent power to issue legal process or to open an investigation. Instead, he must secure the agreement of the three-member pretrial chamber before he can even begin an investigation or issue legal process. Moreover, when he applies to the pretrial chamber for authorization, he must notify all other parties to the statute and all states that "would nor-

[6] Agreement Between the Parties to the North Atlantic Treaty Organization Relating to the Status of Their Forces, June 19, 1951, Art. VII, 4 UST 1792, 199 UNTS 67.

[7] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

[8] Wilson v. Girard, 354 U.S. 524, 529 (1957) (per curiam).

mally exercise jurisdiction over the crimes concerned."[9] This latter phrase includes both the territorial state and the state of nationality of the accused.

At this point, the complementarity provisions[10] of the Rome Statute become controlling: the nation of which the accused is a national has a right under the treaty to assert its primary jurisdiction both as to investigation and as to trial. If primary jurisdiction is asserted by the state of nationality, or by the territorial state, the prosecutor must suspend[11] his quest for authority from the pretrial chamber to investigate or prosecute. And he must accept the conclusion reached by the state of nationality or the territorial state as to whether the case should be investigated or prosecuted by the state of nationality of the accused unless he can show that that state is "unable or unwilling genuinely" to do so. It is nearly impossible to imagine a case in which the United States would not fully exercise its primary jurisdiction. It is not to be expected that the United States will allow this remote and theoretical contingency to arise. Moreover, the statute prohibits double jeopardy.[12]

Even if the prosecutor challenges the conclusion of the state of nationality, that state has a right under the treaty to contest the challenge in the pretrial chamber, as well as a right to an expedited interlocutory appeal to the appellate chamber of the ICC.[13]

III. The Specter of the Politically Motivated Prosecutor

That leaves for discussion the previously stated objection; namely, that a politically motivated prosecutor might attempt to convict the United States in the court of public opinion of a violation of international law, by charging one of its military or civilian officials with war crimes, crimes against humanity, or genocide, using the accused as a proxy for the United States. However, this possibility is not created by the statute; it already exists. The United States can be put in the dock of public opinion at any time it applies military power abroad. The Rome treaty does not create or exacerbate this risk. If anything, the terms of the statute ameliorate the risk by limiting the jurisdiction of the court to individuals and restraining the *exercise* of jurisdiction in all the ways previously discussed.

Moreover, the negotiators have built into the text of the treaty so many checkpoints that in my opinion the international prosecutor would not be likely to succeed in challenging a decision of the United States not to prosecute or a decision of a United States court to acquit.

In view of the frequency with which administration spokesmen have raised the specter of the "runaway prosecutor," it seems appropriate to list, even at the risk of repetition, the restraints that will apply under the statute to assure that the complementarity provisions are applied in favor of the state of nationality. They are in summary form as follows:

(1) The prosecutor cannot subject any person to the exercise of jurisdiction by the ICC without prior notice to the state of nationality.

(2) The prosecutor cannot subject any person to the exercise of jurisdiction by the ICC without the concurrence of the pretrial chamber, which will control the actual initiation of investigations and prosecutions and the issuance of legal process.

(3) The prosecutor cannot subject any person to the exercise of jurisdiction by the ICC if the state of nationality has already asserted primary jurisdiction and genuinely exercised jurisdiction to investigate and prosecute or is willing and able to do so. The prosecutor is bound by the treaty to suspend all efforts to investigate and prosecute unless the state that has primary jurisdiction is genuinely unwilling or unable to do so.

[9] Statute of Rome, *supra* note 1, Art. 18(1).
[10] *Id.*, Arts. 17–19.
[11] *Id.*, Art. 18(2).
[12] *Id.*, Art. 20.
[13] *Id.*, Art. 18.

(4) The prosecutor cannot subject any person to the exercise of ICC jurisdiction for trivial offenses or in cases of insufficient gravity. The statute sets the standards for "admissibility" at a high threshold.[14]

(5) If the prosecutor challenges the determination of the state of nationality, or its courts, either as to investigation or as to prosecution, he or she must get the pretrial chamber to sustain this challenge. Decisions by the three-judge pretrial chamber as to jurisdiction or admissibility are subject to appeal by the state of nationality to the five-member appeals chamber.

(6) No person can be subjected to the exercise of ICC jurisdiction during any twelve-month period for which the Security Council, acting with the concurrence of the five permanent members under Chapter VII of the UN Charter, has voted suspension of investigation or prosecution. Suspensions may be extended for successive twelve-month periods.[15]

Finally, as a practical matter, the ICC would have to gain custody of the military or civilian officer before it could exercise jurisdiction. The ICC is prohibited from trying anyone *in absentia*.[16] If the custodial state is the United States, it would refuse to transfer custody to the ICC if the assertion of jurisdiction over a U.S. military or civilian official were unjustified or politically motivated. If custody is with a state party, that state party would be treaty-bound to respect the specific complementarity provisions of the treaty. In either case, the ICC could not exercise jurisdiction *in absentia*. If the custodial state is a nonparty and makes an ad hoc decision to transfer the U.S. official to the ICC, the accused would probably be better protected by virtue of the applicable due-process provisions of the statute than if there were no treaty.[17]

IV. THE LESSER OBJECTIONS

On June 14, 2000, Senator Jesse Helms introduced a bill in the Senate called the American Service Members Protection Act (S. 2726). Although this bill and its companion in the House (H.R. 4654) have been the subject of hearings in the Senate Committee on Foreign Relations and the House Committee on International Relations, where they were opposed by the Department of State and the Department of Defense, neither house has reported its bill out of committee as of this writing.

The Helms bill would, among other things, forbid any agency of the U.S. government from cooperating with the new court so long as the United States was not a member. Further, it would deny military assistance to any foreign country that did join the court, with the exception of NATO countries and certain other allies too important to be cut off from military assistance.

In addition, the bill criticizes the Rome Statute on the ground that it would deny to American military personnel "many of the procedural protections to which all Americans are entitled under the Bill of Rights." The only rights named in the bill as being denied are (1) trial by jury, (2) the right not to be compelled to provide self-incriminating testimony, and (3) the right to confront and cross-examine witnesses.

Trial by jury, however, is not available to service members under the Fifth Amendment. They are excepted from coverage by the text of the Fifth Amendment. And the same exception is generally assumed to be applicable under the Sixth Amendment. As for the other two rights (as to self-incrimination and cross-examination), they are expressly guaranteed in the Rome Statute. Indeed, the list of due-process rights guaranteed by the Rome Statute

[14] *Id.*, Art. 17(1).
[15] *Id.*, Art. 16.
[16] *Id.*, Art. 63.
[17] *Id.*, Arts. 20, 22, 57, 61, 63, 66, 67, 69.

is, if anything, somewhat more detailed and comprehensive than those in the American Bill of Rights. Not better, but more detailed. The list includes the presumption of innocence (Art. 66); assistance of counsel (Arts. 67(1)(b), (d)); the right to remain silent (Art. 67(1)(g)); the privilege against self-incrimination (Art. 67(1)(g)); the right to a written statement of charges (Art. 61(3)); the right to examine adverse witnesses (Art. 67(1)(e)); the right to have compulsory process to obtain witnesses (Art. 67(1)(e)); the prohibition of *ex post facto* crimes (Art. 22); protection against double jeopardy (Art. 20); freedom from warrantless arrest and search (Arts. 57 *bis*(3), 58); the right to be present at the trial (Art. 63); speedy and public trials (Art. 67(1)(a), (c)); the exclusion of illegally obtained evidence (Art. 69(7)); and the prohibition of trials *in absentia* (Arts. 63, 67(1)(d)).

The criticism that under the ICC United States service personnel will be denied due-process protections that they would enjoy under the Constitution is totally misplaced. I can think of no right guaranteed to military personnel by the U.S. Constitution that is not also guaranteed in the treaty of Rome.

V. CONCLUSION

In sum, the United States can most effectively protect its national-security interests, as well as the individual interests of U.S. nationals, by accepting the Statute of Rome—better sooner than later.

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