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THE COURT WE WANT

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I recently served on the U.S. delegation to the Rome conference that adopted a treaty to establish an International Criminal Court for war crimes, crimes against humanity and genocide. I returned to academia with a terrible concern about the court's prospects. There is a real possibility that the United States may become actively hostile to the treaty.

The United States clearly has the power to undermine this nascent institution. But it would be unfortunate if we did so, because this country has a clear long-range national interest in deterring atrocities and bringing offenders to justice.

The United States deserves more credit than it has been given. Without this country, the Yugoslav and Rwanda tribunals would not have been established or would have failed for lack of political or material support. Were it not for our action in Rome, the definition of "crimes against humanity" would have been emasculated and possibly made applicable only to war situations. The applicability of war crimes to internal conflicts would have been drastically narrowed.

The U.S. imprint is, in fact, all over the statute: in ensuring due process in trials, in the priority given to national courts, in the checks and balances on the powers of the prosecutor. These are some of the remarkable achievements of the U.S. delegation to Rome, ably led by Ambassador David Scheffer.

Enormous progress was made in advancing the goal of protecting U.S. personnel from politically motivated international prosecutions – to the point that such prosecutions of U.S. military personnel would be quite improbable.

Unfortunately, the proposed treaty, though a valuable advance in international law's definitions of crimes, suffers both from timidity and from being too broad.

By providing that the court is to have jurisdiction only when it is accepted by the state where the crimes have been committed or by the nation state of the accused, the treaty effectively lets off future Saddam Husseins or Pol Pots, who kill their own people on their own territory. This provision makes the court largely ineffective in dealing with rogue regimes, except when the Security Council exercises its Chapter VII authority to extend jurisdiction to them. And there are possibilities for mischief. For example, a state where alleged atrocities are committed could accept jurisdiction to complain against another state that resorted, even with Security Council authorization, to a humanitarian intervention to save lives.

On the other hand, the statute overreaches in extending the court's sway over states that choose not to ratify the statute. In fact, the proposed treaty imposes more obligations on non-parties than on party states. The latter may opt out of the provisions dealing with war crimes and crimes to be added to the court's jurisdiction in the future; the former may not.

These results were not inevitable. Early on, it became clear that the conference would not accept proposals that a government's consent be required before its nationals could be prosecuted. In the last few days of the conference, the United States submitted a narrowly crafted amendment limiting the requirement of consent by a national state that has not ratified the treaty only to cases involving "acts of officials or agents of a state in the course of official duties acknowledged by the state as such."

The argument was that if the troops of the United States or another law-abiding state not party to the statute engaged in atrocities, their governments would be loath to acknowledge such atrocities as state policy, and thus assume supreme responsibility. Experience shows that governments deny or virtually never acknowledge such acts. Hence, the court could have jurisdiction in such cases over nationals of a non-state party, unless the government concerned has launched serious investigations or prosecutions of the violations. At the same time, the United States would obtain an important added guarantee.

Unfortunately, in the rush toward the conference's grand finale, and against a backdrop of antagonism toward the United States, this amendment failed. Its rejection was a mistake. But now that the dust of battle has settled, it is time for more sober reflection. The ball is in the court of the treaty supporters.

The respected chairman of the Rome conference, Philippe Kirsch of Canada, could still try to save the court by seeking a consensus to incorporate the U.S. proposal. This is a small price to pay to prevent, at the very least, American opposition. In fact, it would build confidence and could be a significant step toward ultimate U.S. support of the treaty.

At the same time, it would be appropriate for the United States to help secure this change and consider reasonable changes designed to obtain jurisdiction over tyrants massacring their own people on their territory, the number one humanitarian issue of our times – rather than work to scuttle the treaty. This would be the best answer to those who support the misleading impression that our government is an opponent of international justice.

A process of this kind, particularly if it is pressed by President Clinton himself, might yet achieve the effective court we all want, one endowed with power that only the United States could provide.

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