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The United States and the International Criminal Court: Concerns and Possible Courses of Action[*]

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On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court (ICC). Pursuant to its Article 126, the Rome Statute will enter into force on the first day of the month after the 60th day following the date that the 60th instrument of State Party ratification has been delivered to the United Nations. As of February 7, 2002, 52 States have ratified the Statute, which will establish at The Hague in the Netherlands a permanent international criminal court with subject matter jurisdiction over crimes of genocide, crimes against humanity and war crimes (in each case, committed after the date that the Statute takes effect).

The United States objected to the design of the proposed ICC at the Rome Conference and in the negotiations leading up to it, and voted against adoption of the final Statute at the Rome Conference. Thus, it was somewhat of a surprise that on December 31, 2000, the last day on which signature of the Statute was permitted pursuant

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[*] The Federalist Society takes no position on particular legal or public policy initiatives. All expressions of opinion are those of the authors.

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to Article 125 of the Statute (and only three weeks before the inauguration of President George W. Bush), President Clinton authorized the United States' signature of the Rome Statute. President Clinton's authorization was even more puzzling in light of the fact that it was accompanied by a statement expressing concerns about "significant flaws" of the Statute and, notwithstanding Article 120, which prohibits reservations to the Rome Statute, with the qualification that "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until fundamental concerns are satisfied." Whatever President Clinton's motivations, the Rome Statute has not been sent to the Senate for advice and consent. The Bush Administration has not yet made an official pronouncement regarding the Statute, although then-candidate Bush indicated his opposition to the ICC during the 2000 presidential campaign.

The refusal of the United States to ratify the Statute, though, almost surely will not be enough to prevent the Court from coming into existence. At the Rome Conference, 120 States Parties voted to adopt the Statute and 138 States Parties (plus the United States) have signed the Statute, so it seems altogether likely that, even if its opponents put forth a strong and concerted effort, the Statute will attract the necessary 60 ratifications and the ICC will be brought into existence, perhaps even in the first half of this year.

As a general matter, the United States, of course, has a strong interest in seeing that persons responsible for war crimes, crimes of genocide or crimes against humanity are held accountable for their actions. This interest is reflected in our participation in the Rome Conference, as well as in our support for and participation in

the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The United States has provided significant financial resources to these Tribunals — including by way of voluntary contributions — and has used its diplomatic and military resources to promote the effectiveness of the Tribunals. The real issue is how best to accomplish this goal without sacrificing vital American interests. The matter is complicated by the fact that, as events of the past decade have proven, the United States occupies the dominant position in promoting international peace and security in today's world. Fulfilling our unique role often requires the use of military force.

Given the importance of the United States in promoting world security and keeping in mind our national security interests, the United States has been and should continue to be concerned with the adverse effects that the ICC, as currently proposed, might have on our foreign policy decisions and the threat of ICC prosecution facing everyone in our military chain of command, from the President as Commander-in-Chief to our soldiers, sailors, airmen and marines who carry out American military operations. In addition to these compelling foreign policy and national security concerns, the ICC poses a serious concern under the U.S. Constitution.

This paper, one in a series collected by The Federalist Society on issues that touch on national security, addresses the following five matters (for the other papers in the series, see http://www.fed-soc.org/Publications/White%29Papers/nationalsecurity.htm):

- First, for those readers who are less familiar with the Rome Statute and the International Criminal Court that it would create, we provide a basic summary of the provisions of the Statute and the jurisdiction and procedures of the Court;

- Second, we examine in depth the most serious problems with the Court from the perspective of the United States and its ability to conduct its foreign policy and national defense;

- Third, we examine possible problems with the Rome Statute arising under the U.S. Constitution;

- Fourth, we set forth several avenues that the United States might pursue in order to protect American citizens from the Court's jurisdiction or possibly even to prevent the Court, at least as it is currently proposed, from coming into existence; and

- Fifth, we discuss the possibility of the United States "de-signing" the Rome Statute.

I. Overview

The Rome Statute marks the culmination of an international process that began in earnest following the Nuremberg Trials that were held after World War II. In 1947, the U.N. General Assembly tasked a commission on international law with examining the possibility of creating an international criminal chamber. It was contemplated that this proposed criminal court would have jurisdiction over individuals (in contrast to the International Court of Justice, which adjudicates disputes between States). A draft statute for an international criminal court was completed in 1951. However, interest in such a court faded due to Cold War pressures and discussion of the matter all but ceased. In the late 1980s, Trinidad and Tobago resumed the discussion with its proposal to create an international criminal court to deal with its problems related to international drug trafficking. However, the real impetus behind the renewed interest in a permanent international criminal court with jurisdiction over war crimes, crimes against humanity and genocide came in the early 1990s with the outbreak of hostilities

and reported atrocities in the former Yugoslavia and Rwanda, and the failure or inability of the relevant national judicial systems to punish the perpetrators.

In order to bring persons suspected of "serious violations of international humanitarian law" to justice, the U.N. Security Council, citing its powers under Chapter VII of the U.N. Charter, established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Many States, though, viewed temporary, case-by-case international criminal tribunals such as the ICTY and ICTR as too limited in scope to be a solution to the problem. These bodies, it was thought, were too constrained by jurisdictional limitations and efficiency and logistical concerns associated with establishing, staffing and funding a special tribunal. Thus, a new statute for an international criminal court was drafted. The process reached substantial conclusion at the Rome Conference. (The delegates to the Rome Conference established a Preparatory Commission to promulgate Draft Rules of Procedure and Evidence and Draft Elements of Crimes for the ICC to give substance to the general provisions of the Statute regarding those matters. The Preparatory Commission has recently completed its work on those drafts.)

The Rome Statute is comprised of a Preamble and the following thirteen parts: (1) Establishment of the Court (Articles 1-4); (2) Jurisdiction, Admissibility and Applicable Law (Articles 5-21); (3) General Principles of Criminal Law (Articles 22-33); (4) Composition and Administration of the Court (Articles 34-52); (5) Investigation and Prosecution (Articles 53-61); (6) The Trial (Articles 62-76); (7) Penalties (Articles 77-80); (8) Appeal and Revision (Articles 81-85); (9) International Cooperation and Judicial

Assistance (Articles 86-102); (10) Enforcement (Articles 103-111); (11) Assembly of States Parties (Article 112); (12) Financing (Articles 113-118); and (13) Final Clauses (Articles 119-128).

Pursuant to Article 34, the ICC will be composed of four principal organs:

- the Presidency;
- the Courts, composed of an Appeals Division (consisting of four judges and the President), a Trial Division (consisting of at least six judges) and a Pre-Trial Division (also not less than six judges);
- the Office of the Prosecutor; and
- the Registry.

The Presidency will be headed by the President, assisted by the First and Second Vice Presidents. Each of these three officers shall be elected from the ranks of judges, by an absolute majority of the judges. The Presidency will be responsible for administration of the judicial business of the Court. However, the Office of the Prosecutor is considered an independent office, not subject to the Presidency's supervision.

An initial eighteen judges will be chosen as full-time members of the Court, by secret ballot at a meeting of the Assembly of States Parties. These judges must come from eighteen different States Parties, at least nine must have established competence in criminal law and procedure, and at least five must have established competence in international human rights law. In order to provide for staggered terms, one-third of the judges will be elected to three-year terms, one-third to six-year terms and

the remaining one-third to nine-year terms. The judges elected to three-year terms will be eligible for re-election to a full nine-year term.

The Pre-Trial Division's responsibilities include ruling on jurisdictional and admissibility matters, issuing orders and warrants, and ruling on similar preliminary matters. The functions of the Pre-Trial Chamber shall be carried out either by three judges or by a single judge. The Trial Division, as the name suggests, conducts trials (without the assistance of a jury). Each trial shall be before a panel of three judges. The Appeals Division also has the function that its name suggests — to hear appeals from rulings of the Pre-Trial and Trial Divisions. All of the five judges of the Appeals Division will sit to hear appeals.

The Prosecutor will be elected by an absolute majority of the Assembly of States Parties, again in a vote by secret ballot. Upon taking office, the Prosecutor shall submit a list of three candidates to the Assembly for each Deputy Prosecutor position to be filled and the Assembly will vote on those candidates by secret ballot as well. The Prosecutor and Deputy Prosecutors will hold office for a nine-year term and shall not be eligible for re-election.

The Office of the Prosecutor will receive referrals from States Parties on the commission of crimes potentially within the jurisdiction of the Court. The U.N. Security Council may also refer matters to the Prosecutor under Chapter VII of the U.N. Charter. (In the event of a Security Council referral, all States would be bound to comply with orders for evidence or the surrender of indicted persons and enforcement would be achieved by any combination of, among other measures, Security Council-imposed

embargoes, freezing of assets of leaders and their supporters, and authorizing the use of force.) The Prosecutor will be responsible for examining these referrals and any other substantiated information on crimes within the jurisdiction of the Court, and for conducting investigations, prosecutions and appeals before the Divisions of the Courts.

The Prosecutor also may initiate investigations on its own motion on the basis of information within the jurisdiction of the Court. If the Prosecutor concludes, upon a preliminary investigation, that there is a reasonable basis to proceed with an investigation, he must obtain the approval of the Pre-Trial Chamber before commencing a full investigation. The Pre-Trial Chamber's oversight, however, is limited to an inquiry into whether the case "appears to fall within the jurisdiction of the Court" and whether there is "a reasonable basis to proceed." Moreover, the Pre-Trial Chamber's refusal to authorize an investigation does not preclude the Prosecutor from making subsequent requests regarding the same situation, so long as the Prosecutor's request is based on new facts or evidence.

The Office of the Registry will be responsible for the nonjudicial administration of the Court, including such areas as security and communications. The Registrar will be elected by an absolute majority of the judges by secret ballot after considering any recommendation that may be made by the Assembly of States Parties. The Registrar may serve up to two five-year terms.

The Court will be financed in three ways. The primary means of finance will be assessed contributions made by States Parties. Also, the United Nations may provide funds upon the approval of the U.N. General Assembly, in particular, with

respect to expenses of the Court incurred in connection with referrals by the Security Council. Finally, the Court will accept voluntary contributions from States Parties, international organizations, individuals, corporations or other entities.

The subject matter jurisdiction of the ICC is limited to the crimes defined in Article 5 — namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression (however, the Rome Conference could not agree to a definition of aggression and Article 5 thus provides that, until a provision defining the crime is adopted, the Court shall not exercise jurisdiction in that regard). Article 11 clarifies that the Court only has jurisdiction of those such crimes committed after the Statute enters into force. Article 13 provides that the Court may only exercise its jurisdiction if there is a referral to the Prosecutor by a State Party or the U.N. Security Council, acting under Chapter VII of the U.N. Charter, or if the Prosecutor has initiated an investigation in accordance with the provisions of Article 15. Finally, Article 12 provides that the Court may exercise jurisdiction only where the matter in question involves a national of a State Party or the conduct in question takes place in the territory of a State Party, or where a non-party State consents to the Court's jurisdiction in a particular case where the crime was committed in such consenting State's territory or was committed by a national of the consenting State.

In addition to these jurisdictional limitations, Article 1 of the Statute provides that the ICC is "complementary to national criminal jurisdictions." As such, the Court is supposed to have jurisdiction only of those cases where a State has failed to prosecute a matter in accordance with its own processes and procedures. In other words,

the Court is purportedly designed to serve as a court of last resort for extraordinary cases, as an international safety net to prevent criminals of lawless states from escaping without punishment for their crimes.

Also of importance, Article 86 of the Rome Statute imposes upon States Parties a general obligation to "cooperate fully with the Court in its investigation and prosecution" of the crimes that fall within the Court's jurisdiction. In order to satisfy that obligation, States Parties must ensure that there are "adequate procedures" in place under their national law to comply with "all of the forms of cooperation" that are specified in the Rome Statute.

One specified form of cooperation is that States Parties must, in accordance with their national law procedures, comply with requests for arrest and surrender of persons to the ICC. If a State Party receives an extradition request from another State Party in competition with the Court's request for surrender of a person, the requested State must give priority to the request from the Court so long as the Court has ruled that the case is admissible to its jurisdiction (taking into account the investigation or prosecution conducted by the requesting State in respect of its extradition request under the principle of complementarity). If the Court has not yet made that determination, the requested State must refrain from extraditing the person until the Court, on an expedited basis, makes such a ruling. If the requesting State is not a State Party, the request from the Court has priority if the requested State is not under an international obligation to extradite the person to the requesting State. And if the requested State is subject to an international obligation to extradite, it must decide among competing obligations, taking

into account the several factors specified in the Rome Statute, including the timing of the competing requests, the possibility of subsequent surrender by the requesting State to the Court and the interests of the requesting State. Also pursuant to the obligation of cooperation, Article 93 requires that States Parties assist the Court in respect of investigations and prosecutions (such as with service of documents, execution of searches and seizures, and provision of documents) and provide "any other type of assistance which is not prohibited by the law of the requested State."

II. Matters of Concern about the ICC for the United States

The policy concerns of the United States with respect to the Court can be summed up in the statement that the Court, as proposed, has the power to hamper the United States in its conduct of foreign policy and military operations and as such it is not in the best interests of the United States. In theory, the basic principle of complementarity mitigates our concerns as it would guarantee that an American could only be brought before the Court if there were an inconceivable breakdown of the justice system in the United States. Unfortunately, due to broad carve-outs from the basic principle of complementarity and the almost complete discretion given to the Office of the Prosecutor and the Divisions of the Courts of the ICC, the desired effects of the complementarity provisions are not at all guaranteed.

Article 17 of the Rome Statute gives content to the general principle of complementarity, but unfortunately introduces several potentially worrisome carve-outs

from that principle as well. That Article requires that the ICC shall rule inadmissible to its jurisdiction:

- any case that is being investigated or prosecuted by a State with jurisdiction of the case, unless such State is unwilling or unable genuinely to carry out the investigation or prosecution;
- any case that has been investigated by a State having jurisdiction that, after such investigation, has decided not to prosecute, unless such decision is due to that State's unwillingness or inability genuinely to prosecute; and
- any case for which the individual has already been tried for the conduct in question, unless the trial was held to shield the person from the ICC's jurisdiction or was not conducted impartially or independently and in a manner designed to bring the accused to justice.

The above "unless" clauses clearly allow the ICC to easily second-guess the decisions arrived at by States in their exercise of primary jurisdiction over an accused. To be sure, it is possible that the exceptions to complementarity may be interpreted quite narrowly. Unfortunately, there is no such guarantee in the text of the Statute or in its structure. Indeed, the text all but invites second-guessing where the Court is so inclined.

The standards for determining unwillingness to prosecute are very general. The Court is instructed to consider whether the national proceedings are undertaken, or the national decision is made, in order to shield the person from the Court's jurisdiction; whether there has been an unjustified delay in the national proceedings inconsistent with an intent to bring the person to justice; or whether the proceedings are not being, or were not, conducted independently or impartially but rather are, or were being, conducted in a manner that is inconsistent with an intent to bring the person to justice.

The standards for determining inability to prosecute are no more specific. The Court is instructed to consider whether, due to a total or substantial collapse or

unavailability of the national judicial system, the State with primary jurisdiction is unable to obtain the accused person or the necessary evidence or testimony, or is otherwise unable to carry out its proceedings. No further definition of the terms "unjustified delay," "shield" and "intent to bring to justice" can be found in the Statute. The Finalized Draft Text of the Rules of Procedure and Evidence prepared by the Preparatory Commission has nothing of significance to add to the description of the process of determining admissibility set forth in the Statute.

Thus, the entire concept of complementarity will depend on the subjective judgment of the Court, and how aggressive it wishes to be in interpreting these vitally important terms. The vague and imprecise statutory language makes it all too possible that any State's exercise of the so-called primary jurisdiction that results in a decision not to prosecute or does not punish the accused harshly enough in the Court's eyes would not be respected. The Statute, therefore, cannot possibly be said to give significant and guaranteed respect for the primary jurisdiction of States.

At the very least, the "independence" and "impartiality" conditions provide the Prosecutor and judges of the ICC a convenient way around respecting the primary jurisdiction of the United States in respect of every prosecution brought by the United States against a military officer or civilian official of the United States. This is because the United States Constitution establishes a "unitary" Executive. All prosecutorial discretion of the United States and the commander-in-chief authority of the United States military are vested in the Executive Branch. Thus, it would not be surprising if the Prosecutor or the Pre-Trial Division took the position that the United

States was incapable of investigating a matter within the jurisdiction of the Court involving a member of the U.S. armed forces in an "independent" or "impartial" manner within the meaning of Article 17.

Moreover, although the initial decisions of the Pre-Trial and Trial Divisions may be appealed to the Appeals Division, there is no resort to a body outside of the ICC — save the U.N. Security Council pursuant to Article 16, which provides for the suspension of any investigation or prosecution under the Statute for a period of 12 months (subject to renewal) after the Council has adopted a resolution under Article VII of the U.N. Charter so requiring. However, given the potential difficulties in obtaining such a resolution (for one thing, it could be vetoed by any of the Security Council's five permanent members), it is clear that the ICC is essentially its own judge of its power and jurisdiction.

In addition to the fundamental failure of complementarity, the Rome Statute lacks appropriate checks and balances on prosecutorial discretion. The Statute contemplates, as do all systems of justice, lodging substantial discretion in a prosecutor. However, a prosecutor in a domestic law system is typically subject to a host of checks and balances that makes it easier for the public and its elected representatives to monitor his conduct and, if necessary, take appropriate steps to remove the prosecutor from office. The lack of practical constraints on the ICC's Office of the Prosecutor is striking.

The Prosecutor will serve a nine-year term and during that time will be accountable to no particular national or international official. The docket of the ICC will likely consist of cases of relatively remote practical importance to citizens around the

world, so the Prosecutor almost surely will come under little public scrutiny. To be sure, certain interest groups will be very concerned with particular ICC prosecutions. Unfortunately, monitoring by interest groups is likely to come at the cost of particularly intense pressure, which in most cases is likely to be applied with one goal in mind — the aggressive prosecution of all manner of alleged offenses. The result of the combination of interest group pressures and public inattention is certain to give rise to the risk that the Prosecutor will not follow neutral principles in carrying out the mandate of the Office. In this way, the ICC may become a threat to the very rule of law its advocates want to promote.

To be fair, the Rome Statute does build in certain formal restraints on the Prosecutor's discretion. Unfortunately, these checks are performed by equally unaccountable officials of the ICC. For example, after completion of a preliminary investigation, the Prosecutor must secure the approval of the Pre-Trial Division in order to proceed with an investigation under Article 15. However, the Pre-Trial Division "shall authorize the commencement of the investigation" if it determines that the case falls within the jurisdiction of the Court and there is a reasonable basis to proceed with an investigation. Under the Statute and the Finalized Draft Text of the Rules of Procedure and Evidence, the Pre-Trial Division may act through one judge. And the Pre-Trial Chamber's refusal to authorize the investigation does not preclude the Prosecutor from presenting a subsequent request based upon "new facts or evidence." This gives rise to the possibility that a "preliminary investigation" could continue indefinitely.

During even a preliminary investigation, the Prosecutor is given very intrusive powers. When the Prosecutor has determined that there is a reasonable basis to pursue an investigation of a State Party referral or upon initiating an investigation upon its own initiative, Article 18 requires the Prosecutor to give notice to all States Parties, the State of an accused's nationality and the territorial State. While the Prosecutor must give way to a State that asserts primary jurisdiction after receiving such Article 18 notice, the Prosecutor may make application to the Pre-Trial Division seeking a ruling that the State is unwilling or unable to investigate the matter. Even if the Pre-Trial Division rules against the Prosecutor on that application, the Prosecutor may require that State to provide periodic reports of its progress in the investigation and prosecution of the matter.

Moreover, the deferral to State primary jurisdiction is open to review by the Prosecutor upon six months' time or at any time that circumstances regarding the State's willingness or ability to carry out the investigation have changed significantly. Finally, Article 17 requires the cases that the Prosecutor brings to be of "sufficient gravity" in order for jurisdiction to be admissible but, like the other Article 17 determinations discussed above, the sufficiency of the case is judged by the Court without precise statutory or procedural criteria to guide its discretion.

Despite these checks on the Prosecutor — whatever their value — there is no question that the Prosecutor is otherwise granted very broad powers under the Statute. The prosecutor may initiate and maintain preliminary investigations without any approval of the Pre-Trial Division or otherwise, and the permitted scope of a preliminary investigation includes seeking additional information from States, organs of the United

Nations, intergovernmental or non-governmental organizations, and other "appropriate" and "reliable" sources. By virtue of the provisions of Article 18 discussed above, the Prosecutor has ample opportunity to interfere with a national prosecution by demanding periodic progress reports from the prosecuting State.

Another danger exists under Article 28, which provides that any military commander or other superior officer shall be subject to international criminal liability for the acts of their forces where such commander or officer "knew or should have known" of the criminal acts or "failed to take all necessary and reasonable measures" within his power to prevent the commission of the act. (This provision may cause particular trouble for the United States, given the President's role as chief prosecutor and commander-in-chief.) If the Prosecutor and as few as one judge of the ICC are of like minds — not an unreasonable supposition given the pool from which the Prosecutor and the judges are likely to be selected — the Prosecutor's discretion will be amplified by the significant discretion vested in the judges.

Further uncertainty exists with respect to the definitions of crimes within the Court's jurisdiction. There can be no doubt that many of the crimes falling within the jurisdiction of the ICC generally are serious and potentially horrific matters. Nevertheless, the definitions of the crimes are phrased rather generally and, in some instances, leave enormous room for interpretation. This is especially true with regard to the crimes as defined in the Rome Statute, but also as clarified in the Finalized Draft Text of the Elements of Crimes prepared by the Preparatory Commission. In any event, because the interpretation and application of those terms, once again, will be left to the

discretion of the Prosecutor and judges of the ICC, there is a risk that definitions and terms that on their face seem clear will not be read in accordance with their apparent plain meaning.

To be sure, judges and prosecutors in national legal systems routinely must construe the meaning of various statutory provisions. Because of the elaborate system of independent appellate review and the separation of the prosecutorial and judicial functions, there is less temptation and opportunity to misconstrue vague provisions. But these checks and balances do not exist at the ICC, where the Prosecutor and judges are organs of the same body. Moreover, in national legal systems, the legislature is able to correct erroneous judicial interpretations. It is much more difficult to do so with respect to the Rome Statute, as amendments to the Rome Statute require a meeting of the Assembly of States Parties and adoption by consensus of the Assembly (if consensus cannot be reached, an amendment requires a two-thirds majority vote of States Parties, with all States Parties' votes counting equally).

It is also important to note that the Statute breaks new international law ground. Some actions that never were thought punishable on the international level before have been added to the definitions of crimes that fall within the ICC's jurisdiction. And, while the subject matter jurisdiction of the Court is limited to the crime of genocide, crimes against humanity and war crimes, with aggression to become a crime upon which the Court may exercise discretion upon the subsequent promulgation of the definition of the term, the Statute specifically provides for a Review Conference to meet seven years after the time that the Treaty goes into effect to consider adding new crimes to the

Court's jurisdiction. Although crimes may only be added by amending the Statute, several new crimes have already been proposed, including terrorism and drug crimes. Finally, the Rome Statute obligates States Parties to surrender persons to the ICC, which could include nationals of the requested State accused of crimes committed in the requested State. This breaks new ground in two ways. First, many States do not extradite their own nationals. And there is no current practice of extraditing nationals of the requested State for crimes committed wholly within the requested State.

Proponents of the ICC attempt to deflect much of the above criticism by maintaining that complementarity ensures that only nations that do not respect the rule of law and their citizens have anything to fear from the ICC. Law-abiding States and their citizens have no cause for concern because, the proponents claim, it is nearly impossible to imagine a case in which a law-abiding State would fail to exercise its primary jurisdiction, a case where the Prosecutor would fail to respect primary national jurisdiction or a case where the judges of the ICC would go along with the Prosecutor if the Prosecutor was not justified in bringing the prosecution.

There does not seem to be any significant empirical evidence, and no compelling logical argument has been advanced by the ICC's defenders to support their belief, that the Court will substantially deter those individuals who come from States with little or no respect for the rule of law. (The notion that the ICC's existence would have somehow deterred, for example, members of Afghanistan's Taliban and Al-Qaeda from their deeds certainly seems to fly in the face of all available evidence.) In any event, this line of argument misses the point.

It remains to be seen whether the Prosecutor and the judges of the ICC will push the limits of their discretion to interpret their power and authority as broadly as possible and second-guess the exercise of the primary jurisdiction by States. Rather, the point is that the Rome Statute allows them to do so, and due to the lack of built-in oversight and accountability of the Prosecutor and the judges, it will be very hard, if not impossible, to stop them if they are so inclined. This is not to suggest that the ICC's bench and Office of the Prosecutor would be staffed by power hungry or unethical individuals. However, one of the key insights in American political philosophy, shared widely among the Framers of the Constitution and reflected throughout the text of the Constitution, is that institutional safeguards must be in place to avoid abuses of power. Relying on the virtue of individual officers is not enough.

The danger posed by the ICC cannot be ignored by the United States as, under the Rome Statute, any individual or official of the United States military and government, including the President, military officers, civilian officials and enlisted personnel (and even ordinary citizens, who may have been involved in actions the Court determines to be unlawful and within its jurisdiction) are potential targets for prosecution. If the Treaty takes effect, non-parties (such as the United States currently) will have no obligation to extradite persons sought by the ICC or to provide evidence to the ICC. But this does not mean that the nationals of non-party States are immune from the ICC's jurisdiction. If persons against whom an indictment has been issued and proceedings have been initiated in the ICC are later found in a party State, those individuals must be seized by that party State and either prosecuted by that State or surrendered to the ICC for

prosecution (although, in certain instances, Article 90 allows the State to extradite the individual to another State).

The authority vested in the Prosecutor and the judges under the Statute to interpret the provisions governing jurisdiction, admissibility and their own powers create two unacceptable threats to the United States. The first is that of illegitimate prosecution. An illustration of prosecutorial overreaching can be found in the practice of the ICTY. The U.S. and NATO engaged in a military campaign, fully blessed by most of the international community and driven largely by humanitarian concerns, to protect the Kosovar Albanians against Slobodan Milosevic's government in Belgrade. In 1999, the ICTY prosecutor initiated an investigation into whether officials of the United States and NATO had committed "war crimes" during that campaign by their use of depleted uranium munitions and other alleged violations of the laws of war, such as the prohibition against the infliction of excessive collateral damage.

Although the investigation was ultimately closed without indictments, this was not because the prosecutor concluded that there was no violation. Rather, although the committee of Tribunal employees conducting the review voted three to two to pursue an indictment, the prosecutor rightfully was concerned that the close vote was not sufficient to pursue an indictment and also feared that adequate documentation to prove her case could not be obtained. Nevertheless, as law-abiding States came this close to being prosecuted in a court established by the Security Council to pursue persons responsible for ethnic cleansing offenses, the risk that law-abiding States will be tried by the ICC must be taken seriously. If the Rome Statute were now in force, the U.S.

response to Al-Qaeda, including the 1998 raid on bin Laden's camps in Afghanistan and our Afghan campaign following the September 11 attacks would be subject to investigation by the Prosecutor, perhaps arguing that our response constitutes a war crime or crime against humanity, based upon alleged "excessive" collateral damage to civilians or civilian property.

Another "real world" example of the potential risk of prosecutorial overreaching can be found in the comments of the Spanish magistrate Baltasar Garzon. Shortly after the September 11 attacks on the United States, Garzon, who was involved in the Pinochet extradition matter, declared that "there will come a time when justice is demanded of those responsible for . . . the loss of an historic opportunity to make the world more just," and continued with the warning that "the justice that I am talking about is that which should be brought to bear not only on the Taliban for its brutal and oppressive regime but also on the leaders of the western countries, who, irresponsibly and through the media, have generated panic among the Afghan people." See Baltasar Garzon, The West Shares the Blame, Financial Times, October 3, 2001.

And one only needs to observe the rash of criticism directed against the United States for its treatment of the "detainees" at Guantanamo Bay to realize the scope of the threat that the ICC poses. Notwithstanding the irony that the ICC will not have jurisdiction over the events of September 11, it might have jurisdiction over measures taken in response to September 11 that occur after the Rome Statute goes into effect. If the United States is still detaining these persons after the Rome Statute comes into effect, the Prosecutor could investigate whether the conditions of detention violated the Geneva

Convention Relative to the Treatment of Prisoners of War, and the ICC could assert jurisdiction to try anyone involved for their "crimes" — from the President down to the camp guards (assuming, for purposes of this example, that although Cuba will not ratify the Rome Statute, it would consent to the ICC's jurisdiction in the event that the Prosecutor sought to bring this charge).

Indeed, the very existence of the ICC will surely constrain our otherwise appropriate activities and policy decisions. The obvious way in which this is likely to occur is that the Prosecutor, through use of the investigative powers under the Statute, will seek sensitive or confidential information in order to build a case. Another less obvious way in which this may occur is that the threat of ICC prosecution, whether actual or implied, will be considered by our decision makers.

America has a healthy respect for the rule of law, so when considering military action or foreign policy involving the use of force, our decision makers will ask not only the question "is this action legal?" but also the question "how will this action be perceived by the ICC and the Prosecutor?" Our servicemen will rightly seek assurances that their actions will not be second-guessed by the ICC. But because of the Rome Statute's design, that assurance is impossible to give. Thus, military action would likely be increasingly restrained. The United States is a law-abiding nation, and it is likely that our decision-makers will be tempted to "stay away from the cliff," so to speak — to take a more cautious approach so as not to risk running afoul of an aggressive interpretation of the definition of war crimes or crimes against humanity, or the other provisions of the Rome Statute that are left to the discretion of the ICC.

III. Constitutional Issues

In at least one context, ratification of the Rome Statute by the United States will raise a serious question under the United States Constitution. Even in the absence of ratification by the United States, the Rome Statute presents a real threat to any national of the United States accused of crimes that would fall within the jurisdiction of the ICC who happens to be found outside the United States. But ratification by the United States would give the ICC jurisdictional authority to investigate, prosecute and punish Americans for alleged offenses taking place entirely within the United States and obligate the United States to surrender any such American to the ICC. Not only is this an extension of the current extradition practice among States, it would appear to raise a serious question under the U.S. Constitution — whether the United States can subject to the authority of any court not properly organized in accordance with its provisions a person accused of a crime taking place wholly within the United States.

The U.S. Constitution prohibits the vesting of such authority in any court not properly organized in accordance with its provisions — this was essentially the rule articulated by the U.S. Supreme Court in the landmark Civil War case *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, a civilian resident of Indiana, who was evidently a Confederate sympathizer, was tried by a military court. The Supreme Court ordered his release, ruling that "[e]very trial involves the exercise of judicial power," and that the military court established to try Milligan could exercise "no part of the judicial power of the country." *Id.* at 121. The judicial power of the United States, the Supreme Court explained, is expressly vested, under Article III of the Constitution, "'in one supreme

court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress." *Id.* The Court rejected the proposition that a civilian, like Milligan, could be tried by a military court not established under Article III, when the civilian courts remained open and available — even under the laws of war. Milligan's condemnation by a non-Article III court was unconstitutional, as the court in which he was convicted had not been established under the Constitution's authority and did not preserve the right to trial by jury or the other applicable guarantees of the Bill of Rights.

The ICC would neither be established pursuant to Article III of the Constitution nor bound by the requirements of the Bill of Rights. It is true, as defenders of the ICC argue, that the Rome Statute guarantees certain due-process rights, including: the presumption of innocence (Art. 66); the assistance of counsel (Art. 67); the right to remain silent (Art. 67); the privilege against self-incrimination (Art. 67); the right to a written statement of charges (Art. 61); the right to examine adverse witnesses (Art. 67); the right to have compulsory process to obtain witnesses (Art. 67); the prohibition of ex post facto crimes (Art. 22); protection against double jeopardy (Art. 20); freedom from warrantless arrest and search (Arts. 57, 58); the right to be present at the trial (Art. 63); the right to speedy and public trials (Art. 67); the exclusion of illegally obtained evidence (Art. 69); and the prohibition of trials in absentia (Arts. 63, 67). The overall process provided by the Rome Statute is in accord with international standards of fairness, but it is not nearly of the same character or vigor as the fundamental procedural protections provided by the U.S. Constitution.

For example, with regard to the right to confrontation, as is common in certain other international tribunals, evidence that would be permitted in ICC proceedings includes anonymous witnesses and extensive hearsay evidence — forms of testimony that would never be allowed in American courts. With regard to the right to a speedy trial, while the Rome Statute calls for trial "without undue delay," under current international standards, criminal defendants may be held for exceptionally long periods of time before a delay is considered undue. Experience with the ICTY proves that defendants may be held for years (often without precise charges issued against them) before a trial is convened. As for the right to an attorney, the Rome Statute requires a showing of financial need (as would be required in the U.S.) but also requires proof that appointment of counsel would be required by the interests of justice.

Other basic criminal procedural protections would be lost entirely. Perhaps most important is the right to trial by jury and the right to be tried in the place of the crime. In light of the colonial experience, the Framers of the U.S. Constitution sought to eliminate forever the danger that Americans might be surrendered to a foreign power for trial by specifically requiring in Article III and again in the Sixth Amendment that criminal trials be by jury and that they take place in the state and district where the crime was committed. These are the only rights guaranteed by the Constitution to be stated once in the original document and again in the Bill of Rights. As Justice Joseph Story explained in his Commentaries on the Constitution of the United States, these provisions were designed "to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus subjected to the

verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him." Under the Rome Statute, however, there is the possibility that Americans once again might face the prospect of being judged beyond the seas for actions committed entirely within the United States. Also, persons brought before the ICC will be judged by a panel of international judges in the civil law "inquisitorial" model. These judges need not even be unanimous in their verdict.

The Supreme Court's later ruling in *Ex parte Quirin*, 317 U.S. 1 (1942), is not contrary to the *Milligan* holding. In *Quirin*, the Court permitted the trial by "military commission" of eight Nazi saboteurs, even though that commission was not established pursuant to Article III and did not preserve all of the Bill of Rights' guarantees. (It is the Court's ruling in *Quirin* that supports President Bush's Military Order of November 13, 2001, 66 Fed. Reg. 57,833, permitting the trial of Osama bin Laden and other Al-Qaeda members by military commission.) In *Quirin*, the Court carefully distinguished *Milligan*, explaining that, unlike the Nazi defendants before it, who all qualified as "unlawful belligerents" subject to summary military justice, Milligan had never been associated with the military, and "was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents." 317 U.S. at 45. Indeed, so far from overruling, or otherwise restricting, *Ex parte Milligan*'s application, the Supreme Court again cited it as good authority four years after *Quirin* was decided, in *Duncan v. Kahanamoku*, 327 U.S. 304, 322, 324 (1946). In that case, the Court reversed the convictions of two civilians in Hawaii who had illegally been convicted by a military tribunal.

It is important to note that the status of the Rome Statute as a "treaty" does not affect the constitutional analysis. As the Supreme Court wrote more than a century ago: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments . . . . It would not be contended that it extends so far as to authorize what the Constitution forbids." *DeGeofroy v. Riggs*, 133 U.S. 258, 267 (1890). The fact that "international law" offenses are involved makes no difference. As the Supreme Court has noted specifically with respect to the laws of war: "[w]e do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution." *In re Yamashita*, 327 U.S. 1, 16 (1946) (emphasis added).

Nor does the Court's ruling in *Missouri v. Holland*, 252 U.S. 416 (1920), necessarily contradict the basic principle of *Milligan*. In that case, the Supreme Court upheld a treaty between the United States and Great Britain that regulated the treatment of migratory birds flying between Canada and the United States. It was claimed that the treaty infringed the sovereign rights of the several states under the Tenth Amendment. The Court rejected this argument, reasoning that although the power to make such a treaty was not specifically provided for among Congress' enumerated powers in Article I of the Constitution, it could be inferred. The Court noted, however, that there were some things the Federal Government could not do in a treaty, because such action might violate some other provision of the Constitution: "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.*

at 433-34. The guarantees provided to criminal defendants in the Bill of Rights are far more precise, and in mandatory language, a point made clear in Mr. Justice Black's plurality decision in *Reid v. Covert*, 354 U.S. 1 (1957). In that case, the Court ruled that an American civilian could not be subjected to trial in a military court overseas, even though an international agreement between Britain and the United States appeared to allow such a trial. Justice Black wrote that "we reject the idea that when the United States acts against its citizens overseas, it can do so free of the Bill of Rights." *Id.* at 5-6.

IV. What Should the United States Do About the ICC?

In light of the very significant concerns raised by the Rome Statute, and recognizing that only eight more ratifications are needed before the Rome Statute goes into force, what course of action should the United States follow to protect its citizens and government from what is a flawed treaty not in the best interests of the United States?

The paramount threat of the Rome Statute regime that the United States must protect against is the possibility that any acquittal by a United States court of a person accused of crime subject to the ICC's jurisdiction or a decision by the United States not to prosecute such a person will be second-guessed by the Prosecutor of the ICC. A lesser risk is that a United States national accused of a crime within the ICC's jurisdiction, but as to which the United States has not yet made a decision to prosecute, will be found in a State Party and surrendered to the ICC against the wishes of the United States. There also is a serious question as to whether the United States should ratify a

treaty when the obligations thereunder could — no matter how theoretically — conflict with the United States Constitution.

In a case where the accused had been acquitted by a United States court or the United States had declined to prosecute, if the accused was in the United States at the time that the ICC issued a request to transfer such person to its custody, it seems unlikely that the United States would comply. While its failure would constitute a breach of the Rome Statute if the United States were a State Party, the consequences would appear relatively mild compared to those resulting from a head-on challenge by the ICC of an acquittal of a person by a trial conducted by the United States or a decision by the United States not to prosecute. But the only way the United States can protect itself from the threats that the ICC presents in every instance would be to obtain a suspension of the jurisdiction of the ICC insofar as it applies to the United States.

Obviously, asking parties to and signers of the Rome Statute to agree to that suspension would be doomed to failure. On the other hand, it may be possible to obtain the same result by getting the United Nations Security Council to adopt a resolution suspending the ICC's jurisdiction under specified circumstances. Although the efforts of the United States, during the Rome Statute negotiations, to require Security Council authorization for each and every ICC prosecution failed, Article 16 of the Statute nevertheless allows the Security Council, acting under Article VII of the U.N. Charter, to suspend an investigation or prosecution for a period of twelve months, on a renewable basis. Expanding on this principle, the United States could seek a Security Council resolution providing that no ICC prosecution may be brought against nationals of a

Member State participating in measures taken by a Member pursuant to its exercise of its right of self-defense under Article 51 of the U.N. Charter.

Action by the Security Council, even if broader than that specified in Article 16, would be binding on all members of the United Nations and would be an effective limitation on the ICC's jurisdiction. That is because Article 25 of the Charter provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council and Article 103 of the Charter further provides that, in the event of a conflict between the obligations of Members under the Charter and under any other international agreement, such as the Rome Statute, obligations under the Charter shall prevail.

To be sure, there are difficulties with this approach. In order to be binding on Members, the resolution adopted by the Security Council must be a decision made under Chapter VII, and therefore must be adopted in connection with a determination by the Security Council of the existence of a "threat to the peace, breach of the peace, or act of aggression." A resolution adopted before such a determination had been made, however, still should be binding under Article 25 so long as it stipulated that any such determination shall be deemed to include a suspension of jurisdiction in respect of any national participating in measures taken by a Member acting in self-defense in response to any such threat, breach or act. Even if not, a resolution suspending the jurisdiction of the ICC surely could be adopted at the time the Security Council authorized (or required) any action under Chapter VII. If such a suspension resolution were not adopted, the United States could refuse to participate in the action or, alternatively, could veto a

resolution requiring Members to participate in the action. (In the context of the events of September 11, the Security Council already has acted under Chapter VII, explicitly recognizing the right of self-defense under Article 51. Thus, a resolution suspending the jurisdiction of the ICC in respect of nationals participating in measures taken by a Member acting in self-defense under Article 51 would be effective to protect U.S. nationals participating in the current response to terrorism from the reach of the ICC.)

It also is true that Security Council action requires the affirmative action of nine of its fifteen members, and any one of its five permanent members — Russia, China, the United Kingdom and France, in addition to the United States — may veto any proposed action. It is quite possible that Russia and China would affirmatively support any resolution limiting the ICC's jurisdiction. To be sure, the U.K. and France already have ratified the Rome Statute, and perhaps it seems logical to assume that one or the other would veto any resolution that limited the ICC's powers or reach. But each has been very reluctant to exercise its veto right generally, so it is hardly a foregone conclusion that one would exercise its veto right in the case of the resolution described above. In the event that China and Russia voted in favor of such a resolution, and the U.K. and France did not exercise their vetoes, the United States would have to convince only six of the remaining ten Security Council members to support such a resolution.

Other courses of action that the United States might pursue in order to attempt to reduce its exposure to the risks posed by the ICC include the following:

- Work to prevent the requisite 60 ratifications of the Rome Statute by persuading States yet to ratify the Statute to forgo ratification and States that already have ratified the Statute to revoke their ratifications. In order

to so persuade these States, the United States would inform other countries that it considers ratification of the Rome Statute an unfriendly act directed at the United States and would make clear that ratification thus will adversely affect bilateral relations between the United States and any State joining the Rome Statute regime.

- Halt military assistance and/or reassess troop deployment to countries that fail to agree not to turn U.S. servicemen over to the ICC in respect of alleged crimes committed on their territory.

- Renegotiate the several agreements the United States maintains with other States governing the treatment and extradition of Americans. One such class of agreements are Status of Forces Agreements (SOFAs) between the United States and host countries governing the rights and responsibilities of U.S. military personnel stationed overseas. Generally, these agreements provide that U.S. service personnel accused of criminal conduct in carrying out an official duty in the host country will, at least in the first instance, be turned over to U.S. military judicial processes for investigation and prosecution. New provisions might be drafted and made part of these agreements specifically forbidding the host state from surrendering U.S. nationals to the ICC. A second class of agreements or understandings that might be modified in this regard are those governing multilateral peacekeeping operations. The United States could condition participation of American servicemen in such operations upon the agreement of the other participating parties not to surrender Americans if accused of criminal actions to the ICC but rather to submit such Americans to the custody of the United States.

- Renegotiate extradition treaties, adding provisions to make clear that individuals extradited from the United States cannot, under any circumstances, then be transferred by the requesting State to the ICC for prosecution.

- Legislative action. The proposed American Service Members Protections Act would, among other things, forbid any agency of the U.S. Government to cooperate with the ICC so long as the United States had not ratified the Statute. It also would prevent military assistance to any foreign country that ratified the Statute, with the exception of NATO countries and other important allies.

Unfortunately, all of these options present difficulties and none is likely to offer a complete solution. Attempting to prevent 60 countries from ratifying the Rome Statute would involve the expenditure of enormous diplomatic capital, with little real

chance of success this late in the day. Threatening to withhold military or other assistance might well be persuasive to some countries, but there probably are at least 60 countries that are not so dependent on U.S. assistance that they would respond to such pressure. And although efforts to renegotiate some SOFA agreements and extradition treaties likely would be more successful (at some diplomatic cost), such renegotiation would not necessarily protect American nationals in every case. For instance, Article 90(6) of the Rome Statute requires a State Party under an obligation to extradite a person to a non-party State to "consider all the relevant factors" before deciding whether to comply with that obligation or to surrender that person to the ICC. Under customary rules of treaty interpretation, the later of the two agreements should prevail. But the wording of the Rome Statute implies that a State Party is not required to follow any subsequently ratified extradition treaty. Moreover, preventing a State Party in which the alleged crime occurred from surrendering U.S. nationals to the ICC would not deprive the ICC of jurisdiction over the alleged crime under the Rome Statute. Thus, any U.S. national sought by the ICC and found in a State Party with whom the United States had not negotiated a revised extradition treaty would still be subject to being surrendered to the Court.

The above responses, to be sure, each have their practical difficulties and are therefore less than ideal solutions. But some proponents of the ICC have argued that the United States may not even attempt to solve the problems that the ICC poses in the ways suggested above. They argue that by signing the Statute, the United States became subject to the mandate of Article 18 of the Vienna Convention on the Law of Treaties,

which provides that signatories to a treaty, before ratification, should not undertake any actions that would defeat such treaty's objectives and purposes.

While we may be skeptical that the above courses of action will be completely effective in solving the problems that the ICC creates for the United States, we have no doubt that the United States may pursue those courses if it so decides. The United States has not ratified the Vienna Convention on the Law of Treaties and there is disagreement in the international community regarding the extent to which the Vienna Convention reflects customary international law. Even putting this disagreement aside, the argument that the United States is so restricted by the Vienna Convention is particularly stretched in the case of the Rome Statute, because President Clinton's statement accompanying his "final days" authorization of signature expressed concerns about the Statute's "significant flaws" and made it clear that he had no intention to submit the Statute to the U.S. Senate for advice and consent and would not even think of doing so until "fundamental concerns" were satisfied. As the Rome Statute explicitly forbids accession accompanied by reservations, it is unclear how President Clinton expected to satisfy his "fundamental concerns" short of re-opening negotiations on issues as to which his Administration had been unsuccessful previously. In any event, the statement is inconsistent with the good faith obligation that Article 18 of the Vienna Convention indicates is inherent in a treaty signature.

V. Should the United States "De-Sign" the Rome Statute?

To avoid any legal or appearance problems with respect to any obligations that arguably the United States has accepted as a result of signing the Rome Statute, the United States could take an affirmative step of indicating its intent not to proceed with ratification by promptly "de-signing" the Rome Statute. There is not much in the way of precedent regarding de-signing treaties. However, just because an action may not have been considered or performed before does not mean that action is illegitimate. On the contrary, de-signing of the Statute by the United States is well within the President's inherent executive powers and perfectly legitimate under constitutional and international law.

As discussed above, Article 18 of the Vienna Convention on the Law of Treaties provides that a State that has signed a treaty subject to domestic ratification should refrain from acts that would defeat the purpose and objective of that treaty. Such obligation, however, continues only until such time that the State shall have made clear its intention not to become a party to the treaty. In this regard, even accepting Article 18 as customary international law, the Article is essentially a good faith requirement for a signing State that cannot fully commit to the treaty by signature alone due to its domestic law.

Of course, President Clinton's authorizing statement specifically stated that the United States had no intention to ratify the Rome Statute as it existed at the time of signing (and remains today). It is difficult to ascribe much meaning to a signature that was accompanied by a statement inconsistent with the very good faith obligation that the

Vienna Convention indicates is inherent in a treaty signature. In any event, there is no indication in the Vienna Convention or in the Rome Statute that Article 18 is meant to restrict conduct in the event that the signing State either becomes unwilling to seek or unable to obtain the necessary domestic law approvals for ratification. Indeed, such a position would be absurd, as it would effectively prevent States that have signed a treaty from withdrawing their consent, in contrast to a core principle of international law that sovereign States are free both to give their consent and withdraw such consent. And there is nothing in the Vienna Convention or the Rome Statute to require any particular method of clearly expressing an intention by a sovereign State not to become a party to a treaty. De-signing of the Rome Statute would be a permissible, but surely not the only, way to signify such an intention.

Some observers have argued that even if de-signing were a permissible way to express an intention not to become a party to the Rome Statute under international law, it is not permissible under the U.S. Constitution. Rather, the argument goes, because Article II of the U.S. Constitution requires approval of two-thirds of the Senate for the President to make a treaty, once a treaty is signed by the President, only after rejection of the treaty by the Senate in its advice and consent role may the United States make clear its intention not to become a party to the treaty. This position is untenable as a matter of constitutional law. The President's constitutional power in foreign affairs clearly includes the power to terminate treaties. See Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale Law Journal 231 (2001). It has been effectively upheld by the U.S. Supreme Court in *Goldwater v. Carter,* 444

U.S. 996 (1979). It is also worth noting that the Senate does not ratify treaties by giving its advice and consent. Even after the Senate gives its advice and consent to a particular treaty, the final ratification decision rests with the President.

The lesser power of deciding to reverse an intention to enter into a treaty also fits comfortably within the ambit of executive power. There is no textual support or case law in favor of the argument that the President lacks the power to de-sign a treaty. The Constitution does not give, and no court has recognized, a role for the Senate in unmaking treaties or deciding not to make a treaty in the first instance. The President is charged by the Constitution with the general management of the nation's foreign affairs, as that power was understood by the Framers to be part of the executive power. The decision to de-sign the Rome Statute would merely be one such managerial decision.

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