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The Universal Jurisdiction of the International Criminal Court and the US National Interest: An Issue of Incompatibility

By John O. Ifediora*

Introduction

On July 17, 1998, one hundred and twenty countries adopted a treaty in Rome to establish a permanent International Criminal Court in The Hague, Netherlands.¹ This treaty is the culmination of decades of advocacy by leading human rights advocates around the world to establish an international forum or mechanism by which nations can bring to justice individuals who engage in atrocities against humanity.² Inspired, inter alia, by the Nuremberg trials, and the tribunals on war crimes for the former Yugoslavia, and Rwanda, the treaty to create this court is the product of the proceedings at the United Nations' "Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," or simply known as the "Rome Conference."³ The beneficial attributes of such a permanent legal institution are undeniable, but to date, several countries, including the United States, although signatories to the treaty, have refused to ratify on the grounds of constitutional incompatibility, or, in the case of the United States, the Court is perceived to be adverse to national interest.⁴

The treaty required sixty countries to ratify the statute creating the International Criminal Court (ICC) before the Court could become operative.⁵ By May 20, 2002, sixty-six countries had ratified, including the United Kingdom, and all members of the European Union. Thus, having met the necessary minimum, the Court became operational on July 1, 2002.⁶ But for countries still reluctant to ratify, and even for those that have ratified, an operational question with serious implications for the success or failure of the court remains: How to arrest and surrender to the International Criminal Court nationals of member countries whose constitutional provisions forbid such practice. A closely related issue is how to reconcile a country's constitutional immunities for her public officials with the obligation to arrest and deliver her citizens to foreign authorities.⁷

The United States, for example, although instrumental in negotiating and developing the due process rights of the accused embodied in the treaty, ironically voted against creation of the Court. Only in the waning days of the Clinton Administration did President Clinton, on December 31, 2000, sign the treaty, thus making the United States a signatory to the Rome

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Conference.⁸ But the Bush Administration has given all indications that it will not ratify, and for many in the US Congress it is just as well, for, detractors of the ICC in the US have become more vociferous; but none more so than Senator Jesse Helms, who on June 14, 2000, introduced a bill in the Senate entitled the American Service Members Protection Act (S. 2726).⁹ The bill, in substance, would forbid any federal agency from cooperating with the ICC, and would deny military assistance to all foreign nations that ratify the treaty, except NATO allies and other allies essential to US interest. While the bill has gone through hearings in the Senate Committee on Foreign Relations, and the Committee on International Relations, it remains pending as of this writing.

Mr. Helm's bill is primarily based on the premise that the Statute would deny accused Americans due process rights guaranteed by the US constitution. It specifically cites the right to confront and cross-examine witnesses, the right to trial by jury, and the right to refuse making self-incriminating statements. Mr. Helm could not have been more mistaken! At the outset, it should be clear that trial by jury is not applicable to military personnel under the Fifth Amendment, the text of which exempts this group from coverage. The same holds true for the Sixth Amendment. The other two rights, through the efforts of the US negotiating team, are expressly reserved to the accused by the Rome Statute, and can be found in Art. 66 to Art. 69(7) of the Statute.¹⁰

Objective

This paper presents a historical and legal justification for the International Criminal Court, and addresses the issue of potential incompatibility of some of the Court's articles of formation with statutory provisions of the US government. The focus is primarily on the preconditions that will trigger the Court's jurisdictional competence, as embodied in Articles 12-14 of the Court's Statute, and on why the US government finds them incongruent to the US national interest, even though all her allies in the

European Union have ratified the treaty. Furthermore, my thesis suggests that the Executive branch of the US government is mistaken in its view that by not ratifying the treaty, her nationals will not be subject to the Court's jurisdiction. This view will be shown to be incorrect by analyzing the process whereby States that are party to the treaty can refer cases to the Court so long as they are in possession of the offender regardless of the offender's nationality. Thus, France, for example, may arrest a US citizen on her soil for crimes against humanity and may, if she wishes, refer the case to the International Criminal Court even though the US is not a party to the Statute. In the final analysis, my thesis will demonstrate that it will be in the US national interest to ratify the treaty, and by so doing, create the opportunity to effectively exercise considerable influence on the Court.

Part II. Formation and Structure of the Court

The momentum for a permanent International Criminal Court was revived by initiatives from Trinidad and Tobago in 1989 to combat international trafficking in illicit narcotic drugs, and the attendant criminal activities.¹¹ This provided the needed impetus that galvanized one hundred and twenty-four Non-Governmental Organizations (NGOs), seventeen intergovernmental organizations, fourteen specialized agencies and funds of the United Nations, and one hundred and sixty countries to convene in Rome for a conference that gave birth to a permanent court to prosecute and punish those accused of the worst atrocities against mankind.¹²

The Rome Statute established the ICC and imbued it with considerable power to exercise jurisdiction over proscribed crimes of international concern.¹³ The crimes for which the court may exercise jurisdiction are crimes against humanity, genocide, war crimes, and crimes of aggression. The statute, to be formally known as the Rome Statute of the International Criminal Court, was adopted by a non-recorded vote of 120 countries in favor, 7

against, and 21 abstentions.¹⁴ Immediately following adoption of the Rome Statute, the UN's General Assembly constituted the Preparatory Commission (PrepCom) to establish for the Court the Rules of Procedure and Evidence, and the elements of the various crimes within the jurisdiction of the Court. On June 30, 2000, the rules and elements of crime produced by the Preparatory Commission were adopted.¹⁵

During the conference proceedings, three major groups were clearly visible. One of the more active was the group of Like-Minded states made-up of mostly Europeans and some developing countries. Their primary objective was to see the creation of a strong and independent court. Another group of note was the P-5, the five permanent members of the UN Security Council; in unity, all members of the group pushed for: (1) that the Security Council maintain a strong influence and presence in the court, and (2) that the Rome Statute not include nuclear weapons as prohibited weapons of mass destruction. A third group, which included Egypt, India, Mexico, and a few other developing countries, argued strongly that nuclear weapons be banned, and at the same time advocated for a jurisdictionally weaker and less independent court.¹⁶

Before the final vote on the statute in the plenary session, India and the United States attempted to introduce amendments to the final draft. Although these attempts were defeated, such motions underscored the fact that the final draft did not fully address the needs of conference participants. India, for example wanted the statute to include provisions that would allow the United Nations Security Council to refer cases to the Court, or for the Court to defer consideration of a case that the Security Council has jurisdiction under its Chapter VII powers for 12 months. Second, India wanted the final draft to include a list of weapons of mass destruction, such as nuclear, chemical and biological weapons, whose use is considered a serious violation of the laws of international armed conflict.¹⁷ The United States, on the other hand, was primarily concerned with the court's

jurisdiction over nationals of non-signatories to the statute. Specifically, the US wanted the statute to include a provision to allow the court to exercise jurisdiction over citizens of non-signatories only if the State expressly recognizes such jurisdiction. The motion failed.¹⁸

The protection of information relevant to national security was strongly stressed by the US. In light of the proceedings at the International Criminal Tribunal for the former Yugoslavia, it was obvious that materials, though relevant to the trial, may compromise security interests of States supplying the information. The US argued that affected national governments should have the right to refuse compliance with a request from the Court for sensitive information. Article 72 of the Statute adopted the US position; it grants a national government the right of first refusal in instances where the request implicates national security interests in conformance with Article 93 sec. 4. When a refusal occurs, the Court may either appeal to the Assembly of States Parties or go directly to the UN Security Council for remedy.¹⁹

Two of the more difficult issues of contention at the Rome Conference were the inclusion of crimes against women, and Due Process Rights. Experts in women rights issues in the NGOs and the US delegation insisted that explicit language be used to express sexual assaults in the final draft of the Statute. Articles 7(1), 8(2)(b) (xxii) and (e)(vi) contain the various forms of violence against women that come within the jurisdiction of the courtenforced prostitution, sexual slavery, rape, forced pregnancy, and enforced sterilization. The second issue, Due Process protection for defendants, seriously engaged the efforts of the US delegation. From the US perspective such protection was necessary in order for the Statute to satisfy the US constitutional requirements in all criminal prosecution. The final draft adequately addressed the rights of the defendant, and the limits of the prosecutor's power in parts 5-8 of the Statute.²⁰

Governance and Structure

The Court will be governed by the Assembly of States Parties consisting of all states that have ratified the Rome Statute. When fully operational, the Court shall comprise four divisions – the Presidency; Pre-Trial, Trial, and Appeals; the Prosecutor; and the Registry. Eighteen judges will serve in different capacities in the Court's four divisions in any given time period, and all judges will be elected to the Court for a non-renewable term of nine years by the Assembly of States Parties. The office of the Prosecutor is also subject to the same terms.²¹

Articles 12-14 of the Statute stipulate certain conditions that must exist before the Court can invoke its jurisdictional powers. When a State Party refers a case to the Prosecutor, Article 12 specifically requires that "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court....by declaration lodged with the Registrar... (a) The State or the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national."²² In addition to cases that pertain solely to individual culpability, some ICC cases will focus on the lawfulness of official acts of nations. While individuals and not states will be indicted, there will be instances in which individuals are indicted for official acts undertaken as part of the State's official policy and with the State's authorization.

In the final analysis, the court created by the Rome Statute is a treaty-based institution with enormous powers to investigate and punish. However, the Court may defer to national courts already in the process of investigating or prosecuting a case, but may, nonetheless, launch its own investigation if it deems the national court's efforts insufficient or the result inadequate. In terms of funding, the Court's activities will be financed by dues paid by states that are signatory to the Statute, and fees from the UN Security Council for cases it refers to the Court.²³

Part III. The International Criminal Court as a Treaty-Based Institution

The League of Nations, and the United Nations are manifestations of the perennial search for peaceful resolutions of international conflicts since the first and second world wars. Indeed, political debates in the US in terms of her proper role in the international arena soon after both wars remarkably shaped the formation of both institutions. The League of Nations, principally advanced by President Woodrow Wilson's administration, was short-lived due to isolationist forces in the US Senate.²⁴ The United Nations, for a very different reason, almost suffered a similar fate; the ideological and economic struggles between the super powers during the cold war essentially rendered the UN powerless, and prevented it from assuming the role it was originally designed for; to maintain international peace and security. The experiences of these international bodies, and the impact of US foreign policies on their respective capacities as international institutions, have raised doubts about the viability of the ICC in the absence of strong US support.²⁵

The International Criminal Court is accorded, under the Rome Statute, a limited and residual treaty-based jurisdiction. The jurisdictional scope of the Court is further curtailed by other provisions in the statute that ensure the primacy of jurisdiction is maintained by the territorial sovereign or the country of nationality of the accused. Unless and until the territorial sovereign or the country in question is unable or unwilling to conduct a genuine investigation or prosecute the accused, the Court will assert its jurisdiction.²⁶ This residual jurisdiction of the Court complies with recognized standards of international jurisdictional arrangement that allows nations to have jurisdiction over criminal acts committed within the country's territory regardless of the offender's nationality, and affords nations jurisdiction over their nationals regardless of where the crime against the individual country's laws are committed.²⁷

The Vienna Convention on the Law of Treaties emphatically expressed that treaties can not create obligations for non-parties.²⁸ The US, in opposing the treaty, has consistently pointed to this fundamental principle of international law, and claims that the Rome Statute, by providing the ICC jurisdiction over non-party nationals, violates the law of treaties. But this position misses the mark because the Rome Statute does not, in any of its provisions, impose obligations on non-party states. As discussed immediately below, the non-party state is not obligated to do anything it does not wish to do; indeed, it is perfectly free to refuse to cooperate when asked so long as it has physical custody of the accused.

Customary International Law and Treaties

It is axiomatic in international law that non-signatories to a treaty may not be subject to the rules and obligations created by such treaty.²⁹ But there are exceptions; when a tribunal is formed to prosecute violations of customary international laws with universal jurisdictional ambit and still extant at the formation of the tribunal, the tribunal's jurisdictional competence can no longer be assumed to be limited only to signatories to the treaty.³⁰ Obligations, duties and responsibilities under international laws are universal. Thus, if a country such as South Africa, has in her custody a French national accused of war crimes as defined in customary international law, South Africa has the jurisdictional competence, and responsibility to try the accused, or surrender him to another body or country with competent jurisdiction. This is the essence of universal competence and responsibility; it is of no consequence that the accused is a South African national, or whether the victims are Australians, and the crimes occurred in Zimbabwe. Any country would have the same competence and responsibility under international law.

Again, under customary international law, South Africa can invite other countries to jointly create a tribunal to try the accused French national in her control. Such a tribunal would have universal competence, and its decisions would have the

force of international law as evidenced by the Nuremberg Tribunal.³¹ In the Nuremberg trials, the US, France, Britain, and the Soviet Union formed the International Military Tribunal to try German nationals even though Germany was not a signatory to the tribunal. The International Military Tribunal at Nuremberg, in justification of its powers, stated:

“ The Signatory Powers[to the London Agreement of 8 August 1945 creating the Charter of the IMT at Nuremberg] created this tribunal... and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly, for it is not to be doubted that any nation has the right to set up special courts to administer the law. With regard to the constitution of the Court, all the defendants are entitled to ask is to receive a fair trial on the facts and law.”³²

By refusing to ratify the Statute, with the expectation that US nationals will not be subject to the Court's jurisdiction, the Bush Administration is either denying the implications of universal competence and responsibility or wants the international community to make an exception for the US. From the Nuremberg experience, it is clear that under international law, countries can implement a formal tribunal with or without participation by the country whose national is the subject of the criminal proceeding. Thus, in Nuremberg, it was not necessary for Germany to consent to the formation of the tribunal even though some of the crimes committed by the Nazis did not occur in Britain, the United States or in France. It was equally unnecessary that the individuals prosecuted be nationals of countries forming the tribunal.

The U.N. General Assembly's declarations on war against humanity and war crimes imply a general obligation for nations to assist in the prosecution of international crimes, and to engage in multilateral efforts to prevent future occurrences. The U.N. Assembly's declarations, in part, state:

“States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes; States shall not grant asylum to any such person.”³³

Thus, given the competence of South Africa as a member of the United Nations, she can take part in the formation of an international criminal tribunal to try a French national held in her territory for war crimes. By virtue of this competence, it follows that South Africa can also refer cases to the International Criminal Court even if she is not party to the Rome Statute, but must accept the jurisdiction of the Court by special declarations. Hence she can deliver a war crime suspect to the Court with the proviso that she is not barred from doing so by constitutive treaty. Under the universal jurisdictional umbrella, France, whose national is the subject of the criminal proceeding, also need not be a party to the Statute in order for the Court to have jurisdictional competence.

The plain reading of Article 13 of the Rome Statute makes clear that the Court, upon the invitation of a State Party, may exercise jurisdiction over the referred case in accordance to the provisions of Article 14, which in turn simply requires that the crimes be within the jurisdiction of the Court, and that the crimes appear to have been committed.³⁴ This understanding of the Court’s jurisdiction is confirmed by Mahnoush Arsanjani, Secretary of the “Committee of the Whole” at the Rome Conference: “The Court will have jurisdiction... even if committed in non-party states by nationals of non-party states and in the absence of consent by the territorial state or the state of nationality of the accused.”³⁵

The legal essence of Article 14 is to virtually make the ratification of the Statute by non-conforming states inconsequential once the required number

of signatories is met. By granting the ICC jurisdiction over non-party states, Article 14 makes it possible for the Court to exercise jurisdiction over any individual so long as the state where the crimes took place consents or the country in which the accused is a national consents. In light of Articles 13 and 14, the Court will be able to exercise limited universal jurisdiction.³⁶

In the example given above, where South Africa has in her custody a French national accused of war crimes, it is possible for France to initiate her own investigation of the matter, but this will only grant her prescriptive jurisdiction, just like any other state interested in the matter. However, under Article 17 of the Statute, so long as South Africa has enforcement jurisdiction, she can surrender the accused to the ICC or refer the case to the prosecutor. Thus, the possession of prescriptive jurisdiction by the state which the accused claims as his country of origin does not preclude another state with enforcement jurisdiction from surrendering the accused to the Court. Furthermore, since international human rights law forbids a state from trying the accused in absentia, the French, while possessing prescriptive jurisdiction may not be able to try her national if South Africa retains custody.

Articles 89(1) and 90(4)-(6) also provide the Court jurisdiction over nationals of non-signatories to the Statute.³⁷ In instances where a requesting state has jurisdictional competence but is not a signatory to the Statute, Article 90 confers competency and primacy to the Court. Thus, if a non-signatory to the Statute, such as the United States, has nationality jurisdiction, and makes a request of a State Party to surrender or extradite her national for prosecution in order to circumvent the Court, the State Party shall give priority to the Court’s request for jurisdiction if the Court ascertains that the case is admissible, and that the State Party is not obligated under international law to extradite the accused to the requesting non-signatory. In effect, Article 90 clearly establishes that the Court shall have the power to determine whether the case is admissible when a non-

signatory requests extradition of her nationals from a signatory state. If the case is admissible, the Court may exercise its jurisdiction.³⁸

The US Objections

For its supporters, the ICC is an overdue addition to the host of international institutions now operative, and a natural progression from the Nuremberg Tribunal, and the ad hoc war tribunals for Rwanda and Bosnia.³⁹ But for its detractors, the real objective of the ICC supporters, as they perceive it, is to assert the supremacy of its authority over nation states, and to promote prosecution over alternative methods for dealing with the worst criminal offenses against humanity. In this vein, Richard Belton writes:

“In fact, the Court and the prosecutor are illegitimate. The ICC’s principal failing is that its components do not fit into a coherent “constitutional” design that delineates clearly how laws are made, adjudicated, and enforced, subject to popular accountability and structured to protect liberty. Instead, the Court and the prosecutor are simply “out there” in the international system. This approach is clearly inconsistent with American standard of constitutional order, and is, in fact, a stealth approach to erode our constitutionalism. That is why this issue is, first and foremost, a liberty question.”⁴⁰

To the more pronounced detractors of the Court in the US, the Court’s basic inadequacies stem from the robustness of the crimes that fall within the Court’s jurisdiction. For instance, the crime of genocide as defined by the Court will run counter to the US Senate’s position adopted in February 1986 when it attached two reservations, five understandings, and one declaration before approving the Genocide Convention of 1947. However, Article 120 of the Rome Statute explicitly provides that “.. no reservations may be made to this statute..”,⁴¹ thus for the US to fully recognize the Court’s jurisdiction over her citizens, the Senate’s position on the crime of genocide will have to change in order to comply with the Court’s stipulation.

However, the principal objection raised by the US during the conference in Rome and in the meetings of the Preparatory Commission was that US military personnel could, in discharging their duties around the world, be charged and tried by the Court without US consent. A more recent, and less than obvious self-serving formulation of the same objection is that the Rome Statute allows the Court to try nationals of a nonparty country without the consent of the country.⁴² Based on this new formulation, the US then attempted to include in the treaty a clause that will prevent the Court from exercising jurisdiction over nationals of nonparty countries unless the Court first obtains the consent of the nonparty country to try her national. The overall effect of this proposal would be to afford US nationals a blanket protection from the Court as long as the US remains a nonparty state. But it would also provide the same protection from rogue nations that are more likely than not to engage in the type of atrocities the Court is designed to guard against, and allow savage dictators to elude the Court’s jurisdictional reach. Such undesirable outcome was enough ground for all NATO allies, except Turkey, to reject the proposal.⁴³

While most of the European, and NATO allies found this US proposal unacceptable for obvious reasons, the proposal also points to a long-held view that the US may be inclined to hegemonic tendencies in view of the fact that the proposal was, and continues to be, based on arguments inconsistent with customary international law.⁴⁴ Specifically, that international law does not permit a treaty-based institution to exercise jurisdiction over nationals of nonparty states unless the affected state consents. But this is not the customary understanding or interpretation of international treaties, for while a nonparty state is not herself bound to accept such jurisdiction unless she consents, this, however, does not hold true for nationals of nonparty states when they violate laws of a sovereign state and are within the territory of that state. Customary international law does not prohibit a territorial sovereign from exercising jurisdiction over an offender of any

national within her territorial reach even if the offender is acting under the auspices of a nonparty state. Moreover, once such jurisdiction is exercised over the offender, the territorial sovereign is free to extradite the offender to a third party state or institution.

This ability by the territorial sovereign to try or extradite an offender within her jurisdiction should have been enough reason to persuade the US to ratify the treaty because, under the Rome Statute, the Court must engage due-process protection and rules of evidence already written into the statute. This is a major benefit that would otherwise not be available to the accused in the courts of many nations.

A second point of objection raised by the US is that the prosecutor would exercise inordinate prosecutorial power to the extent that US foreign policy will be subject to the exercise of such power.⁴⁵ But this argument misses the point, for the prosecutor cannot initiate an investigation without first securing an approval from a three-member pretrial chamber. Moreover, when an authorization to investigate is secured, all affected states must be notified of the decision to investigate; and once such notice is issued the complementarity provision again controls. The state of nationality of the accused and the host nation have the option to assert primary jurisdiction and retain the right to investigate. Given this provision, it is hard to imagine a situation where the US will decline primary jurisdiction. And even when the prosecutor decides that the outcome was unacceptable and elects to remove the case to the ICC, the investigating state has the right under the Rome Statute to challenge the prosecutor's decision in the pretrial chamber, and to appeal to the appellate division of the Court. It must also be noted that the fear or specter of politically motivated or unjust prosecutions is properly ameliorated by the fact that the ICC can only try the accused if it has custody; the Statute prohibits it from trying individuals in absentia.⁴⁶

So far, US negotiators are yet to come to terms with their inability to convince other Party-States that because the US shoulders certain obligations in the global arena, some provisions of the Rome Statute should be modified to reflect this unique set of responsibilities. In observance of this frustrating dilemma, Bruce Broomhall of Lawyers Committee for Human Rights, an active participant in the Rome Conference, wrote:

"Unable to offer credible "carrots," decisive "sticks," or viable legal arguments, the United States finds herself on "a lonely legal ledge," able neither to go forward nor step back. Asking for concessions it cannot win in a process it can neither leave nor oppose, the United States has so far resisted coming to terms with the limits of its ability to control the ICC process. It has also resisted the recognition that its reasons to support the ICC far outweigh its reasons to oppose it."⁴⁷

Part IV. Conclusion

The current formulation of the US position is based on a 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 nationals of a nonparty state when they act under the direction of the nonparty state. The fault in this line of reasoning is that, in the absence of some specific agreements, the jurisdiction of the state in which the crime was committed will prevail over any other claim of jurisdiction. It also ignores the fact that territorial jurisdiction prevails over jurisdiction based on nationality. But even in the likely event that the prosecutor challenges the conclusion of the investigating state, that state has a right under the treaty to contest such challenge in the pretrial chamber, as well as a right to an expedited interlocutory appeal to the appellate chamber of the ICC.⁴⁸

Right up to the final vote on the Rome Statute in 1998, and ever since, the US has made remarkable efforts to secure changes to the statute that would make it acceptable, and enable her to sign the

treaty, first by suggesting amendments in the text, and proposing “agreed interpretations” of various provisions.⁴⁹ More recently, the US negotiating team proposed several clauses in the relationship agreement between the proposed new Court and the United Nations that would exempt certain US nationals from application of the Court’s jurisdiction so long as the US is not a party or unless the US gives its consent on a case-by-case basis. None of these suggestions was accepted, and most were rejected summarily by the Like-Minded group that constituted the dominant voting bloc in the conference.⁵⁰

The US, from all indications, will not ratify the treaty as currently constituted, and thus will not participate in the establishment of a permanent international criminal court as envisioned in the Rome Statute. Absence of US participation will have both long-run and short-run implications. The long-run effects on the Court will be serious indeed, for the Court will lack the support of a country with the most extensive economic and military resources amongst the nations, and may be inclined to use her might to frustrate the Court’s efforts. But the long-run effects will be equally serious for the US in terms of the consequences that attend isolationism in an era of global interdependency.

In the short-run the effects are rather immediate, for it calls into question the credibility of the US in supporting and defending international human rights abroad in the recent past, and its open declaration of support in principle for the establishment of a permanent international criminal court. By not becoming a member of the Assembly of States Parties at the early stages of the Court’s development, the US may have irreparably damaged her chances to help shape and define essential aspects of the Court such as the Rules of Procedure and Evidence, the Elements of Crimes, Due-Process protection for the accused, and the crucial role of the United Nations in recommending cases for prosecution. Furthermore, by standing aloof, the US loses the opportunity to participate in the selection and

appointment of the first batch of judges and the prosecutor, and simultaneously denies her nationals eligibility for the Court’s judicial appointments.

A fundamental foreign policy and national security issue of remarkable interest to the US and her military personnel is the definition of the crime of aggression by the Rome Statute.⁵¹ But this crime is yet to be fully defined and agreed upon by the Assembly of State Parties therefore, the absence of the US at this stage will almost guarantee that the final version of the crime of aggression will be a further obstacle to US full participation. The salient point to be stressed here is that the Rome Statute provides the US the better alternative in terms of protecting her armed forces accused of international crimes in foreign countries, because under the complementarity provisions of the Statute, the ICC will only act if the sending country is unwilling or unable to try the case. But since the US has perennially insisted on having sole jurisdiction over her military personnel, the Statute affords her this preference that would otherwise be unavailable under the regime of territorial jurisdiction.

NOTES

¹ Rome Statute of the International Criminal Court adopted on July 17, 1998. See U.N. Doc. A/CONF.183/9 (1998).

² See U.N. Doc. A/CONF.183/10 (1998). Crimes against humanity are defined to mean “... any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilization, or other form of sexual violence of comparable gravity; persecution of any identifiable group or collectively on political, racial

national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law ...” (Ibid.)

³ See U.N. Doc. A/CONF. 183/9 (1998).

⁴ See David J. Scheffer’s remarks on the International Criminal Court at the 53rd Session of the U.N. General Assembly; USUN Press Release No. 179 (Oct. 21, 1998). See also M. David, “Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law”, 20 Michigan Journal of International Law (1999) 337-412.

⁵ See UN Press Release, L/ROM/22, 17 July, 1998

⁶ The various positions held by participating states on the Rome Statute can be found in a UN Press Release, L/ROM/22, July 17, 1998.

⁷ See Zwanenburg, “The Statute for an International Criminal Court and the United States: Peace without Justice?”, 12 Leiden Journal of International Law (1999) 1-7.

⁸ See “Statement on the Rome Treaty on the International Criminal Court”, Weekly Compilation of Presidential Documents, Jan. 8, 2001, v37 II p4.

⁹ See the American Members Protection Act, S. 2726, 2000; and the companion bill in the House, H.R. 4654

¹⁰ See U.N. Doc. A/CONF.183/10 (1998).

¹¹ See letter from the Permanent Representative of Trinidad and Tobago to the Secretary General of the United Nations dated August 21, 1989; UN GAOR, 44th Session, Annex 44, Agenda Item 152, UN Doc.

¹² See UN Press Release, L/ROM/22, 17 July, 1998

¹³ Ibid.

¹⁴ See U.N. Doc. A/CONF.183/10 (1998).

¹⁵ See Proposed Corrections to the Rome Statute of the International Criminal Court, UN Doc. C.N.502, 1998. Treaties-3(Annex.)

¹⁶ See M. Cherif Bassiouni, Negotiating the treaty on the Establishment of an International Criminal Court, 32 Cornell International Law Journal 443, 449-59 (1999).

¹⁷ See Zwanenburg, “The Statute for an International Criminal Court and the United States: Peace without Justice?”, 12 Leiden Journal of International Law (1999) 1-7.

¹⁸ Ibid.

¹⁹ See David J. Scheffer, “The United States and the International Criminal Court”, American Journal of International Law, Vol. 93, Issue 1(Jan., 1999), 12-22.

²⁰ See Madeline Morris, “High Crimes and Misconceptions: The ICC and Non-Party States”, Law and Contemporary Problems, Wntr 2001 v64 il p 13, 17.

²¹ See U.N. Doc. A/CONF.183/10 (1998)

²² See U.N. Doc. A/CONF. 183/9 (1998).

²³ Ibid.

²⁴ See William K. Lietzau, “International Criminal Law After Rome: Concerns fro A US Military Perspective”, Law and Contemporary Problems, Wntr 2001 v64 il p 119.

²⁵ See The Case for Universal Jurisdiction, Kenneth Roth; Foreign Affairs, Sep/Oct. 2001, Vol. 80 issue5, p150.

²⁶ On the need for complementarity, David Scheffer, the leading US delegate to the Rome Conference remarked: “One of our major objectives was a strong complementarity regime. Article 18 is drawn from an American proposal submitted during the final session of the preparatory Committee. We considered it only logical that, when an investigation of an overall situation is initiated, relevant and capable national government be given the opportunity under the principle of complementarity to take the lead in investigating their own nationals or others within their jurisdiction. Otherwise, under the original provisions on complementarity (Articles 17 and 19), the need to wait until an individual case has been investigated would have meant that national efforts would always have to defer first to ICC – a delayed procedure that would undermine the willingness and ability of national judicial systems to enforce international humanitarian law.” See David J. Scheffer, “The United States and the International Criminal Court”, American Journal of International Law, Vol. 93, Issue 1(Jan., 1999), 12-22.

²⁷ See Jonathan I. Charney, *Progress in International Criminal Law?*, 93 Am.J. INT'L. 452, 456 (1999).

²⁸ See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331,340.

²⁹ The US, understandably, sees this as a major constraint on her abilities to militarily effectuate her foreign policies, and worries that her personnel may be subject to the Court's jurisdiction in any number of instances when she deploys the military arm of her foreign policy. The fact that the Court would only bring non-party State nationals to justice when the national of the non-party state is reasonably accused of committing war crimes, crimes against humanity or genocide in the territory of a party state, or if the state of the national so accused is either unable or unwilling to prosecute the case, has not provided the US enough reason to be comfortable with this possibility. States that have ratified the treaty view this provision as an extension of what every nation has the obligation to do under customary international law, for, the International Criminal Court cannot legally do more than what each of the states has the right to do.

³⁰ See King and Theofrastous, "From Nuremberg to Rome: A Step backward for US Foreign Policy", 31 Case Western Reserve Journal of International Law (1999) 47-106.

³¹ See Opinion and Judgment, International Military Tribunal at Nuremberg, reprinted in Jordan Paust et al, *International Criminal Law: Cases and Materials*, 744-761 (1996).

³² Ibid.

³³ See G.A. Res. 3074, U.N. GAOR, 28th Sess. Supp. No.30, at 79, U.N. Doc. A/9326 (1973).

³⁴ See U.N. Doc. A/CONF. 183/9 (1998).

³⁵ See Jordan Paust, *supra* note 35, at 746.

³⁶ See U.N. Doc. A/CONF.183/10 (1998).

³⁷ Ibid.

³⁸ Ibid.

³⁹ See generally Chris Cillizza, "Passing The Treaty Ball", *National Journal*, Jan. 27, 2001, v33 i4 p27.

⁴⁰ See Peirce, Rachel, "Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction should be Adopted into the Rome Statute?" , *BYU Journal of Public Law*, 2001, Vol. 15 Issue 2 p281.

⁴¹ See U.N. Doc. A/CONF. 183/9 (1998).

⁴² See David J. Scheffer, "Statement on the International Criminal Court Remarks before the 53rd Session of the UN General Assembly", *USUN Press Release No. 179* (Oct. 21, 1998)

⁴³ Ibid.

⁴⁴ See Peirce, Rachel, *Supra* at note 44, p284.

⁴⁵ See David J. Scheffer, *Supra* at note 46.

⁴⁶ See U.N. Doc. A/CONF.183/10 (1998).

⁴⁷ See Zwanenburg, "The Statute for an International Criminal Court and the United States: Peace without Justice?", *12 Leiden Journal of International Law* (1999) p6.

⁴⁸ See U.N. Doc. A/CONF. 183/9 (1998).

⁴⁹ See David J. Scheffer, "The United States and the International Criminal Court", *American Journal of International Law*, Vol. 93, Issue 1(Jan., 1999), 12-22.

⁵⁰ Ibid.

⁵¹ See David J. Scheffer, "Statement on the International Criminal Court Remarks before the 53rd Session of the UN General Assembly," *USUN Press Release No. 179* (Oct. 21, 1998).