

This material is protected by copyright. All rights reserved. Please contact the publisher for permission to copy, distribute or reprint. *The Future of International Legal Regimes*, (co-authored with Abram Chayes), in *National Security and International Law: The United States and the International Criminal Court*, Lanham, MD: Rowman & Littlefield Publishers, Inc. (2000). Appears by permission of author and publisher.

<http://www.rowmanlittlefield.com>

The ICC and the Future of the Global Legal System

Abram Chayes and Anne-Marie Slaughter

If an appraisal of U.S. national interest begins with the military dimension, it cannot end there. The United States has traditionally maintained the importance for its own national security of an international system governed by the rule of law. Skeptics have often dismissed this invocation of an international rule of law as the utopian rhetoric of a few internationalists. In the post-Cold War world, however, it is hardheaded realism. An increasingly interdependent world is bound together by law. Much of what the United States can and must do to enhance its own prosperity and well-being depends on reliably functioning legal frameworks.

The processes involved in the globalization of the economy—international funds transfers, trade in goods and services, investment, worldwide air transport, telecommunications, and much more—all operate within well-defined regimes of law. Much has been made of the importance for globalization of deregulation and free markets. But it is elementary that a necessary condition for the operation of markets is the rule of law, not only to enforce contracts but also to establish norms defining what practices are permissible and what transactions are appropriate. Without this legal infrastructure, economic globalization would not work.

The requirement of the rule of law is not limited to the global economy. Efforts to deal with major environmental problems—climate change, the protection of the ozone layer, maintenance of fish stocks, management of waste—all operate within a legal framework that defines the rights and the obligations of public and private actors. Closer to traditional national security areas, the attempts to control drug traffic, to defend against terrorism, and to prevent the spread of nuclear, chemical, and biological weapons proceed against a highly developed international legal backdrop defining prohibited activities and establishing modalities for cooperation.

Of particular importance in recent years has been the strengthening of human

rights and the humanitarian laws of war. This responds to the most fundamental demand of a legal system: that it should protect the physical security of those who live under it. The development of human rights norms in the second half of the twentieth century bespeaks a growing sense that individuals live under the international legal system and must necessarily have rights and obligations flowing from it. It is true that these relatively recent international norms are not infrequently violated. The response to violation, as in the domestic field, should be to improve the legal system rather than to resort to vigilantism and self-help. The movement for the International Criminal Court (ICC) is just such an effort.

These various bodies of law do not emanate from a single legislative institution. Some of the rules are comprised in formal treaties among states. More are to be found in agreements and understandings among administrative bodies and even private or quasi-private actors. But all of these regimes are interlinked in many ways. Most fundamentally, they all depend on an underlying respect for law and the legal order.

It is difficult to say with assurance how this respect is generated and maintained. But one essential factor must be the element of reciprocity embodied in the idea of equality under the law. Exemption of any nation—especially the richest and most powerful—from important legal requirements strikes at this foundation notion of equal treatment under law. In the case of the ICC, this claim of U.S. exceptionalism manifests itself both in the decision not to sign the Rome Statute and in the underlying reason for that refusal, namely that American citizens might in some circumstances, however unlikely, be subject to prosecution without U.S. consent.

A realistic evaluation of the U.S. position on the ICC must count this erosion of the international rule of law as a heavy cost.

THE PRICE OF OPTING OUT

The impact of the U.S. failure to support to the ICC Statute is only partly symbolic—a high-profile rejection of a major initiative for the rule of law in international affairs. The treaty reflects and embodies many of the larger current trends in the evolution of international legal institutions. These trends did not begin with the negotiations for the ICC, and they will persist whatever the future of the Court may be. But the detailed course these trends take will be shaped in significant part by the evolving experience with the Court.

Thus there are more specific costs to the United States in standing aside from this process of evolution. The United States has worked hard to formulate and to implement a strategy for the twenty-first century that includes a vision of global governance, international institutions, a proper balance between national and global interests, and mechanisms for delegating the many dimensions of government

to different levels of responsibility appropriate to the tasks. Participation in the ICC would mean that the United States would have a major role in shaping the evolution of the Court in ways that further this vision of the future of the international legal system. Conversely, staying out of the ICC and clinging to the architecture of the past may mean that a critical aspect of the development of the international legal system—with which we will have to live in any case—takes place without U.S. input. If the ICC goes forward in the face of U.S. opposition and proves to be an institution that continues to command the support of a majority of the world's nations, including many of the most powerful, then prospects for realization of a coherent U.S. vision will be correspondingly blunted. The U.S. decision to oppose the Statute will thus undercut its larger effort to effectuate its distinctive vision of international governance for the twenty-first century.

This chapter briefly reviews some of the most important of the more specific issues that are at stake.

INDIVIDUALS AT THE BAR OF INTERNATIONAL LAW

Traditional international law was an affair of states. It was said to govern relations among states and to prescribe rights and duties binding on them. In the International Court of Justice (ICJ), only states can appear as litigants in a case. Contemporary international law, however, increasingly recognizes and makes room for the coexistence of individual and state actors within the same international regime. For two decades now, U.S. courts have been deciding cases involving violations of human rights brought against foreign officials by their victims.¹ This trend is highlighted in the ICC treaty itself, which builds on the human rights insistence of holding governments accountable for their treatment of individuals by seeking to hold individuals accountable for the actions of governments.

More generally, the debate about the future of international law and, indeed, world politics often frames a false dichotomy between traditional statist and new medievalists, all arguing over whether the state is here to stay or rather is doomed to wither away. Many commentators, observing the rise of a host of nonstate actors—a category that includes regional and local governments, nongovernmental organizations (NGOs), individuals, and international and supranational institutions—conclude that the state is being displaced.² Traditionalists point to the present international scene as evidence that the state is alive and well and that, if anything, state power is needed more than ever to anchor and to check this diverse array.³

The ICC treaty, by contrast, envisions a regime in which state and the individual participate side by side. Defendants before the Court would be natural persons. But when a case is brought, it is assumed that both the defendant and his or her state will respond.⁴ The state can of course choose to disavow the indi-

vidual; conversely the individual could presumably choose to leave the conduct of the case entirely to his or her government. But the presumption is that both will want to be heard, and the Statute provides both with an opportunity to do so.

This emerging phenomenon also characterizes other "mixed regimes" like the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), in which both individuals and state officials participate—either directly or indirectly—in dispute resolution proceedings.⁵ In those institutions, individuals play a role analogous to their function as "private attorneys general" in the United States, helping ensure that those with the greatest interests in seeing the law implemented are at least partially responsible for its enforcement. The same principle operates in the right of individual petitions in human rights regimes such as the European Convention on Human Rights and the Inter-American Convention on Human Rights. In the ICC, the same principle of mixed representation applies. States represent the accused individuals while simultaneously allowing them to represent themselves. This is very different from the traditional image of international diplomacy, but it is one that is quite consistent with the multiple roles played by both governments and individuals in liberal democracies.

A Shrinking Conception of Domestic Jurisdiction

If international law establishes rights and duties of individuals, it implies a radical reconstruction of the concept of domestic jurisdiction. The international architecture of 1945 preserved an insulated and carefully protected sphere of domestic affairs. Article 2 (7) of the U.N. Charter provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."⁶

Although the provision reads only against the United Nations (and even then had an exception for enforcement measures adopted by the Security Council under Chapter VII), it has been read more generally to instate the general prohibition of the Westphalian system against interference by one state in the internal affairs of another. And as the U.S. Senate promptly proclaimed in the 1945 Connally reservation to the U.S. submission to the jurisdiction of the World Court, governments could and did reserve to themselves the decision as to what matters fell within the scope of domestic affairs.⁷

But only three years after the adoption of the Charter, the Universal Declaration of Human Rights foreshadowed a contrary movement that has burgeoned in recent years. The existence of exclusive domestic jurisdiction is now increasingly conditional on conformity with international rules and principles, especially human rights norms. As evidenced by the intervention in Kosovo, the international

community is no longer prepared to stand aside while a government commits gross violations of fundamental human rights under the rubric of internal affairs.

The contingent nature of domestic sovereignty is not confined to the field of human rights. It follows from the increasingly coextensive scope of domestic and international regulation. In the areas of economic integration, trade, environmental affairs, and internal conflict, international and domestic law now often regulate the same conduct. Laws drafted and implemented at both levels organize and constrain the behavior not only of states but also of the individuals and groups within them. National jurisdiction may be primary, but it is no longer exclusive.

The ICC Statute can be seen as a natural product of this development. Within the ICC framework, if the national law enforcement system actively and effectively prosecutes crimes within ICC jurisdiction, the ICC (and by extension the international community) will not interfere.⁸ But should the national legal system fail, the international system will take over.

The Role of Nongovernmental Organizations

Without the NGO community, the ICC treaty might not have been concluded. Organizations devoted to human rights, women's rights, humanitarian assistance, social justice, and the eradication or at least the diminution of the myriad forms of oppression, all organized, lobbied, drafted, and negotiated to push governments in their desired direction.⁹ Moreover, it is already apparent that NGOs will have a major part in providing impetus for the ratification of the Statute in many states and in Statute implementation. Indeed, Article 15 specifically provides that the Prosecutor may seek information from NGOs in evaluating the seriousness of information he or she has received concerning possible crimes within the jurisdiction of the Court.

This phenomenon of major NGO input in treaty drafting and negotiation surfaced earlier in the context of the Land Mine Convention and numerous environmental treaties like the Framework Convention on Climate Change.¹⁰ As a result, NGOs increasingly are recognized as independent participants in the process of international lawmaking.¹¹ This development too gained new ground in the ICC negotiating process. NGOs have not displaced states, but states can no longer reckon without them.

The United States has long encouraged this development. NGOs are vibrant participants in U.S. civil society. Under a different guise as Alexis de Tocqueville's "voluntary associations," they have been the backbone of American democracy.¹² Private groups, from the American Civil Liberties Union (ACLU) to the American Manufacturers Association are a familiar part of domestic politics and lawmaking at all levels. In the past four decades, NGOs here and abroad have been

regarded as a force for global democracy. In many cases, indigenous NGOs appear as more legitimate representatives of their countries than the governments they expose and denounce and that seek to repress and stifle them.

Domestic NGOs working within the liberal democratic society of the United States play a well-established part in the political system. In the United States, it is automatically assumed that they have a similar role to play in developing U.S. foreign policy, as gadflies and representatives of voices otherwise unheard in the decision-making process. Thus, although U.S. opposition to the ICC is easily framed as "the United States versus the world," the division is just as sharp between U.S. government officials and the leaders of the myriad U.S.-based NGOs who fought so hard for the Treaty.

It is usual to think of NGOs as the fiber of both domestic and transnational civil society. Yet the new role of NGOs has its own problems. Their operation in the domestic context raises questions of accountability and democratic representation. These questions are intensified in the field of international affairs.¹³ Indeed, since the strongest and the richest NGOs are organized in the United States and other industrialized countries, their activities in the foreign policy field are often regarded by others as simply another manifestation of the West's power. Figuring out a new framework to encompass state and nonstate actors as both principals and agents in the international legal system is an important task for the twenty-first century.

A NEW JUDICIAL PARTNERSHIP

The ICC also reflects a growing interrelationship between national and international courts. The central concept is *complementarity*, under which the ICC will have jurisdiction over a case only if the Judges determine that national legal authorities are "unable or unwilling" to prosecute the case themselves. This concept provides a framework for a new relationship and perhaps even for a partnership between national and supranational judges. Although the most obvious implication of this arrangement is that supranational judges must evaluate the quality and the sincerity of their national counterparts, the relationship need not be and is unlikely to be primarily confrontational. Instead of the supranational tribunal seeking to encroach on national jurisdiction by carving out specific issues or doctrinal areas for its own, this arrangement instead assumes that national courts have primary jurisdiction and indeed presumes that national courts will be fully up to the task of doing justice. It is only in exceptional circumstances where this assumption does not hold that jurisdiction will devolve to the supranational level.

At the same time, national courts will increasingly be inclined to look to the ICC for guidance in the developing area of war crimes law. The ICC will not be

hierarchically superior to national tribunals, and its decisions will not be binding on them. But ICC judgments are likely to carry great persuasive authority.

This authority will be enhanced by the mandated composition of the ICC, which includes more specialists in criminal law than in international law.¹⁴ In this respect the ICC illustrates that international law is no longer the exclusive province of internationalists. Five Judges must be distinguished international law specialists, but nine must be criminal law specialists. In the International Criminal Tribunal for the Former Yugoslavia (ICTY), where a similar selection procedure is used, each group learned from the other after an initial period of adjustment, just as judges from civil and common law systems on the European Court of Justice (ECJ) have educated one another.¹⁵

By ensuring that the members of the ICC are not drawn from an elite, specialized, and often insulated group of international law professors and practitioners, the treaty ensures a broader base of legitimacy for the Court. National judges and prosecutors will see their former colleagues on the Court and assess the Court's judgments accordingly. Above all, as international law becomes simply "law," interpreted and applied by both supranational and national judges and shaped by their respective training and expertise, it becomes much less remarkable and much more effective.

The most developed judicial partnership between national and supranational tribunals at present is that between the ECJ and the national courts of European Union member states. The ECJ, in effect, "recruited" national courts, first to refer cases and then to abide by and carry out the resulting decisions. The judges on the ECJ crafted their judgments to appeal both to individual litigants and to national courts; the court itself also held seminars and other training sessions for national judges.¹⁶ In so doing, the ECJ created an independent base for the construction of a European Community legal system. At the same time, it gave national courts a role in enforcing and developing a body of supranational rules that they had never before known.

The parameters of this partnership are still developing. The German Constitutional Court, for instance, recently served notice that there are limits to its willingness to be a junior rather than a senior partner. In a case brought by a group of German litigants challenging the constitutionality of the Maastricht Treaty establishing the European Monetary Union, the ECJ held that the treaty was constitutional, but only so long as the competences granted the European Union do not infringe the guarantees of democracy assured all German citizens through their Constitution.¹⁷ In the process, the Court proposed a "cooperative relationship" with the ECJ, whereby the German court would establish a threshold of constitutional guarantees and the ECJ would adjudicate the application of these and additional guarantees on a case-by-case basis.¹⁸ The ultimate outcome of this controversy and the exact place where the line between the supremacy of the two

systems will be drawn remain uncertain. Nevertheless, the combination not only of supranational and national law but also of supranational and national adjudication has been uniquely successful and effective and is firmly established.

The European Court of Human Rights has a much less structured relationship with the national courts of the member states within its jurisdiction. However, in effect it judges states' handiwork in the sense that an individual cannot appear before it without first seeking redress in national tribunals without success. In any case, the jurisprudence of the European Court of Human Rights is increasingly cited by European national courts, again as persuasive rather than coercive authority.¹⁹

Similarly, the decisions of other specialized supranational courts will become part of the sources of national law. National courts will naturally turn to the decisions of WTO dispute-resolution panels for guidance in applying General Agreement on Tariffs and Trade (GATT) principles or perhaps in construing their own national trade law. The Law of the Sea Tribunal may serve the same purpose in its field. Supranational courts can thus become catalysts for increased uniformity and coherence in areas of the law in which they have particular expertise or a valuable bird's-eye global perspective, while in other cases remaining as the court of last resort.

Seen in this perspective, the ICC does not appear as a novel or a frightening departure. It is only the latest example of partnerships between national and supranational judicial authorities, developing the applicable law by a familiar process of interaction among courts dealing with the same subject matter. Within this conception of supranational adjudication, no court or tribunal is likely to truly become a world court, but the courts of the world will interact in many different ways.

CONCLUSION

To return to the initial question, is support for the ICC in the U.S. national security interest? Weighing the costs and benefits of support for or opposition to the ICC requires a sense not only of its specific strengths and weaknesses as an institution, but also of its larger place in the evolution of international legal rules and institutions. This chapter has sought to situate the ICC in that larger context.

An important element of the U.S. conception of its national interest, from the outset, has been the development and maintenance of an international rule of law. The importance the Framers gave to international law is reflected in the Constitution itself. In the twentieth century, the United States was a leading force in the establishment of the Permanent Court of Arbitration at The Hague. Woodrow Wilson was the prime proponent of the League of Nations, even though he was ultimately unable to convince the Senate to approve U.S. participation. After World

War II, the United States was the chief architect of the United Nations, the International Monetary Fund (IMF), the World Bank, and associated international institutions. All of them bear many of the marks of the American political and legal experience. More recently, U.S. trade negotiators pushed steadily for the increasing legalization of the GATT and ultimately the creation of the World Trade Organization. Over the past fifty years, the United States has been a major participant in these institutions, exercising a predominant influence in their implementation and evolution.

The international institutions of the 1940s reflected the spirit of their time. They had an important normative content—most prominently the prohibition of the use of force against another state. But they also embodied a realism born of the experience of the interwar years, a recognition of the continuing importance of power. They thus gave the most powerful states that emerged from World War II the principal responsibility to address a discrete set of international security problems. They were state-centric and intergovernmental, primarily oriented to the relatively limited set of problems that the experience of the previous three decades had demonstrated could not be left to the unmediated interactions of national governments.

The international institutions of the 1990s reflect the new spirit and the new problems of these times. These new institutions are often unwieldy and unsatisfying. They challenge common preconceptions and do not fit the analytical categories carried over from the Cold War period. They are born of a complex process in which states, individuals, and NGOs all participate. They are supranational as well as intergovernmental. They are universal and legislative rather than voluntary and contractual. They blur the line between international and domestic law.

But although these new institutions embody in a general way the emerging tendencies in international law, the specific form they will take will only become clear with practice over time. Like the post-World War II legal structure, the ultimate shape of today's new institutions will depend on the continued participation of all those actors in the implementation of the rules that are adopted and the standards that are set. The balance between power and equal treatment remains to be struck. The respective roles of state and nonstate actors remain to be defined. Operating procedures that ensure both domestic participation and domestic support for the new institutions remain to be worked out. The solutions that are developed for these problems will affect not only the detailed contours of the ICC, but also the broader evolution of the global legal system of the twenty-first century.

Consistent with its own conception of its global position, the United States should be taking the lead in shaping these new institutions. It is not too late. By signing the treaty, even if prospects for early ratification look dim, the United States would strengthen its ability to participate as an observer in the early phases of implementation. If the United States stands aside from the process, it will miss

an opportunity of serious dimensions. And the loss will have an impact on U.S. national interests far beyond the work of prosecuting war crimes.

NOTES

Abe Chayes died while this volume was in press. His contribution to the whole volume as well as this essay was great and expressive of the dedication to promoting the law over force in international relations that marked his academic and public career.

The authors would like to thank David Bosco for his research assistance.

1. John F. Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution," *Harvard Human Rights Journal* 12, no. 1 (1999).

2. Jessica T. Mathews, "Power Shift," *Foreign Affairs* (January/February 1997): 50; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (New York, N.Y.: Cambridge University Press, 1996).

3. John Mearsheimer, "The False Promise of International Institutions," *International Security* (Winter 1994/95): 5.

4. Statute (July 17, 1998), arts. 18 and 19 (giving the state of nationality the right to object to the admissibility of the case).

5. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization," *University of Pennsylvania Journal of International Economic Law* 17 (1996): 359; Philip M. Nichols, "Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernment Parties," *University of Pennsylvania Journal of International Economic Law* 17 (1996): 295.

6. U.N. Charter, art. 2, par. 7.

7. 92, *Congressional Record*, 79th Cong. 2d sess., 1946, 10, 694.

8. Statute, n. 4, art. 17.

9. Roger S. Clark and Ved P. Nanda, "An Introduction to the Symposium," *Transnational Law and Contemporary Problems* 5, No. 2, i, iv-vi (1995); Charles Truehart, "Clout without a Country: The Power of International Lobbies," *Washington Post*, June 18, 1998, A32.

10. Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law," *Harvard Environmental Law Review* 21 (1997): 537.

11. Raustiala, "The 'Participatory Revolution,'" 537-39.

12. Alexis de Tocqueville, "Democracy in America," trans. George Lawrence (New York: Harper and Row, 1988): 513-24.

13. Peter J. Spiro, "New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace," *Cardozo Law Review* 18 (1996): 957.

14. Statute, n. 4, art. 36.

15. Symposium, "War Crimes Tribunals: The Record and the Prospects: *The Prosecutor v. Dusko Tadic*," *American University International Law Review* 13 (1998): 1441 (with then president of the ICTY Gabrielle Kirk McDonald noting the mix of legal systems in the tribunal's work); Thijmen Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions," *American Journal* 39 (1991): 493; David Edward, "How the Court of Justice Works," *European Law Review* 20 (1995): 539.

16. Joseph H. H. Weiler, "The Transformation of Europe," *Yale Law Journal* 100 (1991): 2403; Anne-Marie Burley and Walter Mattli, "Europe before the Court: A Political Theory of Legal Integration," *International Organization* 47 (Winter 1993): 41.
17. "Brunner v. The European Union Treaty," *Bundesverfassungsgericht* (2. Senat), October 12, 1993, *Common Market Law Review* 1, 57 (F.R.G.).
18. "Brunner v. The European Union Treaty," 79.
19. Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997): 273.