I would like to begin by acknowledging the serious work that members of the American Society of International Law have undertaken in recent years with respect to the establishment of an international criminal court. As a negotiator, I have gained from your scholarship and insights into international criminal and humanitarian law, and the law of international organizations. It is a tribute to the Society that the ICC has been a regular feature of annual, regional, and Washington meetings in this decade. I have had the honor to speak at many of those meetings, and know well that members recognize the historic significance of this endeavor.

I asked one of the Society's leading members, Professor Ted Meron of New York University Law School, and a very recent editor of The American Journal of International Law, to join the U.S. delegation to the U.N. talks on the ICC, including the Rome Conference. His advice has been invaluable and he was instrumental in our achieving some key provisions in the treaty that represent the advancement of international
humanitarian law as an enforceable body of law. The Society's current president, Professor Tom Franck, also of NYU Law School, has been a constructive critic whose views always merit serious attention. And, of course, Professor Cherif Bassiouni, a distinguished member of the Society from DePaul University Law School, has become a legend in the field of international criminal law and has shared a lot of quality time with me on this subject.

I have often spoken publicly since the conclusion of the Rome Treaty on the major U.S. objectives that were successfully negotiated in the treaty and on our remaining objections to certain provisions in the treaty. Thanks to command decisions by Editors and Professors Michael Reisman and Jonathan Charney, the most detailed record of the U.S. position now appears in my article in the January 1999 issue of The American Journal of International Law. I encourage all of you to read it. I want to use this morning's opportunity to expand on my views regarding Article 12 of the treaty, namely the preconditions to the exercise of jurisdiction by the Court.

First, however, I want to emphasize a few points. The United States continues to have a compelling interest in the establishment of a permanent international criminal court. The issue for us remains whether the ICC would operate efficiently, effectively, and appropriately within a global system that also requires our constant vigilance to protect international peace and security. Our remaining objections to the Rome treaty are grounded both in law and in the reality of the international system. As Secretary of State Madeleine Albright stated at Wesleyan University last month, "We believe the effectiveness of an international criminal court will depend significantly on the definition of the court's jurisdiction and whether the Court addresses the fundamental concerns of a wide range of governments. We also believe that the problems with the Rome treaty can be solved, and are prepared to work with others to establish a Court that will live up to the hopes and expectations of its sponsors."
As we step back from the results of the Rome Conference, we firmly believe that the true intent of national governments cannot be that which now appears to be the interpretation of several crucial provisions of the Rome treaty. At the same time, the political will remains within the Clinton Administration to support a treaty that is fairly and realistically constituted. The United States participated in the important work of the first session of the Preparatory Commission. We believe that good progress was made on the elements of crimes and the rules of procedure and evidence at the Preparatory Commission and that a foundation has been laid for further constructive work on these and other essential documents in the months ahead.

We are looking forward to consultations with other governments prior to and during the summer session of the Preparatory Commission to determine how the problems referenced by Secretary Albright can be addressed so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized. We do not pretend to know all the answers. We do know that we are benefiting from new ideas generated by thoughtful diplomats from a number of governments and by scholars with important ideas to advance our thinking on a range of key issues.

Government and non-governmental representatives have often told me that their intention behind establishing an international criminal court is to prosecute the Pol Pots and Saddam Husseins of the world--those leaders of lawless regimes that bring death and terror upon their own people and citizens of neighboring states. Their intention, they say, is not to "go after" the United States or our armed forces. The United States, to a substantial extent, embraces that intention. In fact, we wish that everyone in Rome who was such a strong advocate for a permanent international criminal court for the future would show more resolve and commitment to helping us today to bring to justice the perpetrators of genocide, crimes against humanity, and serious war crimes in our own time. Lofty rhetoric about justice in the future lacks credibility if we are
not prepared to establish, or to strengthen, credible institutions of international justice today.

That is why we find it so paradoxical that our own intention to focus on the truly important targets of a future international criminal court is clouded by our need to address the possibility of unwarranted exposure of U.S. personnel to the ICC's jurisdiction during that period of time, which may last many years, before the United States could ratify the treaty and become a state party to it. Even if our concerns about the treaty were satisfactorily addressed in the near term, we have no way of predicting how long it might take to achieve the advice and consent of the U.S. Senate for ratification. So, in one sense, while the need to consider how the treaty affects non-party states is a fairly narrow problem, in another sense this is a problem of enormous importance to the United States and to our role in the world.

The single most problematic part of the Rome Treaty is Article 12. Let us be clear what Article 12 states. It is not an article that grants the Court universal jurisdiction over the list of crimes in Articles 5. A proposal to that effect was defeated at Rome. Rather, in the absence of a Security Council referral, Article 12 establishes, as a precondition to jurisdiction over Article 5 crimes, that when there is a referral of a situation by a State Party or when the Prosecutor has initiated an investigation of a situation, either (1) the state of territory where the crime was committed or (2) the state of nationality of the accused, must be a State Party to the treaty or have accepted the jurisdiction of the Court with respect to the crime in question.

So, we are told, Article 12 empowers the ICC to exercise jurisdiction over the nationals of non-party states if the state of territory where the crime was committed is either a State Party to the treaty or, as a non-party, has lodged a declaration of acceptance of jurisdiction. Never mind that Article 11, paragraph 2, requires the Court to exercise jurisdiction only with respect to crimes committed after entry into force of the statute for any particular State unless, as a non-party, the State has made
a declaration under Article 12, paragraph 3. I wonder how Article 11, paragraph 2, makes sense in the context of an international criminal court whose only targets of prosecution are individuals if that provision does not apply to the nationals of the State in question.

Never mind that Article 24, paragraph 1, states, "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." It seems to me that this provision can only be consistent with Article 11, paragraph 2, if it means "entry into force of the Statute for the state of nationality of such person" unless there is a Security Council referral under Chapter VII.

Never mind that Article 22, paragraph 1, which articulates the principle of nullum crimen sine lege, states that, "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." It is puzzling how a national of a non-party state that has not accepted the jurisdiction of the ICC at the time the conduct takes place, could be criminally responsible before the ICC for conduct that does not in fact fall within the jurisdiction of the Court.

However, even if you believe that Articles 11, 22, and 24 have nothing to do with the nationals of non-party states and their rights, Article 12 runs counter to some serious norms of international law if it purports to empower the Court to exercise jurisdiction over non-party nationals. I want to acknowledge at this point two members of the Society whose emerging work has drawn attention to some important points of international law: Professor Madeline Morris of Duke University School of Law, and Professor Ruth Wedgwood of Yale Law School.

Let me begin with the question of universal jurisdiction as a rationale for jurisdiction. As everyone agrees, Article 12 of the Rome Treaty rejects universal jurisdiction for the Court. Yet there is an argument that States Parties delegate to the ICC their right to prosecute domestically individuals of any nationality for certain international crimes of
universal jurisdiction. But the foundations of that argument are paper thin. The ICC treaty itself relies explicitly not on universal jurisdiction but on the consent to jurisdiction either by the act of becoming a state party or by special consent under Article 12, paragraph 3.

Professor Morris has argued that "reliance on universal jurisdiction would render nonsensical the jurisdictional provisions that were adopted" in Rome. She is right. First, the requirement of the consent of the state on whose territory the crime was committed would be unnecessary if the Court's basis for jurisdiction were universality.

Second, not all of the crimes within the subject matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law. Those international treaties that do use universal jurisdiction as a means of enforcement before domestic courts are well understood to apply to crimes of universal jurisdiction, such as torture, terrorism, and hostage-taking. Professor Wedgwood has pointed out that enforcement of these treaties has generally been among treaty parties and, I would stress, before the national courts of those treaty parties. She also points to various war crimes (embodied in the ICC statute) that stem from the Hague regulations or from the laws and customs of war, neither of which directly provides for universal jurisdiction.

Third, as a matter of law, is it true that the universal jurisdiction over a crime that a state may seek to exercise itself can be delegated to a treaty-based collective international court? We believe the Vienna Convention on the Law of Treaties states rather clearly that treaties cannot bind non-party states, and, we would add, particularly with respect to treaty-based international institutions. A state that recognizes universal jurisdiction for a particular crime may not, even as a state party, wish to delegate such jurisdiction to an international court. By becoming a party to the treaty, a state makes a one-time delegation of such jurisdiction to the court. Such delegation thereby eliminates any possibility for bilateral negotiations with another state, even if it is a non-party, on a case-by-
Thus, as I wrote in my AJIL article, "While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law." Recall that the ad hoc international criminal courts for the former Yugoslavia or Rwanda were established by the Security Council pursuant to Chapter VII of the U.N. Charter and are subsidiary bodies of the Security Council. Recall also that the Nuremberg and Tokyo Tribunals actually operated with the consent of the state of nationality of the defendants as a consequence of the surrender instruments signed by Germany and Japan, respectively. In the case of Nuremberg, the Allied Powers also had supreme authority in Germany.

Another major argument advanced to support Article 12's purported reach over the nationals of non-party states is that the state of territory where the crime was committed has delegated its own jurisdiction to the ICC. I recently experienced much advocacy of this during a conference at Cornell Law School. It is certainly true that a state may delegate its territorial jurisdiction to another state in particular cases with the consent of the state of nationality, as we know is possible among states parties to the European Convention on the Transfer of Proceedings in Criminal Matters. We also know, after arduous months addressing the fate of PKK leader Abdullah Ocalan, that even where the right to try a suspect is clearly established, governments resist exercising their right to transfer or receive jurisdiction over a hot potato. Indeed, some see virtue in lobbing the suspect out of their jurisdiction altogether to avoid the political turmoil he generates. As Professor Morris notes, there seem to be no precedents for delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that state of nationality.
An attempt to delegate territorial jurisdiction pursuant to Article 12 also can lead to intolerable abuse, regardless of how many states have ratified the treaty and established a supposedly objective court. I find Professor Morris' example compelling. In her words, "Imagine, for instance, that France is holding for trial a U.S. national who has committed a crime on French territory. The U.S. has no basis to object to exercise by France of its territorial jurisdiction over that U.S. national. Now let us imagine that France proposes to delegate its territorial jurisdiction to Libya and to transfer the defendant to Libya for prosecution. (Just to flesh out the tale, let us say that Libya is holding a French national for trial and is willing to transfer that case to France in exchange for the case of the U.S. national.) Does the U.S. have a legal basis to object to the delegation by France of its territorial jurisdiction over a U.S. national to another state without U.S. consent? The U.S. would appear to have a plausible argument that Libya does not have territorial (nor any other internationally recognized basis for) jurisdiction and that France cannot confer territorial jurisdiction upon a state on whose territory the conduct did not occur, by delegation or otherwise. If it is dubious whether a state may delegate its territorial jurisdiction to another state without consent by the state of nationality, it is even less clear whether territorial jurisdiction may be delegated, without that consent, to a collective court."

Professor Morris' phrase, which I hope will become an epigram, is that territorial jurisdiction is not "a form of negotiable instrument."

It is therefore a very serious question whether the customary international law of territorial jurisdiction permits the delegation of territorial jurisdiction to an international court without the consent of the state of nationality of the defendant. Can, and should, the nationals of a non-consenting, non-party state--particularly when they are associated with official actions of that state--be subject to prosecution before a treaty-based international court? The requirements of the Vienna Convention on the Law of Treaties cannot be so easily avoided.
I hope that, on reflection, governments that have signed, or are planning to sign, the Rome treaty will begin to recognize that Article 12 has limits and that its misuse would do great damage to international law and the international political system. As I have often said, the presumption that, upon ratification by 60 states, the newly-established ICC could try, absent a Security Council referral, to reach anyone anywhere in the world based only on the consent of the state of territory is an untenable overreach of jurisdiction by a treaty-based organization.

I recognize the irony of having to speak in such detail about non-party status under the Rome treaty, but Article 12 is the key to resolving our most fundamental difficulty with the treaty. We look forward to the problem of Article 12 being solved, because by solving it, the interests of international law and justice that we all share will be served.

Thank you.