

THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

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In the event that the United States considers ratifying the Rome Statute of the International Criminal Court (ICC), concerns will be raised regarding whether such ratification and U.S. participation in the ICC would comply with the U.S. Constitution. A primary issue is whether such ratification would violate Article III, Section 1 of the Constitution regarding the judicial power of the United States. The authors argue that ratification following adoption of implementing legislation would not violate Article III, Section 1. The ratification strategy proposed in this Article would be grounded in the Article II, Section 2 treaty power and the Article I, Section 8, Clause 10 Define and Punish Clause of the Constitution, and include amendments to the federal criminal code and military code to ensure the ability of U.S. courts to investigate and prosecute the atrocity crimes comprising the subject matter jurisdiction of the Rome Statute. The Article confirms that fundamental due process rights are protected by the Rome Statute and its Rules of Procedure and Evidence, and that the absence of jury trials before the ICC does not violate the Constitution. Nonetheless, the complementarity regime of the Rome Statute enables the United States to prosecute any American citizen or other individual within its jurisdiction before a jury and in accordance with the full range of due process rights guaranteed by the Constitution and American jurisprudence. The United States would not be barred by the Constitution from agreeing to the Rome Statute's prohibition of head of state or other high-level immunity from prosecution before the ICC. The authors propose a ratification strategy

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that includes adoption of declarations, understandings, and provisos to clarify American adherence to its Constitution as a State Party to the Rome Statute.

A decade has elapsed since the final text of the Rome Statute of the International Criminal Court (ICC)¹ was approved at the conclusion of a diplomatic conference in Rome, Italy.² Legal scholars have written a great deal since then about whether or not the Rome Statute would meet U.S. constitutional requirements if the United States were to become a State Party to it.³ Despite the American opposition to the ICC during the Bush Administration (2001-2009),⁴ there remains the possibility that in the future

¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002) [hereinafter Rome Statute], available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

² Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War Crimes Court*, N.Y. TIMES, July 17, 1998, at A1.

³ See, e.g., Diane Marie Amann, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002); John R. Bolton, *The Risks and Weaknesses of the International Criminal Court From America's Perspective*, 64 LAW & CONTEMP. PROBS. 167 (2001); Brett W. Johnson, *The Future Constitutional Battle if the United States Ratifies the International Criminal Court Treaty*, 3 CHI.-KENT J. INT'L & COMP. L. 1 (2003), <http://www.kentlaw.edu/jicl/spring2003.html>; Monroe Leigh, Editorial Comment, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124 (2001); Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119 (Sarah B. Sewall & Carl Kesen eds., 2000); Audrey I. Benison, Note, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J. INT'L L. 75 (2001); see also Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 101-35 (1995) (discussing constitutionality under U.S. law of a prospective ICC statute).

⁴ See, e.g., John B. Bellinger III, Legal Adviser to the U.S. Sec'y of State, Reflections on Transatlantic Approaches to International Law, Speech at the Duke University School of Law Center for International and Comparative Law (Nov. 15, 2006), in 17 DUKE J. COMP. & INT'L L. 513, 520 (2007) ("Embracing the Rome Statute in spite of our serious concerns could only reflect a cavalier attitude towards the Court and international law more generally."); John B. Bellinger III, Legal Adviser to the U.S. Sec'y of State, The United States and the International Criminal Court: Where We've Been and Where We're Going, Remarks to the DePaul University College of Law (Apr. 25, 2008), available at <http://www.state.gov/s/l/rls/104053.htm> [hereinafter Bellinger Remarks] ("The core concerns of the United States about the Rome Statute have not been resolved during the past decade, and are unlikely to be resolved in the next decade, unless the Statute is changed. Accordingly, as we look forward, the United States will very likely remain outside the Rome Statute regime. This is a reality that ICC supporters should accept."); News Release, Senior Defense Official, Department of Defense, Background Briefing on the International Criminal Court (July 2, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3528> ("In the Prosecutions [of an American by the ICC], Americans would not be entitled to all of the protections that our Constitution affords to Americans in criminal prosecutions . . . the added risks created by the ICC necessitate our withdrawing the U.S. peacekeepers from the East Timor mission."); News Release, Department of Defense, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002),

a new Presidential administration and the Senate, with support from the House of Representatives, will find reason to seriously consider ratification of the Rome Statute.⁵ If that were to occur, we believe the constitutional issues that undoubtedly would be raised require careful examination. In this Article we hope to demonstrate that concerns about compliance with the U.S. Constitution were the United States to ratify the Rome Statute are largely without merit.⁶ Where there may be some residual difficulties on the constitutional front, we offer suggestions for how to accommodate particular concerns through U.S. legislation and with U.S. declarations, understandings, and provisos to the Rome Statute as part of the ratification process.⁷

available at <http://www.defenselink.mil/releases/release.aspx?releaseid=3337> (“Earlier today, this administration announced the president’s decision to formally notify the United Nations that the United States will not become a party to [sic] International Criminal Court treaty. The U.S. declaration, which was delivered to the secretary general this morning, effectively reverses the previous U.S. government decision to become a signatory.”); Marc Grossman, Under Sec’y for Political Affairs, U.S. Dep’t of State, Remarks to the Center for Strategic and International Studies, (May 6, 2002), *available at* <http://www.state.gov/p/us/rm/9949.htm> (“In order to make our objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, the President believes that he has no choice but to inform the United Nations, as depository of the treaty, of our intention not to become a party to the Rome Statute of the International Criminal Court.”).

⁵ See generally KELLY WHITLEY, RESPONSIBILITY TO PROTECT COAL. & NORTHWESTERN UNIV. SCHOOL OF LAW CTR. FOR INT’L HUMAN RIGHTS, THE RESPONSIBILITY TO PROTECT AND THE INTERNATIONAL CRIMINAL COURT: AMERICA’S NEW PRIORITIES (2008), *available at* http://www.cfr.org/publication/15802/northwestern_university_school_of_law.html; John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals*, 18 EUR. J. INT’L L. 277, 315 (2007); Jose Alvarez, *The Evolving U.S.–ICC Relationship: Notes from the President*, 24 AM. SOC’Y INT’L L. NEWSL. 1 (2008), *available at* <http://www.asil.org/newsletter/president/pres080320.html>.

⁶ We follow in the footsteps of such legal scholars as Professor Ruth Wedgwood, who in 2000 wrote, “The ICC is a new creation in international jurisprudence, and thus, one should not expect cut-and-dried precedent on the matter. But the most persuasive answer is that there is no forbidding constitutional obstacle to U.S. participation in the treaty.” Wedgwood, *supra* note 3, at 121.

⁷ We acknowledge at the outset that one of the authors of this Article, David Scheffer, was the U.S. Ambassador at Large for War Crimes Issues from 1997 to 2001, was deputy head of the U.S. delegation to the U.N. talks on the ICC from 1995 to 1997, and was head of the U.S. delegation to the Rome talks from August 1997 to January 2001. He signed the Rome Statute on behalf of the United States of America on December 31, 2000. Steven Lee Meyers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1. Since then, he has written a considerable number of articles explaining, *inter alia*, what transpired during the years of negotiation, and why the United States should move towards a posture of cooperation with, and ultimately State Party status to, the International Criminal Court. See David Scheffer & John Hutson, *Strategy for U.S. Engagement with the International Criminal Court*, CENTURY FOUNDATION (2008), *available at* <http://www.tcf.org/list.asp?type=TP&topic=8A>; David Scheffer, *Review of the Experiences*

This Article addresses nine areas of inquiry into the Rome Statute and U.S. constitutional law. Part I provides relevant background on the Rome Statute and American policy on the ICC as a predicate to the more focused discussion on constitutional issues. Part II explains the significance of the Rome Statute's complementarity doctrine, which offers the United States

of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, 21 LEIDEN J. OF INT'L L. 151 (2008); *The US and the International Criminal Court Then and Now*, JURIST, July 15, 2008, <http://jurist.law.pitt.edu/forumy/2008/07/us-and-international-criminal-court.php>; *Introductory Note to Decision on the Prosecution Application under Article 58(7) of the Statute in the Case of the Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Al Abd-Al-Rahman (Ali Kushayb) ICC Pre-Trial Chamber I*, in 46 I.L.M. 532 (2007); David Scheffer et al., *The End of Exceptionalism in War Crimes*, HARV. INT'L REV., Nov. 21, 2007, <http://www.harvardir.org/articles/1647/>; David Scheffer, *Jostling Over Justice*, 154 FOREIGN POL'Y 4 (2006); *Advancing U.S. Interests with the International Criminal Court*, Address at the Vanderbilt University Law School (Mar. 27, 2003), in 36 VAND. J. TRANSNAT'L L. 1567 (2003); *Restoring U.S. Engagement with the International Criminal Court*, 21 WIS. INT'L L.J. 599 (2003); *Should the United States Join the International Criminal Court?*, Presentation at the University of California at Davis Journal of International Law and Policy Symposium: An Emerging International Criminal Justice System: Milosevic, Killing Fields, and "Kangaroo" Courts (Apr. 22, 2002), in 9 U.C. DAVIS J. INT'L L. & POL'Y 45 (2002); *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2002); *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389 (2002); *A Negotiator's Perspective on the International Criminal Court, Fourteenth Waldemar A. Solf Lecture in International Law delivered at the Judge Advocate General's School* (Feb. 28, 2001), in 167 MIL. L. REV. 1 (2001); *Correspondence*, 95 AM. J. INT'L L. 624 (2001) (discussing International Criminal Court negotiations); Opening Address at the New England Law Review Symposium: Universal Jurisdiction: Myths, Realities, and Prospects (Nov. 3, 2001), in 35 NEW ENG. L. REV. 233 (2001); *The International Criminal Court*, in ABA CONFERENCE ON THE UN DECLARATION OF HUMAN RIGHTS & THE GENOCIDE CONVENTION 88 (American Bar Association, 2001); *The International Criminal Court: The Challenge of Jurisdiction*, 93 AM. SOC'Y INT'L L. PROC. 65 (2000); *The U.S. Perspective on the ICC*, in THE UNITED STATES & THE INTERNATIONAL CRIMINAL COURT 115 (Sarah B. Sewall & Carl Kaysen eds. 2000); *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); *The U.S. Perspective on the International Criminal Court*, Comments at the McGill Law Journal International Conference: Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do? (Jan. 28, 1999), in 46 MCGILL L.J. 269 (2000); *U.S. Policy and the International Criminal Court*, Remarks at the Cornell International Law Journal Symposium: The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression (Mar. 5, 1999), in 32 CORNELL INT'L L.J. 529 (1999). Constitutional issues were constantly considered by the U.S. delegation during the years of negotiations stretching from 1995 to 2001. U.S. Department of Justice career attorneys, particularly from the Criminal Division, actively participated on the U.S. delegation and deeply influenced the negotiations leading to the text of the Rome Statute concluded in July 1998, and the negotiations leading to the Rules of Procedure and Evidence, concluded in June 2000. That experience, along with contemporary research and reflection on the issues, informs this Article.

the first opportunity to investigate any U.S. citizen who may become an ICC target, and by so doing require the ICC to refrain from exercising jurisdiction. Under such circumstances, a U.S. citizen would be prosecuted pursuant to U.S. law and all of the protections afforded by the Constitution. Part III examines whether an Article III court is the only constitutionally valid forum within which to prosecute an American citizen for a criminal act falling within the subject matter jurisdiction of the ICC. Part IV addresses whether the United States can use the Article II treaty power to enter into treaties that provide for extradition of American citizens to foreign courts. Part V explores whether the “define and punish” power of Congress allows the United States to participate in the ICC. Part VI focuses on whether the ICC’s denial of any constitutionally-protected due process rights, particularly trial by jury, introduces an insurmountable constitutional obstacle to U.S. participation in the ICC. Part VII discusses whether the due process rights afforded by the ICC could withstand Supreme Court review with respect to any American citizen prosecuted by the ICC. Part VIII examines whether official immunities would be a bar to U.S. compliance with Article 27 of the Rome Statute. Finally, Part IX recommends concrete steps that could be taken now and in the future to ease remaining concerns about the constitutionality of the Rome Statute. The Conclusion summarizes some of the major points made in this Article.

I. FUNDAMENTAL PRINCIPLES AND AMERICAN POLICY

The International Criminal Court is the first permanent judicial body that seeks universal participation by nations in its objective to bring leading perpetrators of genocide, crimes against humanity, serious war crimes, and aggression, together known as “atrocious crimes,”⁸ to justice. During the last fifteen years, international courts have advanced international criminal justice in regional contexts and within the narrow jurisdictional mandates of the International Criminal Tribunals for the former Yugoslavia (ICTY)⁹ and Rwanda (ICTR),¹⁰ the Special Court for Sierra Leone,¹¹ the Extraordinary

⁸ David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229 (2006); David Scheffer, *The Merits of Unifying Terms: “Atrocity Crimes” and “Atrocity Law,”* 2 GENOCIDE STUD. & PREVENTION 91 (2007).

⁹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; International Criminal Tribunal for the former Yugoslavia Home Page, <http://www.un.org/icty/> (last visited Aug. 5, 2008).

¹⁰ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and

Chambers in the Courts of Cambodia,¹² and war crimes courts in Bosnia-Herzegovina,¹³ Kosovo,¹⁴ and Timor-Leste.¹⁵ While those tribunals were

31 December 1994, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; International Criminal Tribunal for Rwanda Home Page, <http://www.ictt.org> (last visited Aug. 5, 2008).

¹¹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. SCOR, 57th Sess., Annex, U.N. Doc. S/2002/246, available at <http://www.sc-sl.org/Documents/scsl-agreement.html>; and Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145, ¶ 17, available at <http://www.sc-sl.org/Documents/scsl-statute.html>; see also S.C. Res. 1370, U.N. Doc. S/RES/1370 (Sept. 18, 2001) (encouraging the Secretary-General, the government of Sierra Leone, and others involved “to expedite the establishment of . . . the Special Court envisaged by Resolution 1315 (2000) of 14 August 2000”); S.C. Res. 1315 ¶ 6, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (requesting that the UN Secretary General issue a report concerning the establishment of a special court in order to prosecute perpetrators in Sierra Leone); *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (2000) (delineating the legal framework and requisite administrative elements for the establishment of a Sierra Leonean special court and setting forth in the Annex thereto the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and in the Enclosure thereto the proposed text of the Statute of the Special Court for Sierra Leone); WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006) (examining attributes of the Special Court for Sierra Leone); Avril D. Haines, *Accountability in Sierra Leone: the Role of the Special Court*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 173-326 (Jane E. Stromseth ed., 2003) [hereinafter ACCOUNTABILITY FOR ATROCITIES].

¹² Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006 (2006) (Cambodia), available at http://www.cambodiatribunal.org/CTM/Domestic_Cambodian_Law_as_amended_27_Oct_2004_Eng.pdf; Agreement between the U.N. and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, available at http://www.cambodiatribunal.org/CTM/Agreement_between_UN_and_RGC.pdf; Extraordinary Chambers in the Courts of Cambodia, <http://www.eccc.gov.kh/english/default.aspx> (last visited Aug. 5, 2008). See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2008).

¹³ The Court of Bosnia & Herzegovina Home Page, <http://www.sudbih.gov.ba/?jezik=e> (last visited Aug. 5, 2008).

¹⁴ United Nations Mission in Kosovo Home Page, <http://www.unmikonline.org/> (last visited Aug. 5, 2008).

¹⁵ See U.N. Transitional Administration in East Timor I, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf> (establishing a special panel of judges to address serious criminal offences committed in East Timor); see also Laura A. Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 11, at 319 (examining the evolution of accountability and reconciliation mechanisms in East Timor and Indonesia in the aftermath of the September 1999 massacres in East Timor); Suzannah Linton, *Rising from the Ashes: the Creation of a*

evolving, the international community embraced the idea of a permanent criminal court that in most respects would obviate the need for the time-consuming and costly creation of specialized international or hybrid (part national, part international) courts for individual atrocity situations as they erupt anywhere in the world. Although the United Nations Security Council had created and empowered the ICTY and ICTR under the U.N. Charter's Chapter VII enforcement authority,¹⁶ the only way a permanent court with broad jurisdiction would be established was through the treaty process whereby sovereign nations consented to the investigation and prosecution, under certain circumstances, of their own nationals before a global court of criminal law. Because criminal prosecutions are traditionally a national prerogative, this would be no easy task to accomplish on an international platform.

But after years of work by the U.N. International Law Commission¹⁷ and further drafting and intensive negotiations among governments under U.N. auspices,¹⁸ the text of the Rome Statute of the International Criminal Court was approved on July 17, 1998.¹⁹ The U.S. delegation to the U.N. talks contributed significantly to the provisions of the Rome Statute,

Viable Criminal Justice System in East Timor, 25 MELB. U. L. REV. 122 (2001) (describing the September 1999 massacres, conflict that followed, and the establishment of a criminal law system, including a process for prosecuting atrocity crimes).

¹⁶ ICTR Statute, *supra* note 10 (establishing an international tribunal for Rwanda and adopting the statute of the tribunal); ICTY Statute, *supra* note 9 (establishing an international tribunal for prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991).

¹⁷ Int'l Law Commission, *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session*, Draft Statute for an International Criminal Court, U.N. Doc. A/49/10 (May 2-July 22, 1994) (containing final draft statute for an international criminal court approved by the International Law Commission in 1994); see WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 8-11 (3d ed. 2007) ("The International Law Commission's draft statute of 1994 focused on procedural and organizational matters, leaving the question of defining the crimes and the associated legal principles to the code of crimes, which it had yet to complete.").

¹⁸ Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., *Introduction & Draft Organization of Work*, A/Conf.183/2 (1998); Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., *Draft Statute & Draft Final Act*, A/Conf.183/2/Add.1 (1998); Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., *Draft Rules of Procedure*, A/Conf.183/2/Add.2 (1998); Report of the Inter-Sessional Meeting From January 19-30, 1998 held in Zutphen, The Netherlands, A/AC.249/1998/L.13 (1998); Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., *Decisions Taken at its Session held in New York December 1-12, 1997*, A/AC.249/1997/L.9/Rev.1 (1997); Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., *Decisions Taken at its Session held in New York August 4-15, 1997*, A/AC.249/1997/L.8/Rev.1 (1997); Preparatory Comm'n on the Establishment of an Int'l Crim. Ct., *Decisions Taken at its Session held in New York February 11-21, 1997*, A/AC.249/1997/L.5, 1997 (1997).

¹⁹ SCHABAS, *supra* note 17, at 15-21; Stanley, *supra* note 2.

including its due process requirements, and it was the hope of the Clinton Administration to join consensus on the final text in Rome.²⁰ But a few major issues were not satisfactorily addressed,²¹ and the U.S. delegation was instructed by Washington to vote against the final text, becoming one of very few nations to do so.²² Nonetheless, over the next two years the United States actively participated in further negotiations on the Rules of Procedure and Evidence and the Elements of Crime for the ICC.²³ Both of these documents, upon which the U.S. delegation had insisted in Rome and to which the delegation had made major contributions, such as preparing the first draft of the Elements of Crimes and leading negotiations thereafter,²⁴ were adopted by consensus, joined by the United States, in June 2000.²⁵

Following two years of multilateral negotiations on many of the supplemental agreements required by the Rome Statute, President Bill Clinton decided that the United States would join with 137 other governments and sign the Treaty on December 31, 2000, the last possible day for any nation to sign the document.²⁶ Some important issues on the American agenda for the ICC still remained unresolved, but the U.S. delegation prepared the groundwork for negotiation of those issues in continued U.N. talks on the supplemental agreements in 2001. The incoming Bush Administration chose to abandon the U.N. talks altogether, and those opportunities to address U.S. concerns were lost. On May 6,

²⁰ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 68-72; Scheffer, *The United States and the International Criminal Court*, *supra* note 7, at 17.

²¹ *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 10, 12-15 (1998) (statement of David Scheffer) [hereinafter *1998 Senate Hearing*]; Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 77-86; Scheffer, *The United States and the International Criminal Court*, *supra* note 7, at 17-21.

²² SCHABAS, *supra* note 17, at 20-21 ("The result [of the vote] was 120 in favour, with twenty-one abstentions and seven votes against The United States, Israel and China stated that they had opposed adoption of the statute.").

²³ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 74-86.

²⁴ William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L.J. 477, 478-84 (1999).

²⁵ Barbara Crossette, *U.S. Gains Compromise on a War Crimes Tribunal*, N.Y. TIMES, June 30, 2000, at A6.

²⁶ Rome Statute, *supra* note 1, art. 125(1) (providing for December 31, 2000, as the last day any State may sign the Rome Statute—and thereafter ratify, accept, or approve the treaty to become a State Party to it; after December 31, 2000, a non-signatory State would have to accede to the treaty in order to become a State Party to it); William J. Clinton, *Clinton's Words: 'The Right Action.'* N.Y. TIMES, January 1, 2001, at A6 (reprinted statement on the treaty signing) [hereinafter *Clinton Statement*]; Steven Lee Meyer, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

2002, President George W. Bush rendered inactive the U.S. signature on the Treaty by informing the United Nations, as depository of the Treaty, that the United States would no longer honor the obligations of a signatory nation.²⁷ Shortly thereafter, Congress adopted and President Bush signed into law the American Service Members Protection Act,²⁸ which is a blunt anti-ICC piece of legislation designed to prohibit any U.S. cooperation with the ICC and to punish nations that join it.²⁹ By late 2007, however, Congress repealed some of the punitive measures of the law following years of sharp deterioration in U.S. military and diplomatic relations with nations that defied the Bush Administration and joined the ICC anyway.³⁰

As of October 1, 2008, there will be 108 State Parties to the Rome Statute.³¹ These include almost every major ally of the United States, many nations that are considered friends, and none that are characterized as evil, Communist, or adversarial. They consist of all but one of the European Union nations, Canada, Mexico, most of Latin America and the Caribbean, a majority of African countries, and sixteen Asia-Pacific nations, including Australia, Japan, and the Republic of Korea.³² The ICC has accepted four atrocity crimes situations for investigation and prosecution and issued indictments in most of them: the Democratic Republic of the Congo,

²⁷ Neil A. Lewis, *U.S. Rejects All Support for a New Court on Atrocities*, N.Y. TIMES, May 7, 2002, at A11; Letter from John R. Bolton, Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary General (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. Article 18 of the Vienna Convention on the Law of Treaties, which the United States regards as reflecting customary international law, specifies that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty . . .” Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331; U.S. Department of State, Vienna Convention on the Law of Treaties, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Aug. 5, 2008) (explaining that although the United States is not a party to the Vienna Convention, the United States signed it on April 24, 1970, and “considers many of the provisions . . . to constitute customary international law.”).

²⁸ U.S.C. §§ 7421–33 (2006).

²⁹ Lillian V. Faulhaber, *American Service Members Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537 (2003).

³⁰ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 1210, 120 Stat. 2083 (amending the American Service-Members’ Protection Act to remove International Military Education and Training (IMET) restrictions); National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1212, 122 Stat. 3 (amending the American Service-Members’ Protection Act to eliminate restrictions on Foreign Military Financing (FMF) assistance laws).

³¹ International Criminal Court: The State Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Aug. 5, 2008).

³² *Id.*

regarding which arrests have been made and pre-trial proceedings are underway,³³ Uganda,³⁴ the Central African Republic,³⁵ and Darfur.³⁶

The Rome Statute reflects the convergence of the common law and civil law systems, varying nation by nation, that constitute the global administration of criminal law.³⁷ Most of the world is governed by some variation of civil law. Only a relatively small number of nations employ the common law system.³⁸ Consequently, few countries use the jury system in their criminal trials;³⁹ the vast majority of nations rely on judges ruling from the bench. During the negotiations leading to the Rome Statute and, in particular, the Rules of Procedure and Evidence,⁴⁰ there was constant attention to this melding exercise of civil and common law systems as well as acknowledgement of other major bodies of law in the world. It is inconceivable that the vast majority of nations negotiating the Rome Statute would have accepted a requirement of trial by jury. Indeed, the very nature of the exercise—to prosecute the masterminds of complex and massive atrocity crimes before an *international* court in The Hague—was incompatible with the jury system. Who exactly would be the members of the jury from the global society? How would they be selected when so many nations are invested in the process? What educational level would be required of jury members? Negotiators focused on a procedure that would select highly qualified judges conversant in national criminal law and international criminal law and skilled in parsing through the complex evidence that is characteristic of atrocity crimes, particularly when handling

³³ International Criminal Court: Democratic Republic of the Congo, <http://www.icc-cpi.int/cases/RDC.html> (last visited Aug. 5, 2008).

³⁴ International Criminal Court: Uganda, <http://www.icc-cpi.int/cases/UGD.html> (last visited Aug. 5, 2008).

³⁵ International Criminal Court: Central African Republic, <http://www.icc-cpi.int/cases/RCA.html> (last visited Aug. 5, 2008).

³⁶ International Criminal Court: Darfur, Sudan, <http://www.icc-cpi.int/cases/Darfur.html> (last visited Aug. 5, 2008).

³⁷ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 353-77 (2d. ed. 2008); SCHABAS, *supra* note 17, at 1-25.

³⁸ See, e.g., William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *LA. L. REV.* 677, 684 (1999).

³⁹ These include: Canada, the United States, Belgium, Greece, Gibraltar, Australia, Austria, England, Wales, Scotland, and Northern Ireland. Japan will introduce jury trials in 2009. For an overview of this development in Japan, see Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 *CORNELL INT'L L. J.* 315 (2007).

⁴⁰ Rules of Procedure and Evidence, ICC-ASP/1/3 (September 9, 2002), available at http://www.icc-cpi.int/about/Official_Journal.html.

prosecutions of those in leadership roles.⁴¹ The ruling of judges on guilt or innocence was considered vastly fairer to the defendant in such high-profile international criminal trials than a likely problematic ruling by a group of diverse individuals who may harbor prejudices, speak different languages and dialects, hail from many countries, have vastly different levels of educational achievement, and yet hold the fate of an alleged war criminal, probably of a different nationality, in their hands.⁴² It would have been very difficult for advocates of the jury system to take the leap from a jury of peers drawn from one's own community or nation to a jury comprised of foreigners who likely have little or no knowledge of the national context within which the defendant operated or of the law under which he or she is to be judged. Highly qualified judges can address both the national context and the law, as the existing international and hybrid criminal tribunals have demonstrated for years.

The Rome Statute and its Rules of Procedure and Evidence and Elements of Crimes have been in force since July 1, 2002, when the required sixty nations ratified the Rome Statute and became State Parties to it.⁴³ While genocide, crimes against humanity, and war crimes are defined and can be prosecuted by the ICC,⁴⁴ the crime of aggression is included, but remains undefined and without any procedure for referral to the ICC.⁴⁵ Aggression thus cannot be investigated or prosecuted until the crime is defined, the trigger mechanism for its consideration by the Court is agreed to, and the Rome Statute is amended to include a definition and trigger mechanism. The first review conference of the Rome Statute by the State Parties, scheduled for 2010, should have before it one or more proposals for such an amendment to "activate" the crime of aggression.⁴⁶

Cases come before the ICC within the context of referrals of "situations" of atrocity crimes, namely, large-scale and multiple

⁴¹ Rome Statute, *supra* note 1, art. 36(3)(b) (requiring selection of judges who have established competence either in criminal law and procedure or "relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court").

⁴² For general discussion about the inquisitorial and adversarial systems of justice and use of judges and juries, see CASSESE, *supra* note 37, at 357-74, 441; SCHABAS, *supra* note 17, at 205-10.

⁴³ See Reuters, *Countries That Ratified New Criminal Court*, N.Y. TIMES, Apr. 12, 2002, at A3; Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, at A3; Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3.

⁴⁴ Rome Statute, *supra* note 1, arts. 5-8.

⁴⁵ *Id.* art. 5.

⁴⁶ International Criminal Court: Special Working Group on the Crime of Aggression, <http://www.icc-cpi.int/asp/aspaggression.html> (last visited Aug. 5, 2008).

commission of such crimes within a particular event, such as the conflict between the Lord's Resistance Army and the Ugandan Army, the ethnic cleansing against African tribes in the Darfur region of Sudan, the bloodletting in the Ituri region of the Democratic Republic of the Congo, or the mass rapes in the Central African Republic.⁴⁷ A situation involving alleged atrocity crimes can be referred to the ICC by a State Party to the Rome Statute, by the U.N. Security Council using its U.N. Charter Chapter VII enforcement authority, or by the ICC Prosecutor acting independently, but only following approval by the Pre-Trial Chamber.⁴⁸ Once a situation has been referred to the ICC and it clears procedural hurdles for active investigation, the Prosecutor acts independently to investigate individuals who are suspected perpetrators of the atrocity crimes at issue. Then, the Prosecutor may seek judicial approval of arrest warrants against particular persons.⁴⁹

The ICC is not a court of universal jurisdiction that can prosecute anyone who has committed an atrocity crime anywhere in the world.⁵⁰ There are usually certain preconditions to personal jurisdiction: the individual charged with atrocity crimes must be a national of a State Party to the ICC, or the territory on which the crime was committed must belong to a State Party to the ICC.⁵¹ If the Security Council refers the situation to the ICC, however, these preconditions do not apply: a national of a non-party State may be prosecuted, and the crimes need not be committed on the territory of a State Party. Finally, a non-party State may file a declaration with the ICC inviting it to investigate a situation in which the crimes occurred in its territory or one or more of its nationals are suspected of having perpetrated such crimes.⁵²

The admissibility of individual cases, both potential and existing, is governed by Articles 17-19 of the Rome Statute, and these are discussed in greater detail in Part II below. The admissibility tests are critical to any understanding of the constitutionality of the Rome Statute in American practice for they invite national courts to handle cases under their national criminal law, thus preempting the ICC's jurisdiction over a suspect.⁵³ As

⁴⁷ International Criminal Court: Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Aug. 5, 2008).

⁴⁸ Rome Statute, *supra* note 1, arts. 13-15.

⁴⁹ *Id.* arts. 15, 53, 54, 58.

⁵⁰ CASSESE, *supra* note 37, at 338; SCHABAS, *supra* note 17, at 67-85; ALEXANDER ZAHAR & GORAN SLUITER, *INTERNATIONAL CRIMINAL LAW* 446-503 (2008); Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 65.

⁵¹ Rome Statute, *supra* note 1, art. 12.

⁵² *Id.* art. 12(3).

⁵³ SCHABAS, *supra* note 17, at 171-93; David Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 52-63, 87-89.

explained below, concerns, as ill-founded as they likely would be, about the protection of a U.S. national's constitutional due process rights before the ICC need never arise if U.S. prosecutors and courts simply take the initiative to investigate and, if merited, prosecute the U.S. national before a U.S. court. Indeed, they have within their power the ability to guarantee a jury trial. Provided U.S. judicial authorities act with foresight and professional objectivity, and provided federal criminal law is amended to fully cover atrocity crimes,⁵⁴ there should be no reason for the ICC to determine that the United States is, following the language of the Rome Statute, either "unwilling or unable genuinely" to carry out an investigation or prosecution of a suspect, thus entitling the ICC to find the case admissible and to seek custody of the suspect.⁵⁵ This feature of the Rome Statute reflects the overriding presumption in the negotiations that the ICC would focus its attention on situations where national legal systems are devastated, perhaps practically nonexistent, in the wake of conflict and atrocities or where cynical governments, perhaps implicated in the horrors, show no ability to bring their own perpetrators of atrocity crimes to justice. As it happens, three of the four situations currently before the ICC are self-referrals, made by governments that decided to refer internal atrocity situations to the ICC because of inadequate domestic legal capabilities, or for political reasons, to confront rebel movements head-on with international justice.⁵⁶

Part 3 of the Rome Statute sets forth general principles of criminal law drawn from both common law and civil law traditions. These principles, however, will look very familiar to American attorneys and judges, as a U.S. delegation that included Justice Department Criminal Division lawyers oversaw the drafting and adoption of the principles. The concerns the United States had with the Rome Statute on July 17, 1998,⁵⁷ or when

⁵⁴ See discussion, *infra* Part IV(D), on amending federal law.

⁵⁵ Rome Statute, *supra* note 1, art. 17(1)(a).

⁵⁶ Payam Akhavam, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 409-11 (2005); Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 391-99 (2005).

⁵⁷ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 74-87 (noting that these concerns included under Article 12, the preconditions to jurisdiction and how they might expose the United States as a non-State Party to the Court's jurisdiction; under Article 124, the exposure of a non-party State to war crimes charges even though a State Party could opt out of such a risk for seven years; under Article 121(5), the right of a State Party to opt out of a new or amended crime, but the implicit exposure of a non-party State to the new or amended crime; under Article 15, the ability of the Prosecutor to self-initiate investigations; under Article 5, the inclusion of an undefined crime of aggression, the prospect under Resolution E to the Rome Statute and Article 123 of the future inclusion of crimes of terrorism and drug crimes; under Article 120, the prohibition on any reservations

President Clinton pointed to some remaining flaws at the time of the signing of the treaty on December 31, 2000,⁵⁸ had nothing to do with Part 3 or, for that matter, with any due process issues.⁵⁹

The Rome Statute's general principles of criminal law include *nullum crimen sine lege*;⁶⁰ *nulla poena sine lege*;⁶¹ non-retroactivity *ratione personae*;⁶² individual criminal responsibility, including aiding and abetting and joint criminal enterprise;⁶³ the exclusion of jurisdiction over persons under eighteen years of age;⁶⁴ the irrelevance of official capacity when applying the Rome Statute;⁶⁵ the responsibility of commanders and other superiors;⁶⁶ the non-applicability of statutes of limitations;⁶⁷ intent and knowledge, or the mental element;⁶⁸ grounds for excluding criminal responsibility;⁶⁹ mistake of fact or of law;⁷⁰ and the defense of superior orders and prescription of law.⁷¹

Procedural requirements for the investigation and prosecution of suspects are set forth in Articles 53-61 of the Rome Statute,⁷² and the principles governing ICC trials are detailed in Articles 62-76.⁷³ Rules 104-

to the Rome Statute; and under Article 8(2)(b)(vii), the precise definition of a war crime covering an Occupying Power transferring its own population, directly or indirectly, into the territory it occupies); see also David Scheffer, *The United States and the International Criminal Court*, *supra* note 7, at 17-21 (describing U.S. concerns about the Rome Statute during the Rome Conference of June-July 1998).

⁵⁸ *Clinton Statement*, *supra* note 26; see also Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 63-68 (explaining the reasoning behind President Clinton's signing statement of December 31, 2000).

⁵⁹ *1998 Senate Hearing*, *supra* note 21, at 15; Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 73; Scheffer, *The United States and the International Criminal Court*, *supra* note 7, at 12, 17.

⁶⁰ Rome Statute, *supra* note 1, art. 22(1) ("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.").

⁶¹ *Id.* art. 23 ("A person convicted by the Court may be punished only in accordance with this Statute.").

⁶² *Id.* art. 24(1) ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.").

⁶³ *Id.* art. 25.

⁶⁴ *Id.* art. 26.

⁶⁵ *Id.* art. 27.

⁶⁶ *Id.* art. 28.

⁶⁷ *Id.* art. 29.

⁶⁸ *Id.* art. 30.

⁶⁹ *Id.* art. 31.

⁷⁰ *Id.* art. 32.

⁷¹ *Id.* art. 33.

⁷² SCHABAS, *supra* note 17, at 235-84.

⁷³ *Id.* at 285-311.

144 of the Rules of Procedure and Evidence amplify the Rome Statute's provisions.⁷⁴ Part VII below examines the due process requirements of particular relevance to the U.S. Constitution and how the Rome Statute and Rules of Procedure and Evidence enforce those requirements. The sentencing provisions of the Rome Statute do not permit the death penalty,⁷⁵ which might have attracted troublesome scrutiny under constitutional law if it had been included as a sentencing option.⁷⁶

Recently there has been reason to believe that the United States is shifting away from outright and punitive opposition to the ICC and towards a more constructive dialogue about the Court.⁷⁷ If that trend continues, particularly following the election of a new president in November 2008, then there should be some practical value in examining the issues set forth in this Article.

II. THE COMPLEMENTARITY AND ARTICLE 98(2) FIREWALLS

During the U.N. negotiations leading to the Rome Statute, governments gravitated towards a fundamental procedure that would permit national courts the initial opportunity to investigate individuals within their jurisdiction who are actual or potential targets of ICC investigation.⁷⁸

⁷⁴ Hakan Friman, *Investigation and Prosecution*, in THE INTERNATIONAL CRIMINAL COURT 491, 494-512, 515-38 (Roy S. Lee et al. eds., 2001); 2 Olivier Fourmy, *Powers of the Pre-Trial Chambers*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1207, 1208 & 1215-28 (Antonio Cassese et al. eds., 2002); 2 Guiliano Turone, *Powers and Duties of the Prosecutor*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra*, at 1137, 1148 & 1140-80; 2 Salvatore Zappala, *Right of Persons During an Investigation*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra*, 1181, 1181-83 & 1195-1202.

⁷⁵ Rome Statute, *supra* note 1, art. 77.

⁷⁶ It would be a political non-starter for U.S. ratification purposes to expose American defendants before the ICC to the risk of a maximum sentence of death by execution, which is not possible under the Rome Statute anyway and cannot conceivably become one given the abolitionist policies of a large number of the State Parties towards the death penalty. For a discussion of the death penalty in the context of international extradition law and how the United States has addressed it in that context, see M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 621-38 (5th ed. 2007).

⁷⁷ Bellinger Remarks, *supra* note 4; WHITLEY, *supra* note 5; The American Non-Governmental Organization Coalition for the International Criminal Court, Statements of the U.S. Presidential Candidates on the International Criminal Court, http://www.amicc.org/docs/2008_Candidates_on_ICC.pdf (last visited Aug. 5, 2008).

⁷⁸ SCHABAS, *supra* note 17, at 174-86; Iain Cameron, *Jurisdiction and Admissibility Issues Under the ICC Statute*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 86 (Dominic McGoldrick et al. eds., 2004); Frederik Harhoff & Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 664 (Roy S. Lee et al. eds., 2001); 1 John T. Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY,

Initially, this procedure was articulated as one of admissibility on a case-by-case basis. Articles 17 and 19 of the Rome Statute set forth the procedures for challenging the admissibility of an individual case already before the ICC and the determinations the ICC must make in order to overcome a challenge by a State, an accused, or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58. The primary criteria to sustain the inadmissibility of a case before the ICC are set forth in Article 17 and center on whether the State concerned is investigating or prosecuting the case over which it has jurisdiction.⁷⁹ If that State is found to be “unwilling or unable genuinely to carry out the investigation or prosecution,” then the ICC may reach the decision to exercise personal jurisdiction over the individual.⁸⁰

Non-party States are fully entitled to take advantage of the complementarity procedures to avoid the prosecution by the ICC of their nationals, who may be charged with commission of atrocity crimes on the territory of a State Party to the Rome Statute.⁸¹ If the non-party State fails to act at all, or is unwilling to act, or is genuinely unable to act and thus fails the admissibility test, any attempt by the ICC to exercise personal jurisdiction over the non-party State national nonetheless will be highly problematic and depend on the location of the individual. Jurisdiction will depend on whether he or she is in custody in a State Party jurisdiction; whether the Security Council has referred the entire situation to the ICC;⁸² and whether the non-party State has consented to ICC jurisdiction.⁸³

Before the admissibility of a particular case even arises as an issue before the ICC, a nation has the opportunity to seize full jurisdiction over any cases that might attract ICC interest in a situation under investigation by the Court pursuant to a State Party referral or an investigation initiated by the Prosecutor. This preliminary procedure originally was introduced to

supra note 74, at 671-84; 1 Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, *supra* note 74, at 607-08; Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20, 44-63 (2001).

⁷⁹ [T]he Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute

Rome Statute, *supra* note 1, art. 17(1).

⁸⁰ *Id.*

⁸¹ Kaul, *supra* note 78, at 607-08; Holmes, *supra* note 78, at 671-84.

⁸² Rome Statute, *supra* note 1, art. 13(b).

⁸³ *Id.* art. 12(3).

the U.N. talks by the U.S. delegation, and ultimately it was codified as Article 18 of the Rome Statute.⁸⁴ Article 18 effectively precludes the ICC from exercising jurisdiction for an entire atrocity crimes situation over “nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 [genocide, crimes against humanity, war crimes, and, if it achieves definitional and operational status by amendment to the Rome Statute, the crime of aggression]”⁸⁵ But this deferral to national jurisdiction achieves permanence only if the State, whether as a State Party or non-party State, acts in good faith and does not give the Prosecutor and ultimately the Pre-Trial Chamber cause to question the ability or willingness of the State to investigate those within its jurisdiction. An adverse judgment by the Pre-Trial Chamber can be appealed by the State concerned to the Appeals Chamber of the ICC for final judgment as to the jurisdiction of the ICC.⁸⁶

With respect to U.S. constitutional issues, the advantage of the Article 18 procedure is that the United States, either as a non-party State or State Party to the Rome Statute, can choose to preserve all constitutional guarantees by acting in accordance with Article 18, and by investigating and, if merited, prosecuting nationals or others within its jurisdiction strictly in U.S. courts, criminal or military. If it chooses this path, then the ICC would have no jurisdiction over U.S. nationals with respect to the entire atrocity crimes situation under investigation by the ICC that has triggered that particular Article 18 process.

The whole thrust of the negotiations leading to the Rome Statute was to offer the opportunity to any State, including State Parties and non-party States, to undertake their own domestic criminal procedures and associated domestic constitutional guarantees, if applicable, in preference to ICC jurisdiction.⁸⁷ Obviously, where the State fails to seize that opportunity or

⁸⁴ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 87-89.

⁸⁵ Rome Statute, *supra* note 1, art. 18; Holmes, *supra* note 78, at 681-82 (discussing Article 18 procedures); Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 87-90 (explaining how Article 18 operates under principles of complementarity by requiring that the ICC defer to national legal systems that investigate and prosecute those who commit atrocity crimes within such nation’s jurisdiction); *see also* SCHABAS, *supra* note 17, at 278-80 (examining admissibility of cases pursuant to Articles 18 and 19 of the Rome Statute).

⁸⁶ Rome Statute, *supra* note 1, art. 18(4).

⁸⁷ For background on the general objectives and statutory drafting of the complementarity principle, *see generally* 1998 Senate Hearing, *supra* note 21, at 15; M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT 98-101 (2005); SCHABAS, *supra* note 17, at 171-86; Phillippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*,

it demonstrates an inability or unwillingness to perform at the national level, then the Rome Statute cedes the investigative mandate to the ICC. This would have clear consequences for a State Party, which then would have to cooperate with the ICC's requests.⁸⁸ A non-party State could refuse to cooperate with the ICC, in which case its nationals suspected of committing atrocity crimes would remain at risk of arrest and trial before the ICC if they are found on foreign territory and, either by performance of an obligation of a State Party or by voluntary act of a non-party State, are arrested and transferred to The Hague.

Whether or not the United States ultimately joins the ICC, if a case involving a U.S. citizen or an individual falling within U.S. jurisdiction ultimately were to be investigated and prosecuted before the ICC, that would be a signal of failure or abandonment of complementarity by the United States and its forfeited opportunity to conduct a strictly national investigation and prosecution. If the United States were to become a State Party to the Rome Statute, then a voluntary decision by the U.S. government to deprive a national of a U.S. trial under U.S. law by refusing to investigate and, if merited, prosecute the person in U.S. courts would not be inconsequential to any federal judicial review of an individual's claim (say, as a U.S. citizen) that he or she should not be transferred to the ICC in the absence of a U.S. investigation. However unlikely it may seem, a similar claim could be made if the United States as a non-party State were to act in such a manner and nonetheless plan to transfer a U.S. citizen to the ICC.

A supplemental firewall is the Article 98(2) non-surrender agreement, a type of agreement which the United States can negotiate to prevent the surrender of certain U.S. nationals or other individuals falling within its national jurisdiction to the ICC, as can any other State to similarly protect such individuals from being surrendered to the ICC.⁸⁹ Article 98(2) was originally negotiated by the U.S. delegation as a means of preserving the enforceability of Status of Forces Agreements (SOFAs) covering its hundreds of thousands of soldiers deployed overseas at any one time.⁹⁰

in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 74, at 81-85.

⁸⁸ Rome Statute, *supra* note 1, arts. 86-102.

⁸⁹ *Id.* art. 98(2) ("The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.").

⁹⁰ The use of the term "sending State" derives from the original American effort, very early in the ICC negotiations, to preserve the rights accorded to its official personnel covered by status of forces agreements (SOFAs) between the United States and scores of foreign governments and

Over the years of talks the provision broadened to include agreements between two or more States covering all official personnel that the “sending State” deploys to the “receiving State.”⁹¹ However, the hundred or so Article 98(2) non-surrender agreements entered into by the United States with other nations⁹² extend their coverage to *all* U.S. nationals, and not just official personnel sent by the U.S. government to the receiving foreign country. ICC judges may find them unenforceable, at least with respect to private U.S. nationals, if they are used to shield certain individuals from the jurisdiction of the Court.⁹³

The Clinton Administration regarded Article 98(2) authority as something it would use sparingly in the future, while classifying the many existing SOFAs as agreements qualifying for Article 98(2) status in any case.⁹⁴ The Bush Administration saw the Article 98(2) option as a means of insulating Americans from the reach of the ICC throughout the world, regardless of their personal status, whether as official personnel of the U.S. government, tourists, businessmen, journalists, or mercenaries, and launched an aggressive campaign to persuade and compel nations to enter

Status of Mission Agreements (SOMAs) that typically are negotiated in connection with United Nations or multinational military operations. That requirement was advanced by US negotiators during initial discussions about a permanent international criminal court with other governments in 1995. The objective was to ensure that nothing we would negotiate for the establishment of the ICC would undermine the protection and procedures regarding criminal investigations that US personnel have under SOFAs and SOMAs, which exist in part to achieve the purpose of criminal investigation and prosecution of US personnel deployed in foreign jurisdictions. Thus, our objective was not to achieve immunity per se for such individuals, but to ensure that they would be subject only to the judicial procedures set forth in the relevant SOFA or SOMA, and in no other treaty.

David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 341 (2005).

⁹¹ *Id.* at 339.

⁹² The White House, Memorandum for the Secretary of State: Presidential Determination on Waiving Prohibition on United States Military Assistance With Respect to Comoros and Saint Kitts and Nevis (Nov. 22, 2006), <http://www.whitehouse.gov/news/releases/2006/11/20061122-5.html>; U.S. Department of State, Taken Questions: Countries Who Have Signed Article 98 Agreements with the United States (June 12, 2003), <http://www.state.gov/r/pa/prs/ps/2003/21539.htm> (“A total of 38 countries have publicly announced that they have concluded Article 98 or Non-Surrender Agreements with the United States . . . [s]everal other countries have signed but have asked us not to identify them as signers. We are respecting their wishes.”); Press Statement, Richard Boucher, Spokesman, U.S. Department of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> (“On May 2, 2005, Angola became the 100th country to conclude such an agreement with the United States. These bilateral agreements, which are provided for under Article 98 of the Rome Statute, ensure that U.S. persons will not be surrendered to the International Criminal Court without our consent.”).

⁹³ Scheffer, *supra* note 90, at 352.

⁹⁴ *Id.* at 353; Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 98 (2002).

into bilateral agreements with the United States.⁹⁵ The Article 98(2) agreements signal a choice by the United States, currently as a non-party State, to create conditions whereby a U.S. national who might be suspected of committing atrocity crimes on foreign territory would be subject either to the jurisdiction of the foreign courts of the nation in which he or she is located or subject to U.S. jurisdiction, but not to ICC jurisdiction.

There are two considerable problems with the agreements negotiated by the Bush Administration. The first problem is that the Administration seeks to extend the agreements to protect all U.S. nationals regardless of their official status. Article 98(2) of the Rome Statute refers to coverage of persons of the sending State, which was intended to cover official personnel of the sending State, but not other citizens who are not of official status.⁹⁶ The second problem is the appearance of impunity by the U.S. government. The Article 98(2) agreements lack any requirement that in the event an American citizen on the receiving State's territory is sought by the ICC for alleged commission of an atrocity crime, the United States would investigate and conduct any necessary prosecution of that individual in U.S. courts, obligating the receiving State to extradite him or her to the United States for that purpose.⁹⁷

If, however, the United States were to use the opportunity afforded by an Article 98(2) agreement to gain physical custody of the national and investigate such person and, if merited, prosecute him or her before U.S. courts, then all constitutional guarantees would be preserved in that criminal proceeding. A decision by U.S. authorities not to exercise this option when the opportunity presents itself, and thus expose the individual to capture by and trial before the ICC, would appear to be a forfeiture by the U.S. government of the U.S. national's full panoply of constitutional rights and protections before U.S. courts. Although Article 98(2) non-surrender agreements are only partially relevant to a constitutional inquiry, such agreements are one more way the U.S. government, through use of a politically sophisticated strategy, could achieve significant exclusivity over the fates of individuals at risk of being investigated by the ICC for the commission of atrocity crimes. With that exclusivity would arrive full constitutional rights and protections before U.S. courts. Unfortunately, the Bush Administration's strategy of overreach with such agreements may

⁹⁵ See John R. Bolton, Under Sec'y for Arms Control and Int'l Security, U.S. State Dep't, *American Justice and the International Criminal Court* (Nov. 3, 2003) (transcript available from The American Non-Governmental Organizations Coalition for the ICC (AMICC)), available at http://www.amicc.org/docs/Bolton11_3_03.pdf.

⁹⁶ Scheffer, *supra* note 90, at 339-42, 346.

⁹⁷ *Id.* at 352-53.

have seriously hindered the original goals of narrowly targeted Article 98(2) non-surrender agreements.

The complementarity firewall will only work to ensure full application of U.S. constitutional rights in American, as opposed to ICC, investigations and trials if U.S. law substantially mirrors the crimes falling within the jurisdiction of the ICC. Currently, that is not the case. There are significant gaps in U.S. criminal law regarding many of the crimes against humanity and many of the war crimes set forth in Articles 7 and 8, respectively, of the Rome Statute.⁹⁸ That means that even if the United States, either as a non-party State or as a State Party to the Rome Statute, was willing to exercise its complementarity privilege to investigate a U.S. national for commission of an atrocity crime under scrutiny by the ICC, it may not have the *ability* to do so. While such gaps in federal criminal law should be of serious concern and eliminated to defeat any claim of inability, it remains highly unlikely that the United States would satisfy the test for “inability in a particular case” under Article 17(3) of the Rome Statute.⁹⁹ There would have to be “a total or substantial collapse or unavailability of its national judicial system” as the rationale for why the United States “is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”¹⁰⁰ The more plausible concern for the United States would be the unwillingness test set forth in Article 17(2) of the Rome Statute, which could become a considerable issue if there are gaps in federal criminal law that provide a de facto “shield” for suspects and discourage efforts to bring them to justice domestically.¹⁰¹

A good example would be the crime against humanity of persecution,¹⁰² which covers what is commonly described as “ethnic cleansing.”¹⁰³ There is no basis in U.S. law to prosecute the crime of persecution, which encompasses ethnic cleansing, as a crime against

⁹⁸ *No Safe Haven: Accountability for Human Rights Violations in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the Senate Comm. on the Judiciary*, 110th Cong. (2007) (statement of David Scheffer, Mayer Brown/Robert A. Helman Professor of Law, Northwestern University School of Law, Chicago, Illinois), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3028&wit_id=6778 [hereinafter *Accountability Hearing*]; see Michael Hatchell, *Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J. OF INT’L & COMP. L. 183, 187-88 & 208 (2005) (examining the approach of five countries that ratified the Rome Statute and how these approaches may instruct the United States).

⁹⁹ Rome Statute, *supra* note 1.

¹⁰⁰ *Id.* art. 7(h).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., Prosecutor v. Milan Babic, Case No. IT-03-72-A, Judgement, ¶¶ 29-35 (July 18, 2005).

humanity with all of the accompanying elements pertaining to magnitude and planning.¹⁰⁴ ICC judges could determine that despite a U.S. willingness to investigate certain actions by a U.S. national, U.S. law does not criminalize such conduct. Indeed, U.S. law may not even provide jurisdiction over the U.S. national who commits such an atrocity crime on foreign territory. While efforts may be made by a U.S. Attorney to prosecute the crime of murder or another common crime found in Title 18, such efforts may be viewed by the ICC judges as insufficient to address the actual crime in question. The definition and elements of the crime against humanity of persecution simply do not exist in the U.S. Code.

Without the ability to exercise jurisdiction over any atrocity crimes allegedly committed by U.S. nationals anywhere in the world, the United States would forfeit its privilege to apply all U.S. constitutional due process protections, including the right to trial by jury, for the benefit of U.S. nationals sought by the ICC for the commission of crimes that are not codified in U.S. Code Titles 10 and 18. This is an issue of great importance whether or not the United States ratifies the Rome Statute. Even as a non-party State, the United States is entitled to the complementarity privilege if the ICC seeks to investigate and seek the arrest of a U.S. national for commission of an atrocity crime on non-U.S. territory. Therefore, it is in the highest interest of the United States to modernize its criminal codes, civilian and military, so that it has the ability to investigate and prosecute U.S. nationals before U.S. courts for the full range of atrocity crimes falling within the subject matter jurisdiction of the ICC. Such an option would neutralize constitutional concerns about whether the ICC precisely replicates all of the due process rights found in U.S. criminal trials, and it would preserve the right to a jury trial for any U.S. national who merits prosecution for any such atrocity crime. If the United States were to move towards ratification of the Rome Statute, then such amendments to the federal criminal and military codes would be essential components of the implementing legislation required for such ratification.

III. IS AN ARTICLE III COURT ESSENTIAL FOR PROSECUTION OF AMERICANS FOR ATROCITY CRIMES?

The International Criminal Court prosecutes *international* crimes of the most significant character—genocide, crimes against humanity, war crimes and, potentially, aggression—and only when committed on scales of magnitude, substantiality, and often transnational character typically not found in domestic cases.¹⁰⁵ The reality of the ICC's subject matter

¹⁰⁴ *Accountability Hearing*, *supra* note 99, para. 18.

¹⁰⁵ BASSIOUNI, *supra* note 87, at 148-57.

jurisdiction over atrocity crimes has a critical bearing on whether U.S. ratification of the Rome Statute would violate Article III, Section 1 of the Constitution which provides, in relevant part: “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish.”¹⁰⁶

The Rome Statute has established an international criminal court which the United States, if it were to become a State Party, would be obligated to help pay for,¹⁰⁷ cooperate with,¹⁰⁸ elect judges and the Prosecutor to apply justice at,¹⁰⁹ and, in certain circumstances, allow for the prosecution of U.S. citizens before, the ICC.¹¹⁰ The judicial power of the ICC, however, is *not* that of the United States. It is the power of an independent international criminal court, an international organization with “international legal personality”¹¹¹ and bound to no government’s direction or control,¹¹² established by treaty among the sovereign nations of the world for a distinctly international purpose. If the United States were to ratify the treaty establishing the ICC, it would be an exercise of the Article II treaty power¹¹³ to build a uniquely-conceived international court and not an exercise of the Article III, Section 1 power to establish a domestic court.

But serious considerations remain. “Article III, [Section] 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating’ constitutional courts.”¹¹⁴ Thus, “a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal [may] impermissibly threaten[] the institutional integrity of the Judicial Branch.”¹¹⁵ This is particularly so when “the right being adjudicated is not of congressional creation,” but protected in the Constitution.¹¹⁶ While these affirmations by the Supreme Court are unassailable, they also point to why the establishment of the ICC and U.S. participation in it are distinguishable and thus should be unconstrained by the Article III, Section 1 authority.

¹⁰⁶ U.S. CONST. art. III, § 1.

¹⁰⁷ Rome Statute, *supra* note 1, art. 115.

¹⁰⁸ *Id.* arts. 86-102.

¹⁰⁹ *Id.* arts. 36, 42.

¹¹⁰ *Id.* arts. 12, 25.

¹¹¹ *Id.* art. 4(1).

¹¹² *Id.* arts. 40(1), 42(1).

¹¹³ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 4-5 & 6-33 (2d ed. 1988).

¹¹⁴ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *Nat’l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

¹¹⁵ *Id.* at 851.

¹¹⁶ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (plurality opinion).

The ICC was neither conceived nor established for the purpose of “emasculating constitutional courts.” The subject matter jurisdiction embodied in the Rome Statute consists exclusively of international crimes, only some of which are codified in U.S. law.¹¹⁷ These are crimes of concern to the entire international community, striking at the heart of humankind. Much of the subject matter jurisdiction in the Rome Statute, particularly crimes against humanity and some war crimes, does not exist in federal criminal law and even in U.S. military law, so there would be no transfer of jurisdiction of existing Article III power with respect to those crimes if the United States were to ratify the Rome Statute.¹¹⁸ Those atrocity crimes of ICC jurisdiction which currently can be prosecuted in U.S. courts, such as genocide¹¹⁹ and some war crimes,¹²⁰ nonetheless constitute international crimes of the most profound character. The complementarity principle of the Rome Statute, discussed above, preserves the Article III courts’ existing jurisdiction over these crimes, but also recognizes an alternative forum—one that is essentially inferior because of the complementarity principle—for adjudicating these crimes in the event U.S. prosecutors and courts fail to act or act so corruptly as to conduct sham trial proceedings. By virtue of ratifying the Rome Statute, the United States would consent to alternative jurisdiction to adjudicate a particular case by the treaty-based ICC. If and when Congress amends U.S. Code Titles 10 and 18 to fully embrace the atrocity crimes of the Rome Statute, such crimes would remain international crimes that are the sole focus of the ICC as an alternative and, for all intents and purposes, secondary forum to U.S. prosecution.

If in the future the Rome Statute were amended to incorporate into the ICC’s subject matter jurisdiction certain other crimes traditionally and commonly prosecuted by national courts, including U.S. courts, then there might be more reason to argue that Article III, Section 1 of the Constitution would complicate U.S. participation in the ICC, at least with respect to those particular crimes. For example, if the ICC were empowered to investigate and prosecute drug trafficking, terrorism, or offenses against internationally protected persons, then it would be duplicating the jurisdiction of Article III courts which have long prosecuted such actions as domestic crimes with international ramifications. There were serious

¹¹⁷ These crimes include: genocide, crimes against humanity, war crimes, and aggression. Rome Statute, *supra* note 1, arts. 5-8; *Accountability Hearing*, *supra* note 98.

¹¹⁸ *Accountability Hearing*, *supra* note 98.

¹¹⁹ 18 U.S.C.A. § 1091 (2008) (as amended by the Genocide Accountability Act of 2007, Pub. L. No. 110-151 (2007)).

¹²⁰ 18 U.S.C.A. § 2441 (2008) (as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)).

efforts prior to and during the Rome negotiations in 1998 to include drug trafficking and terrorism in the ICC's jurisdiction, but enough governments, including the United States, opposed the proposals, which were defeated.¹²¹ The U.S. delegation argued that existing multilateral treaties on drug trafficking¹²² and terrorism¹²³ would be undermined if jurisdiction were granted to the ICC.¹²⁴ A bedrock principle of these treaties is the "prosecute or extradite" principle, which has long been applied to strengthen national prosecutions of transnational crimes.¹²⁵ Nonetheless, the possibility remains that drug trafficking and terrorism may be resurrected as candidates for inclusion in the ICC's subject matter jurisdiction.¹²⁶ Pursuant to Article 121(5) of the Rome Statute, any State Party could refuse to be subject to ICC jurisdiction over any such crime that

¹²¹ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 47 n.7 (2002).

¹²² *E.g.*, Declaration of Cartagena Concerning the Production of, Trafficking in and Demand for Illicit Drugs, Feb. 15, 1990, T.I.A.S. 12,411, 1990 WL 484467; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, U.N. Doc. E/CONF.82/15, 1582 U.N.T.S. 95, *reprinted in* 28 I.L.M. 493 (revised Dec. 19, 1998); Convention on Psychotropic Substances, Aug. 16, 1976, 32 U.S.T. 543, 1019 U.N.T.S. 175; Single Convention on Narcotic Drugs, Dec. 13, 1964, 18 U.S.T. 1407, 520 U.N.T.S. 204.

¹²³ *See, e.g.*, Inter-American Convention Against Terrorism, June, 3, 2002, S. TREATY DOC. No. 107-18, 42 I.L.M. 19; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. No. 106-49, 39 I.L.M. 270 (2000); International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. TREATY DOC. No. 106-6, 37 I.L.M. 249 (1998); International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Feb. 20, 1977, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195.

¹²⁴ *Comments of the United States of America Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court*, 14-18, *delivered to the General Assembly*, U.N. Doc. A/AC.244/1/Add.2 (Apr. 3, 1995). This was the first extensive set of written views of the U.S. Government regarding the draft statute of an international criminal court prepared by the International Law Commission in 1994, and which formed the initial basis for U.N. Member State negotiations commencing in 1995. The U.S. Government explained on these pages its primary objections to the inclusion of drug crimes and terrorism in the subject matter jurisdiction of the International Criminal Court.

¹²⁵ BASSIOUNI, *supra* note 76, 9-10, 15, 424, 432, 441-42, 448, & 461; *see also* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (providing a comprehensive analysis of the duty to extradite or prosecute).

¹²⁶ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10 (July 17, 2005); Rome Statute, *supra* note 1, Resolution E; Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 47 n.7 (2002).

is added by amendment to the Rome Statute.¹²⁷ The United States could exercise that prerogative and thus avoid contentious challenges regarding the Article III, Section 1 power, and even stipulate that policy choice in a declaration attached to its ratification of the Rome Statute.

This line of reasoning is not meant to suggest that Congress refrain from amending U.S. Code Titles 10 and 18 to incorporate all of the atrocity crimes framing the subject matter jurisdiction of the Rome Statute. We strongly believe it should do so, preferably as implementing legislation prior to ratification. If federal and military courts were empowered to adjudicate the full range of atrocity crimes, these crimes' unique international character should compel the United States to join with other nations to ensure their investigation and prosecution in both national courts and, if it proves necessary, before the ICC. By using the treaty power invested by the Constitution to achieve that objective, the President would ensure the enforcement of essentially the same law before federal and military courts and, as a strictly secondary step, before the ICC.

Another consideration is the reality that not all crimes committed in the United States by U.S. citizens warrant a trial before an Article III court.¹²⁸ Typically, U.S. citizens are afforded this right, and the Supreme Court has held multiple times that ordinary civilians should not be tried before a military court marshal or by a military tribunal.¹²⁹ However, where U.S. citizens are spies or unlawful combatants, the right to appear before an Article III court may be lost. For instance, in *Ex parte Quirin*,¹³⁰ several spies, one of whom was a U.S. citizen, who had entered the United States on behalf of Germany to destroy war industries and facilities in the United States were denied the writ of habeas corpus. The Supreme Court held that

¹²⁷ Rome Statute, *supra* note 1, art. 121(5) provides:

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

¹²⁸ See notes 201-09 and accompanying text.

¹²⁹ *E.g.*, *Ex parte Milligan*, 71 U.S. 2 (1866) (A Confederate sympathizer was convicted for sedition in a military tribunal, a non-Article III court. The court granted his habeas petition and ordered his release. The Supreme Court seemed to have been persuaded that a military court was not proper by the fact that Milligan was not a resident of the rebellious states and was not involved in military action.); *cf.* *Reid v. Covert*, 354 U.S. 1 (1956) (holding that two civilian women married to servicemen were improperly convicted of murder before respective court marshal proceedings).

¹³⁰ 317 U.S. 1 (1942).

a military commission was lawfully constituted and could lawfully try the petitioners.¹³¹

A service member in the case of *United States v. Keaton* appealed his conviction of assault with intent to commit murder, challenging that his trial was by court-martial without the full protections of the U.S. Constitution.¹³² The crime occurred while the petitioner was stationed in the Philippines.¹³³ The petitioner's victim was a fellow service member.¹³⁴ Although that fact alone would have been enough for the court to affirm the court-martial decision, the court further discussed whether a United States citizen could be tried abroad by the United States in a non-Article III court.¹³⁵ The *Keaton* court interpreted Article I, Section 8, Clause 14 of the Constitution, empowering Congress "To make Rules for the Government and Regulation of the land and naval Forces," as enabling Congress to adjudicate service personnel through court martial proceedings.¹³⁶ The court reasoned that there are numerous "offenses which could be committed by a serviceman overseas for which *he could not be returned to the United States for trial, nor be given the benefits of indictment and trial by jury,*" and finally concluded, "[F]oreign trial by court-martial of all offenses under the Code committed abroad, including those which could be tried by Article III courts if committed in this country, is a *valid* exercise of constitutional authority."¹³⁷

Similarly, in *Bell v. Clark*,¹³⁸ a serviceman court-martialed for the rape of a German citizen while stationed in Germany petitioned for a writ of habeas corpus. Bell's theory was that he should have all the protections of an Article III court in his trial because his crime was not connected to his military service. The court disagreed, reasoning that because the NATO Status of Forces Agreement was a constitutional exercise by Congress of its power under Article I, Section 8, Clause 14, the "statute did not clothe the serviceman with any vested privilege."¹³⁹

The United States routinely extradites individuals to non-Article III courts, as discussed in Part IV below. Foreign courts and international tribunals, such as the ICTY and ICTR, do not comport with Article III; they are neither inferior to the Supreme Court nor are they established by

¹³¹ *Id.* at 48.

¹³² *United States v. Keaton*, 41 C.M.R. 64 (C.M.A. 1969).

¹³³ *Id.* at 65-66.

¹³⁴ *Id.* at 67.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (emphases added).

¹³⁸ 437 F.2d 200 (4th Cir. 1971).

¹³⁹ *Id.* at 203.

Congress. Nonetheless, Congress did not legislatively prohibit prosecution of U.S. citizens before the ICTY or ICTR, however hypothetical the possibility of such a prosecution. Such a prosecution could have occurred before either tribunal if the circumstances had warranted. There is no documentary evidence that Congress factored in the risk of prosecution of a U.S. national before either the ICTY or ICTR when considering acceptance of the ICTY and ICTR Statutes. Nevertheless, the possibility of such prosecution clearly existed and was never denied in congressional deliberations. The experience described in Part IV(C) of Elizaphan Ntakirutimana, who was not a U.S. citizen but was an immigrant protected by his green-card status, is instructive about the willingness of federal courts to extradite an indictee to the ICTR or, if the opportunity had arisen, to the ICTY.

While the Article III, Section 1 mandate of the Constitution presents tempting arguments for doubters of American ratification of the Rome Statute, we hope we have introduced some compelling reasons why the ICC would not contravene this particular constitutional requirement with respect to the U.S. judiciary. In the twenty-first century, when the need to effectively investigate and prosecute perpetrators of atrocity crimes is irrefutable and yet so difficult to achieve, the Constitution should be interpreted pragmatically, with our vision pointed to the future and in a manner that preserves our constitutional principles of both domestic and international justice. The discussion in this Part and in Parts IV and V below seek to accomplish that aim.

IV. APPLICATION OF THE ARTICLE II TREATY POWER

The investigation and prosecution of atrocity crimes necessarily requires transnational judicial endeavors. There is a compelling logic behind governments entering into a treaty relationship that establishes a criminal court to bring to justice the perpetrators of the most widespread and destructive crimes known to humankind and often of cross-border character and consequence.¹⁴⁰ It is a legitimate subject of treaties, one of which the United States joined with other sovereign powers to negotiate and complete. That treaty-making process, culminating in the Rome Statute, presents the U.S. government with the opportunity of joining an international effort to prosecute and, one hopes, deter atrocity crimes in coming decades. It is a matter in which the United States has a legitimate

¹⁴⁰ M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 495-99 (2003); Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 74, at 10-18.

and abiding interest and that goes to the core of upholding the rule of law in a dangerous world. Would the President, following adoption of all requisite implementing legislation by Congress and approval of ratification by the Senate, or Congress pursuant to Congressional-Executive Agreement, comply with the Constitution by committing the United States to a treaty for that purpose?

Article II, Section 2 of the Constitution empowers the President “by and with the Advice and Consent of the Senate, to make treaties provided two thirds of the Senators present concur.”¹⁴¹ Treaties are binding on the various states and, under the Supremacy Clause, have the same force of law as a federal statute.¹⁴² Where a later-in-time statute conflicts with a treaty, the statute takes precedence over the treaty for purposes of domestic law.¹⁴³ Where a later-in-time treaty conflicts with a statute, the treaty takes precedence over the statute.¹⁴⁴

Though the Rome Statute presents a *sui generis* court for the United States to examine pursuant to the treaty power, it is instructive to examine how far federal courts have historically gone to validate foreign criminal proceedings that involve U.S. citizens.¹⁴⁵ There is nothing in the sweep of constitutional law explicitly precluding the United States from (1) entering an international agreement, either an extradition treaty or a treaty such as the Rome Statute, to provide for the criminal trial in a foreign court of a U.S. national who has committed a crime abroad even if that court’s procedures fail to meet all U.S. constitutional standards; or (2) enforcing the judgment of a foreign court even if it lacked some of the U.S. constitutional

¹⁴¹ U.S. CONST. art. II, § 2, para. 2.

¹⁴² U.S. CONST. art. VI, cl. 2; see *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled on other grounds by* *United States v. Percheman*, 32 U.S. 51 (1833).

¹⁴³ *Cook v. United States*, 288 U.S. 102, 120 (1933).

¹⁴⁴ *Whitney v. Robertson*, 124 U.S. 190 (1888); *Edye v. Robertson*, 112 U.S. 580 (1884); *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870) (“A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty . . .”); see RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 814-15 (4th ed. 2007).

¹⁴⁵ See, e.g., *Charlton v. Kelly*, 229 U.S. 447 (1913); *Wright v. Henkel*, 190 U.S. 40 (1903); *In re Chan Seong-I*, 346 F. Supp. 2d 1149 (D.N.M. 2004); *Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2004); *In re Munguia*, 294 F. Supp. 2d 893 (S.D. Tex. 2003); *In re Sacirbegovic*, 280 F. Supp. 2d 81 (S.D.N.Y. 2003); *DeSilva v. DiLeonardi*, 125 F.3d 1110 (7th Cir. 1997); *Bovio v. United States*, 989 F.2d 255 (7th Cir. 1993); *In re Russell*, 805 F.2d 1215 (5th Cir. 1986); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986); *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir. 1980); *In re Mainero*, 990 F. Supp. 1208 (S.D. Cal. 1997); Brief of Respondent-Appellee at 1, *Clarey v. Gregg*, 138 F.3d 764 (9th Cir. 1998) (No. 96-55193), 1996 WL 33485532 (“Mexico requests the extradition of appellant David Lee Carey, a citizen of the United States . . .”).

guarantees of due process. Federal courts have rejected the notion that “each element of due process as known to American criminal law must be present in a foreign criminal proceeding before Congress may give a conviction rendered by a foreign tribunal binding effect.”¹⁴⁶ They have also held that “the [F]ifth [A]mendment permits the United States [pursuant to treaty] to enforce the sentences meted out by foreign courts, even if those sentences were ‘unconstitutionally’ procured.”¹⁴⁷

A. STATUS OF FORCES AGREEMENTS

The United States has regularly used the treaty power to permit foreign sovereigns to exercise criminal jurisdiction over American citizens who serve in the Armed Forces abroad.¹⁴⁸ A sovereign nation generally has jurisdiction over the crimes committed within its territory.¹⁴⁹ A longstanding rule of war, however, is that occupying troops are exempt from the criminal jurisdiction of the enemy country.¹⁵⁰ The Supreme Court, in *Dow v. Johnson*, explained that it would be singularly absurd to permit an officer or soldier of an invading army to be tried by his enemy.¹⁵¹ Following World War II, U.S. troops occupied or were stationed in certain countries with the host country’s consent.¹⁵² Because such a host country was no longer an active enemy, the reasoning in providing such occupying or stationed forces immunity from jurisdiction did not apply. It became necessary and desirable for jurisdiction over such troops to be negotiated

¹⁴⁶ *Rosado v. Civiletti*, 621 F.2d 1179, 1197 (2d Cir. 1980).

¹⁴⁷ *Pfeifer v. U.S. Bureau of Prisons*, 468 F. Supp. 920, 924 (S.D. Cal. 1979).

¹⁴⁸ *See, e.g.*, *Wilson v. Girard*, 354 U.S. 524 (1957); *Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954); *United States v. Dadenhead*, 34 C.M.R. 51 (C.M.A. 1963); *United States v. Hutcherson*, 29 C.M.R. 770 (A.F.B.R. 1960); *United States v. Sinigar* 20 C.M.R. (C.M.A. 1955); *cf. Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl. 1970) (holding that a soldier charged with robbery committed in Germany, while he stationed there, was properly tried by U.S. court martial, under jurisdiction provided by the NATO SOFA).

¹⁴⁹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965).

¹⁵⁰ In part, immunity for members of the armed forces is based on the doctrine of sovereign immunity—a foreign nation will not be hauled into a foreign court unless it submits to such a court’s jurisdiction. 17 A.L.R. FED. 725, at § 5 (1973). Members of the armed forces, while not representatives of the sovereign in the same sense as a head of state is a representative, cannot be said “to be totally ‘nonrepresentative’ of the sovereign.” *Id.*

¹⁵¹ *Dow v. Johnson*, 100 U.S. 158, 180 (1879).

¹⁵² *See* JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS AND MODERN INTERNATIONAL LAW* 15 (1992) (describing the peacetime U.S. military presence following World War II around the world).

and established in a Status of Forces Agreement (SOFA).¹⁵³ For example, the United States and other members of the North Atlantic Treaty Organization entered into a SOFA¹⁵⁴ which has served as a model for SOFAs with other countries.¹⁵⁵ There are no less than seventy-five SOFAs (including “status of military personnel” and “status of military and civilian personnel” agreements) to which the United States is a party,¹⁵⁶ in addition to the NATO SOFA, which has twenty-five State members in addition to the United States.¹⁵⁷

A SOFA generally provides for both exclusive jurisdiction and concurrent jurisdiction.¹⁵⁸ The sending country generally retains exclusive jurisdiction over criminal acts that are crimes under its laws, but not under the laws of the host country.¹⁵⁹ For offenses that are crimes under the laws of both the sending country and the host country, there is concurrent jurisdiction.¹⁶⁰ Furthermore, the sending country has primary concurrent jurisdiction over certain offenses involving the property or persons of U.S. forces or the United States and for offenses that are committed in the line of duty.¹⁶¹ Other common crimes committed off-duty on the foreign territory of the host country generally fall under the primary jurisdiction of the host country and its local criminal courts, pursuant to the terms of the particular SOFA.

Various SOFAs and SOFA-like treaties have been held to be constitutional by U.S. courts.¹⁶² The leading case on this issue is *Wilson v.*

¹⁵³ James S. Fraser, *Some Thoughts on Status of Force Agreements*, 3 CONN. L. REV. 335, 335 (1970).

¹⁵⁴ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

¹⁵⁵ Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 23.

¹⁵⁶ U.S. DEPARTMENT OF STATE, TREATIES IN FORCE, SECTION 1: BILATERAL TREATIES (2007), available at <http://www.state.gov/documents/treaties/83046.pdf> (follow “bilaterals” hyperlink).

¹⁵⁷ NATO SOFA, *supra* note 154.

¹⁵⁸ This is true for the NATO SOFA. *See id.* art. VII; *Holmes v. Laird*, 459 F.2d 1211, 1212-13 (D.C. Cir. 1972); *see* Richard J. Erikson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 140-41 (1994) (discussing that the purpose of a SOFA is to provide for shared jurisdiction and highlighting the example of this in the NATO SOFA).

¹⁵⁹ Donald T. Kramer, *Criminal Jurisdiction of Courts of Foreign Nations over American Armed Forces Stationed Abroad*, 17 A.L.R. FED. 725, § 2[a] (1973); *see* BASSIOUNI, *supra* note 76, at 96-97.

¹⁶⁰ Kramer, *supra* note 159, § 2[a].

¹⁶¹ *Id.*

¹⁶² *E.g.*, *Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968) (finding no merit in petitioner’s claim that a SOFA between the United States and Korea is unconstitutional because Korea had not waived jurisdiction in the SOFA over the offense petitioner

Girard, where the Supreme Court denied a habeas corpus petition of a serviceman indicted by Japan for causing death by wounding.¹⁶³ Serviceman Girard shot an empty case at a Japanese woman gathering spent ammunition cartridges and killed her.¹⁶⁴ The United States and Japan had in place a Security Treaty whereby the United States had jurisdiction over its service members who committed offenses arising out of their official duties.¹⁶⁵ Japan argued that Girard's action was not in the scope of his duties, but the United States waived jurisdiction nevertheless.¹⁶⁶ The Supreme Court held that there was no constitutional or statutory bar to the United States waiving jurisdiction that was original to Japan and which Japan had given to the United States pursuant to the agreement.¹⁶⁷

Another example, albeit at the district court level, is *Holmes v. Laird*, where two American service members petitioned for an injunction to prevent their surrender to Germany, where they had been convicted of crimes, and a declaratory judgment that such surrender would be invalid.¹⁶⁸ The Court held that "the controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them [the court] must move with circumspection appropriate when [it] is adjudicating issues inevitably entangled in the conduct of our international relations."¹⁶⁹ Because all of the criminal elements had occurred in Germany, absent some agreement, Germany as a sovereign nation "ha[d] exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consent[ed] to surrender its jurisdiction."¹⁷⁰

committed); *Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954) (finding no violation of soldier's constitutional rights in a French trial where, under a NATO SOFA, a Staff Judge Advocate was present at the trial and reported no violations); *see, e.g., Wilson v. Girard*, 354 U.S. 524 (1957) (finding no constitutional bar to surrendering an American to Japan in accordance with a Security Treaty between the United States and Japan); *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971) (finding the United States' Military Bases Agreement with the Philippines that, *inter alia*, provided for the jurisdiction of U.S. service members stationed there, constitutional).

¹⁶³ *Wilson v. Girard*, 354 U.S. 524 (1957).

¹⁶⁴ *Id.* at 525-26.

¹⁶⁵ *Id.* at 526-28.

¹⁶⁶ *Id.* at 529.

¹⁶⁷ *Id.* at 530.

¹⁶⁸ 459 F.2d 1211, 1214 (D.C. Cir. 1972).

¹⁶⁹ *Id.* at 1215 (citing *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383 (1959)).

¹⁷⁰ *Id.* at 1216 (citing *Wilson v. Girard*, 354 U.S. at 529; *Reid v. Covert*, 354 U.S. 1, 15 n.29 (1957)).

B. EXTRADITION TREATIES

A prominent example of using the treaty power to authorize the use of foreign courts for the prosecution of U.S. nationals is found in the widespread practice of extradition treaties.¹⁷¹ The Supreme Court has upheld the extradition of U.S. nationals to foreign courts even though the extradition treaty used for this purpose did not secure the full range of U.S. constitutional protections for such nationals in such foreign courts.¹⁷² The Supreme Court has held, “We are bound by the existence of an extradition treaty to assume that the trial will be fair.”¹⁷³ One scholar notes that in extradition cases:

[C]ourts follow a “rule of non-inquiry” and refrain from assessing the requesting government’s investigative, legal, and penal systems . . . Courts have applied the rule of non-inquiry in situations involving a wide variety of [prisoner] allegations, many of which, if proven, would violate due process were the United States the offending party . . . All circuits that have considered the issue have adopted the rule of non-inquiry, even when the defendant is a United States citizen.¹⁷⁴

Extradition proceedings are not criminal in nature, nor do they fall under Article III.¹⁷⁵ The role of the court is to independently review the extradition request, and make the following limited findings: (1) the accused person (the relator) is in fact the same person named in the request; (2) a valid extradition treaty exists between the U.S. and the requesting country; (3) the offense is extraditable, including satisfaction of dual criminality; (4) the facts establish probable cause that the relator committed

¹⁷¹ See BASSIOUNI, *supra* note 76, 58-61, 106-11.

¹⁷² *Neely v. Henkel*, 180 U.S. 109, 122-23 & 125 (1901) (affirming the extradition of a U.S. citizen to Cuba, even though Cuba would not guarantee the same rights, privileges, and immunities as provided by the U.S. Constitution). For an example of a lower court following this principle, see *Ahmad v. Wigen*, 726 F. Supp. 389, 410-20 (E.D.N.Y. 1989) (denying the habeas corpus petition of a U.S. citizen found extraditable to Israel, *inter alia*, because, even though some of Israel’s practices would fail U.S. due process standards, the country generally provides fair trials), *aff’d*, 910 F.2d 1063 (2d Cir. 1990).

¹⁷³ *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911).

¹⁷⁴ Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1205 (1991).

¹⁷⁵ *Martin v. Warden*, 993 F.2d 824, 828 (11th Cir. 1993) (“[T]he judiciary serves an independent review function delegated to it by the Executive and defined by statute.”); *Austin v. Healey*, 5 F.3d 598, 603 (2d Cir. 1993) (“Extradition magistrates do not exercise powers traditionally ‘reserved to Article III courts.’ To the contrary, the function performed by the judicial officer in certifying extraditability has not historically been considered an exercise of the ‘judicial power of the United States’ at all The judicial officer conducting an extradition hearing is said to act in a ‘non-institutional capacity by virtue of special authority.’”); see 18 U.S.C. § 3184 (codifying that the certification procedures of an extradition hearing are limited and based on probable cause determinations); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 478 (1987) (describing U.S. extradition procedures).

the actions alleged; and (5) the proceedings have complied with the treaty obligations.¹⁷⁶ Under the well-entrenched rule of non-inquiry, federal courts do not consider what due process the relator will face if extradited.¹⁷⁷ This is so even if the relator fears torture¹⁷⁸ or claims a denial of a fair trial.¹⁷⁹ If the relator is certified as extraditable, the Secretary of State makes the final determination as to whether the relator in fact will be extradited.¹⁸⁰

The few exceptions to the rule of non-inquiry are the “political offense exception,” if a treaty includes such a provision, and the so-called “Gallina exception.” The political offense exception may apply to protect a revolutionary against extradition for crimes against a State or for a typical crime that is incident to rebellion or war.¹⁸¹ Not every crime that touches

¹⁷⁶ See, e.g., *Sacirbey v. Guccioine*, No. 05 Cv. 2949 (BSJ)(FM), 2006 WL 2585561 (S.D.N.Y. Sept. 7, 2006).

¹⁷⁷ *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911); *Neely v. Henkel*, 180 U.S. 109, 122-23 & 125 (1901); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL EXTRADITION PROCEDURE: LAW OF THE UNITED STATES § 478 (1987) (describing U.S. extradition procedures). For a thoughtful analysis of the rule of non-inquiry, see Semmelman, *supra* note 174.

¹⁷⁸ *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, *reh'g en banc*, 386 F.3d 938 (9th Cir. 2004) (denying the habeas corpus petition of a Mexican citizen who the Secretary of State determined would be extradited to Mexico because, even though the citizen feared torture, neither the Torture Convention nor FARR Act created private rights that displaced the rule of non-inquiry); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), implemented by the Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105-277, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231) (FARR Act). See also BASSIOUNI, *supra* note 76, at 608 (“The surrender of a relator, whether a United States citizen or not, is unimpaired by the absence in the requesting state of those specific safeguards available in the United States legal system, and therefore no judicial inquiry into the requesting state’s legal system is permitted.”).

¹⁷⁹ *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1972) (denying the habeas corpus petition of a lawful U.S. resident found extraditable to Peru who feared an unfair trial there, the court explained: “With respect to appellant’s contention that upon his return to Peru he will be charged with, and tried for, other crimes distinct and unrelated to the offense with which he is now charged, we are not at liberty to speculate that the Republic of Peru will not recognize and live up to the obligations subsisting between it and the United States. Neither are we permitted to inquire into the procedure which awaits the appellant upon his return.”); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960) (denying the habeas corpus petition of a relator who was found extraditable to Italy even though he claimed his trial there in absentia was unfair).

¹⁸⁰ 18 U.S.C.A. § 3184 (2008).

¹⁸¹ *Ornelas v. Ruiz*, 161 U.S. 502 (1896) (affirming the magistrate’s denial of a habeas corpus petition where petitioners claimed that their offenses were committed in furtherance of a revolution, but where the magistrate was not clearly erroneous in finding that offenses were not solely of a political character); *Ex parte Mackin*, 668 F.2d 122 (2d Cir. 1981)

politics is swept into this exception's reach.¹⁸² Furthermore, courts do not consider whether the requesting country has political motivations behind an extradition request.¹⁸³

The Gallina exception has a potentially broad reach, but thus far has never been cited as a reason to prevent extradition.¹⁸⁴ In *Gallina v. Fraser*, the Second Circuit denied a relator's habeas petition, in part because, although the requesting country, Italy, had tried the relator in absentia and the relator thus had no opportunity to face his accusers, the federal court does not "inquire into the procedures which await the relator upon extradition."¹⁸⁵ The court reasoned that "the authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government."¹⁸⁶ However, in oft-quoted dicta, the court formed a hypothesis that a future case could exist where the relator "upon extradition, would be subject to procedures or punishment so

(affirming the magistrate judge's denial of extradition certification in response to the UK's request for extradition where petitioner was charged with the attempted murder of a British soldier because petitioner, a member of the Provisional Irish Republican Army, could avail himself of the political offense exception); *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (denying petitioner's habeas corpus petition because offenses were not of a political character. "American courts have uniformly construed 'political offense' to mean those that are incidental to severe political disturbances such as war, revolution and rebellion." *Id.* at 173). See also David Lieberman, Note, *Sorting the Revolutionary from the Terrorist: The Delicate Application of the Political Offenses Exception*, 59 STAN. L. REV. 181, 185-211 (2006) (analyzing the "incidence test"—whether the act occurred during a "revolt, disturbance, or uprising" and whether the act was "incidental to the uprising or . . . formed part of it," *id.* at 188-89); R. Stuart Phillips, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for Its Future*, 15 DICK. J. INT'L L. 337, 340-45 (1997) (analyzing the political offense exception: "The political offense exception was created to protect dissidents from judicial retribution for their political activities." *Id.* at 340).

¹⁸² For instance, financial fraud involving political corruption is outside the exception. See, e.g., *Koskotas v. Roche*, 931 F.2d 169, 170-73 (1st Cir. 1991); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1191-92 (5th Cir. 1971). The exception has been denied to former government officials. See, e.g., *In re Suarez-Mason*, 694 F. Supp. 676, 683-85 & 703-07 (N.D. Cal. 1988); *Sacirbey v. Guccioine*, No. 05 Cv. 2949(BSJ)(FM), 2006 WL 2585561 at *19-20 (S.D.N.Y. Sept. 7, 2006); *In re Sacirbegovic*, No. 03 CR. MISC. 01PAGE1, 2005 WL 107094 at *10-12 (S.D.N.Y. Jan. 19, 2005).

¹⁸³ See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 513 (7th Cir. 1981) ("It is the settled rule that it is within the Secretary of State's sole discretion to determine whether or not a country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i.e., whether the request is a subterfuge.").

¹⁸⁴ However, the case has been cited favorably. See, e.g., *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985); *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980).

¹⁸⁵ 278 F.2d 77, 78 (2d Cir. 1960).

¹⁸⁶ *Id.* at 79.

antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above."¹⁸⁷

The Second Circuit has since distanced itself from the Gallina exception. In *Ahmad v. Wigen*, Ahmad, an American citizen, feared torture, a denial of a fair trial, and inhumane treatment if extradited.¹⁸⁸ The Eastern District of New York set forth the exceptions to the rule of non-inquiry, including the Gallina exception.¹⁸⁹ The court then analyzed the Israeli criminal justice system as relevant to petitioner's claims.¹⁹⁰ Ultimately, the court held that Ahmad failed to present evidence on "a preponderance standard" to establish that he would indeed face the abuses he feared.¹⁹¹ The court entrusted the State Department to look after the defendant and to "ensure against maltreatment."¹⁹² Although the Second Circuit affirmed this decision, the court was quite clear that the district court inappropriately examined the criminal justice system of the country requesting extradition.¹⁹³ Instead of using *Gallina* to support fact-finding as to whether petitioner would face conditions "antipathetic to a federal court's

¹⁸⁷ *Id.*

¹⁸⁸ 726 F. Supp. 389, 395, 416-20 (E.D.N.Y. 1989), *aff'd*, 910 F.2d. 1063 (2d Cir. 1990).

¹⁸⁹ *Ahmad*, 726 F. Supp. 389 at 410-15.

¹⁹⁰ *Id.* at 416-20.

¹⁹¹ The preponderance standard was applicable because the hearing was civil, not criminal. *Id.* at 416.

¹⁹² *Id.* at 420.

¹⁹³ *Ahmad v. Wigen*, 910 F.2d. 1063, 1064-65 (2d Cir. 1990) ("Although we affirm, we do not necessarily subscribe to the district court's dicta concerning the expanded role of habeas corpus in an extradition proceeding, which led to the district court's extensive exploration of Israel's system of justice. In *Messina v. United States* . . . we held that on an appeal from the denial of habeas corpus in an extradition proceeding, we are concerned only with whether the appellant's alleged offense fell within the terms of an extradition treaty, and whether an official with jurisdiction was presented with sufficient evidence to warrant a finding that there was a reasonable ground to believe that the appellant was guilty. As authority for this proposition, we cited [the Supreme Court case] *Fernandez v. Phillips*. *Fernandez* was not an isolated precedent. Indeed, the Supreme Court has adhered steadfastly to the above legal principle for more than a century As we are required to do, we have followed where the Supreme Court has led Unless Congress or the Supreme Court instructs otherwise, the general principle above expressed should continue to guide a habeas corpus court in its deliberations." (internal citations omitted)). The court further wrote:

We have no problem with the district court's rejection of Ahmad's remaining argument to the effect that, if he is returned to Israel, he probably will be mistreated, denied a fair trial, and deprived of his constitutional and human rights. We do, however, question the district court's decision to explore the merits of this contention in the manner that it did. The Supreme Court's above-cited cases dealing with the scope of habeas corpus review carefully prescribe the limits of such review A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge.

Id. at 1066 (internal citations omitted).

sense of decency,”¹⁹⁴ as would be expected if the exception had any teeth, the Second Circuit cited *Gallina* for the proposition that “consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge.”¹⁹⁵ The Second Circuit left such considerations of a sovereign nation’s criminal justice system to the executive branch.¹⁹⁶

A more recent case, albeit in a district court, found that the rule of non-inquiry trumps any potential application of the *Gallina* exception. In *In re Sandhu*, the court acknowledged that the relators were likely to be tortured if extradited, but agreed with the government’s interpretation of *Ahmad* as precluding a denial of extraditability based on *Gallina*.¹⁹⁷ Because, according to *Ahmad*, “the court may not examine conditions in the requesting country, and only the Department of State may deny extradition on humanitarian grounds,” the district court found that the “Second Circuit now treats the non-inquiry doctrine as absolute.”¹⁹⁸

Extradition may be appropriate even if the criminal conduct was committed within the territory of the United States. For instance, in *United States v. Melia*, a U.S. citizen was extradited to Canada for trial of conspiracy to commit murder, despite the fact that the murder was planned to occur within the United States.¹⁹⁹ The critical nexus to Canada were telephone conversations between the U.S. citizen and a Canadian co-conspirator.²⁰⁰ In *Valencia v. Scott*,²⁰¹ two U.S. citizens were extradited to France for their participation in a cocaine smuggling scheme, which they supervised from Queens, New York.²⁰² A U.S. citizen was extradited to the United Kingdom following certification in *Austin v. Healy* for conspiring from New York to commit a murder in the United Kingdom.²⁰³

The relator in *In re Extradition of Muhamed Sacirbegovic* (Sacirbey) was a citizen of the United States for all relevant times and the alleged

¹⁹⁴ *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

¹⁹⁵ *Ahmad*, 910 F.2d. at 1066 (citing *Gallina*, 278 F.2d at 79)).

¹⁹⁶ *Id.* (quoting *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980) (“[T]he degree of risk to [appellant’s] life from extradition is an issue that properly falls within the exclusive purview of the executive branch.”).

¹⁹⁷ *In re Sandhu*, No. 90 CR. Misc No. 1JCF, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996).

¹⁹⁸ *Sandhu*, 1996 WL 469290 at *5, *habeas petition denied sub nom Sandhu v. Burke*, No. 97 Civ. 4608(JGK), 2000 WL 191707 (S.D.N.Y. Feb. 10, 2000). Other commentators share this interpretation of *Ahmad*. See, e.g., Semmelman, *supra* note 174, at 1219-21.

¹⁹⁹ 667 F.2d 300 (2d Cir. 1981).

²⁰⁰ *Id.* at 302-03.

²⁰¹ CV 90-3745 (RJD), CV 91-1959 (RJD), 1992 WL 75036 (Mar. 24, 1992).

²⁰² *Id.* at *1.

²⁰³ 5 F.3d 598, 599-600 (2d Cir. 1993).

crime, embezzlement, occurred exclusively within the United States.²⁰⁴ Sacirbey argued that because the alleged criminal conduct was solely within the United States, the requesting country, Bosnia and Herzegovina (BiH), lacked jurisdiction.²⁰⁵ Interpreting an ambiguous treaty provision on jurisdiction broadly to refer to “the legal authority of a party to hear and decide a case,”²⁰⁶ the court found that Sacirbey’s acts were thus within BiH’s jurisdiction because the alleged criminal conduct “likely would have had a detrimental effect in BiH, and . . . this consequence could reasonably have been anticipated and intended.”²⁰⁷ Sacirbey was later certified as extraditable.²⁰⁸

²⁰⁴ *In re Extradition of Sacirbegovic*, No. 03 CR. MISC. 01PAGE1, 2005 WL 107094 at *3 (S.D.N.Y. Jan. 19, 2005). Sacirbey was born in Sarajevo in 1956, but became a U.S. citizen in 1973. *Id.* at *1. He was an ambassador to the United Nations on behalf of the Federation of Bosnia and Herzegovina (BiH) in 2000. *Id.* In connection with his ambassadorship, he was accused of embezzling funds he may have co-mingled and, in any event, for which he could not account. *Id.* The alleged criminal acts were committed solely in New York City. *Id.*

²⁰⁵ *In re Extradition of Sacirbegovic*, 280 F. Supp. 2d 81, 85 (S.D.N.Y. 2003).

²⁰⁶ *Id.* at 85 (citing *Vardy v. United States*, 529 F.2d 404, 406 (5th Cir. 1976) (“extradition treaties should be construed liberally”)); *Extradition of Neto*, No. 98 CR. MISC 01PAGE19, 1998 WL 898328 at *2 (S.D.N.Y. Dec. 22, 1998) (quoting *United States v. Cancino-Perez*, 151 F.R.D. 521, 523 (E.D.N.Y. 1993)) (“It is well-established that courts should construe extradition treaties liberally ‘to achieve their purposes of providing for the surrender of fugitives for trial in the requesting country.’”); *In re La Salvia*, No. 84 Cr. Misc. 1, 1986 WL 1436, at *11 (S.D.N.Y. Jan. 31, 1986) (noting that if the treaty is subject to no more than one reasonable interpretation, a court should “construe it in a manner that will permit extradition”).

²⁰⁷ *Sacirbegovic*, 280 F. Supp. 2d at 85-86. (citing *Melia v. United States*, 667 F.2d 300, 303-04 (2d Cir. 1981) (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect . . .”)); *see also* *United States v. Marasco*, 275 F. Supp. 492, 496 (S.D.N.Y. 1967) (holding that an almost identically worded treaty demonstrated “an extradition whenever the extraditee is shown prima facie to have intended the harm and caused the harm to the demanding state substantially as claimed by the latter”). The Magistrate Judge found that no special circumstances existed to permit Sacirbey to post bail, and thus, his request was denied. *Id.* at 86. Approximately a year and a half later, however, Sacirbey again requested that he be released on bail. *Sacirbegovic*, 2004 WL 1490219 at *1 (S.D.N.Y. July 26, 2004). Sacirbey presented a letter on his behalf from the head of the BiH government. *Sacirbegovic*, 280 F. Supp. 2d at 85 (S.D.N.Y. 2003). The Chairman of the Council of Ministers of BiH, Adnan Terzic, wrote that the United States “should grant bail to Ambassador Sacirbey until the final decision regarding extradition is made.” *Id.* Sacirbey’s motion was granted, and the Magistrate Judge later wrote that the letter “tipped the special circumstances test in Sacirbey’s favor.” *In re Extradition of Sacirbegovic*, No. 03 CR. MISC. 01PAGE1, 2005 WL 107094 at *2 (S.D.N.Y. Jan. 19, 2005).

²⁰⁸ *Sacirbegovic*, 2005 WL 107094. Although Sacirbey argued that no valid extradition treaty existed between the United States and BiH, the court found that BiH had inherited the treaty obligations of the Kingdom of Serbia, the original party to the treaty under which BiH

Though the alleged crimes at issue in *Melia*, *Valencia*, *Austin*, and *Sacirbey* pale in comparison to the atrocity crimes that are investigated and prosecuted before the ICC, it is the international character and gravity of such crimes that we contend should create an even stronger basis for surrender to the ICC if the United States were to become a State Party to the Rome Statute. These cases show that if the United States were to fail to meet the complementarity test under the treaty—a test that creates the opportunity for enforcement of every constitutional protection an American is entitled to before a U.S. court—and thus trigger an ICC request for arrest and surrender of the person to the ICC, there is well-settled precedent in extradition practice for doing so.

C. EXERCISE OF THE TREATY POWER TO PROSECUTE ATROCITY CRIMES

The Executive Branch can exercise the treaty power through any one of three types of agreements: a treaty that requires two-thirds consent of the Senate; a congressional-executive agreement requiring the majority vote of both the Senate and the House of Representatives; or an executive agreement entered into solely by the President or his empowered representatives and pursuant to legislative authority.²⁰⁹ For example, all of the Article 98(2) non-surrender agreements²¹⁰ are executive agreements entered into by the Executive Branch alone pursuant to authority granted by Congress in the American Service Members Protection Act.²¹¹ President Clinton also entered into exclusive agreements with the ICTY and ICTR in

requested Sacirbey's extradition. *Id.* at *10-11. Next, the court found that Sacirbey was one and the same with "Muhamed Sacirbgovic" as the individual named in the request, and that the alleged offense was an extraditable offense under the treaty. *Id.* at *12-17. Because the alleged act would be unlawful in the United States, the requirement of dual criminality was satisfied. *Id.* at *17-18. Further, the court found that the government established probable cause that Sacirbey committed the offense. *Id.* at *18-19. Sacirbey argued that the political offense exception applied, but the Court found it did not because financial fraud, even involving political corruption, generally falls outside the political offense exception. *Id.* at *19-20. Further, the political offense exception focuses on the criminalized conduct, not the requesting State's political motives in requesting extradition, as Sacirbey argued was the case in his situation. *Id.* Following the finding that he was extraditable, Sacirbey petitioned the Southern District of New York for a writ of habeas corpus, which was denied. *Sacirbey v. Guccione*, No. 05 Cv. 2949(BSJ)(FM), 2006 WL 2585561 (S.D.N.Y. 2006). Currently, he is appealing the denial of his writ of habeas corpus to the Second Circuit. Docket for *Sacirbey v. Guccione* in the Southern District of New York, filed Mar. 17, 2005, last updated Jan. 18, 2008.

²⁰⁹ See ROTUNDA & NOWAK, *supra* note 144, at 816.

²¹⁰ See *supra* Part II.

²¹¹ American Servicemembers Protection Act, 22 U.S.C.A. § 7422 (2008); Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, *supra* note 90, at 344.

1994 and 1995, respectively, which implemented transfer requirements of the agreement adopted in 1996 authorizing U.S. surrender of indictees to the ICTY or the ICTR.²¹²

Neither the ICTY nor the ICTR are treaty-based courts, so there is a distinction to be drawn between them and the ICC. But this distinction between establishment of international criminal tribunals by the U.N. Security Council under U.N. Charter Chapter VII enforcement authority²¹³ and by international treaty based upon State consent is irrelevant when examining the Constitutional issues at play in the surrender process. The Security Council-approved ICTY and ICTR statutes require U.N. Member States to comply with the request for surrender, or transfer, of indicted fugitives to the relevant tribunal.²¹⁴ To fulfill this surrender obligation, the United States entered into an executive agreement with each tribunal, and each such agreement is titled, “Agreement on Surrender of Persons between the Government of the United States and the Tribunal.”²¹⁵ The executive agreements provide that the United States will “surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal.”²¹⁶

Then, with the enactment of Section 1342 of Public Law 104-106 in 1996, Congress implemented the executive agreements for surrender of indicted fugitives with the ICTY and the ICTR. The law provides that, except for certain narrow exceptions, the statutory provisions related to extradition law “shall apply in the same manner and extent to the surrender

²¹² The Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighboring States, Jan. 24, 1995, *available at* 1996 WL 165484 [hereinafter ICTR Surrender Agreement] (In 1996, Congress enacted Public Law 104-106 to implement the Agreement. National Defense Authorization Act, Publ L. 104-106, § 1342, 110 Stat. 486 (1996). Section 1342(a)(1) of this legislation provides that the federal extraditions statutes (18 U.S.C. §§ 3181 *et seq.*) shall apply to the surrender of persons to the ICTR. This federal Statute also applies to the U.S.-ICTY agreement. *Id.*); Agreement on Surrender of Persons between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, Oct. 5, 1994, 1911 U.N.T.S. 224 [hereinafter ICTY Surrender Agreement].

²¹³ ICTR Statute, *supra* note 10; ICTY Statute, *supra* note 9.

²¹⁴ ICTY Statute, *supra* note 9, art 29; ICTR Statute, *supra* note 10, art 28.

²¹⁵ ICTR Surrender Agreement, *supra* note 212; ICTY Surrender Agreement, *supra* note 212.

²¹⁶ ICTR Surrender Agreement, *supra* note 212; ICTY Surrender Agreement, *supra* note 212.

of persons, including United States citizens, to the International Tribunal for the former Yugoslavia or the International Tribunal for Rwanda.”²¹⁷ The law did not preclude the possible surrender to the tribunals of U.S. citizens indicted by either the ICTY or the ICTR for crimes committed within the jurisdiction of either tribunal. But the issue of an indictment of a U.S. citizen has never arisen to be challenged in the courts.

The prospect of such a surrender became a much discussed possibility after the Kosovo campaign of 1999, when the NATO bombing of Serbia and Kosovo gave rise to allegations of war crimes and crimes against humanity perpetrated by the United States and other NATO allies. Some Washington officials were surprised to learn that it was within the ICTY’s jurisdiction to charge U.S. government and military officials for the conduct of the Kosovo campaign. One of the authors of this Article, David Scheffer, personally heard those expressions of astonishment from colleagues in the White House, State Department, and Pentagon, and advised all of them that in fact, Americans were technically exposed to the jurisdiction of the ICTY for actions taken in the former Yugoslavia. The issue was never put to the ultimate test in policy-making circles or before U.S. courts because no charges were ever issued. The Prosecutor’s review of the allegations resulted in a decision not to investigate the NATO bombing campaign, and thus no American was at risk of investigation by the ICTY with respect to that military action.²¹⁸ In any event, the ICTY and ICTR have significant due process protections,²¹⁹ in no small measure because U.S. officials and lawyers were highly influential in the drafting of the statutes and the rules of evidence and procedure for these tribunals. Although they are not mirror images of U.S. criminal courts and do not, for example, provide for trial by jury, they have demonstrated over years of jurisprudence that the protection of international standards of due process tends to dominate trial proceedings and the appeals process.²²⁰

The United States has had only one occasion to surrender an individual to either the ICTY or the ICTR, and that was in the case of Elizaphan Ntakirutimana before the ICTR.²²¹ In 1994, Ntakirutimana was the

²¹⁷ National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(a)(1). For an analysis of this law, see generally Jorge A. F. Godinho, *The Surrender Agreements between the US and the ICTY and ICTR: A Critical View*, 1 J. INT’L CRIM. JUST. 502 (2003); Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT’L L. 510 (1996).

²¹⁸ Prosecutor’s Report on the NATO Bombing Campaign, PR/ P.I.S./ 510-e, June 13, 2000, available at <http://www.un.org/icty/pressreal/p510-e.htm>.

²¹⁹ SCHABAS, *supra* note 11.

²²⁰ *Id.*

²²¹ For other analyses of this case, see Mary Coombs, *In re Surrender of Ntakirutimana*, 184 F.3d 419. U.S. Court of Appeals, Fifth Circuit, 94 AM. J. INT’L L. 171 (1999)

president of the Seventh Day Adventist Church in Mugonero, Rwanda.²²² An ethnic Hutu, he was accused of inviting a large number of local Tutsi people to his church compound under the pretense that it was a safe haven, and then gathering a mob of Hutus who slaughtered these Tutsis.²²³ He was charged before the ICTR with genocide, conspiracy to commit genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II to the Geneva Conventions.²²⁴ Ntakirutimana was later indicted on identical charges for banding with an armed group around the Bisesero area of Rwanda to seek out Tutsis and execute them.²²⁵ Following the Rwanda genocide in 1994, Ntakirutimana fled to Laredo, Texas, where his son lived.²²⁶ The pastor obtained a “green card” visa and lawful permanent residence in the United States.²²⁷ U.S. Marshals arrested him on September 26, 1996.²²⁸

A magistrate judge for the Southern District of Texas initially refused to sanction Ntakirutimana’s surrender to the ICTR.²²⁹ Although the magistrate’s reasoning was quickly overturned on reconsideration by

(summarizing case and how it helps shape the debate on whether international agreements must be pursuant to a treaty); Louis Klarevas, *The Surrender of Alleged War Criminals to International Tribunals: Examining the Constitutionality of Extradition via Congressional-Executive Agreement*, 8 UCLA J. INT’L L. & FOREIGN AFF. 77 (2003) (arguing that congressional-executive agreements are constitutional, weaving the Ntakirutimana case as an example throughout).

²²² *In re Surrender of Ntakirutimana*, 988 F. Supp. 1038, 1039 (S.D. Tex. 1997).

²²³ *Id.*

²²⁴ *In re Surrender of Ntakirutimana*, 1998 WL 655708 at *1 (S.D. Tex. Aug. 6, 1998).

²²⁵ *Id.*

²²⁶ *Id.* at *2.

²²⁷ *Ntakirutimana*, 988 F.Supp at 1039. The arc of rights afforded aliens grows as their contacts with the United States increase, cresting in citizenship if and when naturalized; the status of resident aliens—green card holders—is virtually identical to that of a citizen for most constitutional purposes, the major exception being if the alien were from a hostile nation at war with the United States. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950):

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment.

(internal citation omitted).

²²⁸ *Ntakirutimana*, 988 F.Supp at 1039.

²²⁹ *Id.* at 1044.

another federal court in the Southern District of Texas,²³⁰ his findings reflected an exceptionally narrow view of American constitutional practice, seemingly divorced from America's international obligations or engagements. The magistrate court held that it lacked jurisdiction to surrender Ntakirutimana because there was no Article II treaty between the United States and the ICTR and because the Government had failed to establish probable cause that Ntakirutimana committed the alleged acts.²³¹ The magistrate court incorrectly reasoned that because there were no prior examples of extradition in the absence of an Article II treaty, Congress must have lacked the power to provide for the implementation of an executive agreement.²³² If there had been a request by the ICTY for an indicted fugitive, the identical erroneous argument presumably would have been made by the court for that tribunal, because the U.S.–ICTY relationship likewise was established by executive agreement, not by an Article II treaty. The court found that the Government failed to establish probable cause because witnesses were not identified by name, there was no evidence that the interviewers were fluent in the witnesses' native language, and the circumstances of the interviews were not described.²³³

The Government re-filed its request for surrender before a different judge in the Southern District of Texas, who granted the request.²³⁴ This second court held that the Executive may surrender individuals only with authorization from Congress, but this process may take the form of an executive agreement endorsed by implementing legislation.²³⁵ The court

²³⁰ *Ntakirutimana*, 1998 WL 655708 at *33.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Ntakirutimana*, 1998 WL 655708 at *33 (When an extradition request is denied, the only remedy available to the government is to re-file the request.).

²³⁵ *Id.* at *10. The court cited Article II, Section 2, Clause 2 of the United States Constitution, “[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls.” *Id.* at *9. The court acknowledged that the Executive engages in various foreign relations activities not specifically named in this clause. *Id.* The court interpreted *Valentine v. United States*—where, under a treaty between the United States and France stipulating that neither nation was bound to extradite its own citizens, the Supreme Court held that the power to extradite a U.S. citizen under this treaty “is not confided to the Executive in the absence of a treaty or legislative provision,” 299 U.S. 5, 7-8 (1936)—to mean that “a statute suffices to confer authority on the President to surrender a fugitive.” *Ntakirutimana*, 1998 WL 655708 at *10-11.

also found that the Government had satisfactorily responded to Ntakirutimana's and the prior court's evidentiary objections.²³⁶

Ntakirutimana timely filed a writ of habeas corpus, challenging the order that granted the Government's request for surrender.²³⁷ He raised his earlier challenges that surrender should be denied based on the lack of an Article II treaty and the lack of probable cause, but additionally challenged the ICTR's capability of protecting the fundamental rights guaranteed by the Constitution.²³⁸ The Fifth Circuit reviewed de novo the issue of whether an Article II Treaty is a necessary prerequisite to surrendering a fugitive, but came to the same conclusion as the district court.²³⁹ The court reasoned that the Executive has discretion to surrender fugitives where some affirmative legislation provides this power, be it a treaty or statute.²⁴⁰ Furthermore, the Fifth Circuit held that the district court had satisfactorily resolved the evidentiary concerns.²⁴¹ Finally, acknowledging the limited scope of habeas review, the Fifth Circuit declined to analyze the procedures of the ICTR,²⁴² and reasoned that "such matters, so far as they may be

²³⁶ These evidentiary concerns were addressed, in part, by testimony of a police officer from Holland, Arjen Mostert, who conducted several of the interviews and could attest to the procedures. *Ntakirutimana*, 1998 WL 655708 at *18. The interviews were translated by interpreters who spoke the interviewee's native language, with the exception of one witness who spoke fluent French. *Id.* at *21. Initial interviews were conducted to obtain general information about the attacks in the region and later interviews were more specific. *Id.* at *22. In accordance with the Tribunal's policy, all witnesses were assigned letters (e.g., Witness A, B, etc.) and not named to help protect their safety. *Id.* at *18.

²³⁷ *Ntakirutimana v. Reno*, 184 F.3d 419, 421 (5th Cir. 1999).

²³⁸ *Id.*

²³⁹ *Id.* at 424-27.

²⁴⁰ *Id.* at 425.

²⁴¹ *Id.* at 427-30.

²⁴² The Government claimed in its reply brief that the ICTR procedures were fair, citing an affidavit by Michael J. Matheson, who was a former Legal Adviser to the Department of State. Government Reply to Response of Pastor Elizaphan Ntakirutimana to Request for His Surrender to the International Criminal Tribunal for Rwanda, *In re Surrender of Ntakirutimana*, No. CIV. A. L-98-43, 1998 WL 655708 (S.D. Tex. Aug. 6, 1998) [hereinafter Reply Brief]. Matheson wrote in response to whether the tribunal was fair that:

[T]he establishment of the Tribunal is not inconsistent with the International Covenant on Civil and Political Rights (ICCPR), 6 International Legal Materials 368 (1967) and the Universal Declaration of Human Rights (UHDR), G.A. Res. 271 A, U.N. Doc. A/819 (1948). Indeed the Statute and the Rules of Procedure and Evidence of the Tribunal of 29 June 1995, ITR/3Rev.1 provide full due process for the accused that are fully consistent with ICCPR and UDHR. These various issues have been considered and resolved with respect to the International Criminal for the Former Yugoslavia by the Appeals Chamber of that Tribunal (which, under the Statute for the Rwanda Tribunal, also has jurisdiction over appeals from the Trial Chambers of the Rwanda Tribunal).

Reply Brief, *supra*, at 2-3. The Government concluded in its brief that:

pertinent, are left to the State Department, which ultimately will determine whether the appellant will be surrendered.²⁴³

Ntakirutimana appealed the denial of his habeas petition to the Supreme Court, which denied certiorari.²⁴⁴ Following certification, he was surrendered to the ICTR on March 24, 2000 and later found guilty by the ICTR of the crime of genocide.²⁴⁵ After serving a ten-year prison sentence (including time detained prior to conviction), he was released on December 12, 2006.²⁴⁶

Nothing in U.S. constitutional practice suggests that a treaty, including an executive agreement that is validated by Act of Congress or a Senate-ratified treaty that requires implementing legislation for its full enforcement, cannot require an international criminal court's judgments to be recognized in the same manner as the courts have upheld the enforceability of judgments by a foreign criminal court. The United States was instrumental in the creation of the ICC and the drafting of the ICC's constitutional documents, as reflected in the Rome Statute, the Rules of Procedure and Evidence, and the Elements of Crimes. This suggests that the relatively low bar established in U.S. courts for enforcement of judgments by various foreign criminal courts as well as a robust U.S. extradition practice that refuses to probe the due process standards of foreign criminal courts, including those prosecuting extradited U.S. citizens, makes the highly sophisticated structure of the ICC and its thorough attention to due process rights of defendants acceptable on constitutional grounds. Such an outcome is due in no small part to the role of U.S. negotiators in ensuring that such rights exist in the ICC's constitutional documents,²⁴⁷ an opportunity rarely present in the more conventional experiences of enforcing foreign court criminal judgments or extraditing aliens or U.S. citizens to criminal trials in foreign courts of dubious character.

[T]he United States has been in the forefront of efforts to create an international mechanism and to persuade other nations to cooperate with the Tribunals. Our participation in these efforts reflects our international responsibilities and is important to our foreign policy objectives. It is also fully consistent with the Constitution

Id.

²⁴³ *Ntakirutimana*, 184 F.3d at 430 (quoting *Garcia-Guillen v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971)).

²⁴⁴ *Ntakirutimana v. Reno*, 528 U.S. 1135 (2000).

²⁴⁵ See International Criminal Tribunal for Rwanda, Summary of Judgment, Case No. ICTR 96-10-T & ICTR 96-17-T (Feb. 21, 2003), <http://69.94.11.53/default.htm>.

²⁴⁶ Ntakirutimana died on January 22, 2007. International Criminal Tribunal for Rwanda, Status of Detainees, <http://69.94.11.53/default.htm>.

²⁴⁷ See Part VII, *infra*.

D. THE MEDELLÍN RULING

The Supreme Court recently ruled on the scope of the treaty power under the Constitution in *Medellín v. Texas*.²⁴⁸ As tempting as it may be for skeptics of the constitutionality of the Rome Statute to cite the *Medellín* ruling, it not only is distinguishable from the issues confronting the Rome Statute but it also confirms that proper implementing legislation can ensure the enforceability of such a treaty in U.S. federal and state courts.

The majority opinion in *Medellín*, written by Chief Justice John Roberts, confirmed that non-self-executing treaties require domestic implementing legislation in order to be enforceable in federal and state courts of the United States.²⁴⁹ Much of the dispute in *Medellín* centered on whether the Optional Protocol Concerning the Settlement of Disputes to the Vienna Convention on Consular Relations, the United Nations Charter, and the Statute of the International Court of Justice (ICJ) are all self-executing treaties or whether each requires additional implementing legislation that would create enforceable obligations, particularly for judgments rendered by the ICJ. The Court acknowledged that these treaties are international law obligations of the United States, “But not all [such] obligations automatically constitute binding federal law enforceable in United States courts.”²⁵⁰ The Court discovered no implementing legislation for any of the three treaties and also concluded that by their terms they were not self-executing.²⁵¹ In particular, through interpretation of treaty language,

²⁴⁸ 128 S. Ct. 1346 (2008). Shortly after the Supreme Court decision, the State of Texas executed José Medellín by lethal injection. James C. McKinley, Jr., *Texas Executes Man Despite Objections*, N.Y. TIMES, Aug. 6, 2008, at A19.

²⁴⁹ *Medellín*, 128 S. Ct. at 1356 n.2 (“What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.”).

²⁵⁰ *Id.* at 1356. Justice Roberts then cited *Foster v. Neilson*, “which held that a treaty is ‘equivalent to an act of the legislature,’ and hence self-executing, when it operates of itself without the aid of any legislative provision.” *Foster v. Neilson*, 27 U.S. 25, 314 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 51, 87 (1833). Justice Roberts continued: “When, in contrast, ‘[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.” *Id.*, citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). “In sum, while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.” *Id.* (citing *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)).

²⁵¹ *Medellín*, 128 S. Ct. at 1357 n.4:

Consequently, it is unnecessary to resolve whether the Vienna Convention is itself “self-executing” or whether it grants Medellín individually enforceable rights . . . [W]e thus assume, without deciding, that Article 36 [of the Vienna Convention] grants foreign nationals “an

particularly Article 94(1) of the U.N. Charter,²⁵² the Court concluded that implementing legislation would be required for automatic enforcement of ICJ judgments in U.S. and state courts and, since such legislation was lacking, the state of Texas was not required to enforce the ICJ's judgment in *The Case Concerning Avena and Other Mexican Nationals*.²⁵³

The Rome Statute is a treaty that requires, far more than most treaties, a considerable body of implementing legislation in order for the United States to cooperate with the ICC, respond fully to its requests for assistance, pay its annual assessments, enforce the ICC's judgments when necessary, incarcerate convicted persons in national penal institutions, and, perhaps most importantly for constitutional purposes, undertake all of the judicial tasks that the complementarity regime offers a nation in order to avoid ICC jurisdiction over its citizens and others falling within national jurisdiction. It would be inconceivable for the United States to join the ICC without implementing legislation that extends federal jurisdiction over all of the atrocity crimes within the ICC's subject matter jurisdiction, establishes the precise procedures for cooperation with the ICC (particularly Part 9 of the Rome Statute), and requires states to comply with federal and ICC requests for assistance pursuant to the Rome Statute. Many State Parties, including Canada, Mexico, and European and Latin American nations, have adopted complex implementing legislation that amends their criminal codes and establishes procedures for cooperation with the ICC.²⁵⁴ No less, and

individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.”

(internal citations omitted).

²⁵² *Id.* at 1358 (“Article 94(1) provides that ‘[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.’” (citing the Vienna Convention on Consular Relations (Vienna Convention or Convention), Apr. 24, 1963, [1970] 21 U.S.T. 77, 59 Stat. 1051”) (emphasis in original).

²⁵³ *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). *See also Medellín*, 128 S. Ct. at 1365:

Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to “roughly similar” provisions. Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means that the underlying treaty is ‘useless.’ Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. And Congress could elect to give them wholesale effect . . . through implementing legislation, as it regularly has.

²⁵⁴ For example, Canada implemented the Rome Statute domestically with its Crimes Against Humanity & War Crimes Act, 2000 S.C., ch. 24; *see* DFAIT, Canada and the International Criminal Court, http://www.dfait-maeci.gc.ca/foreign_policy/icc/canada_icc-en.asp (last visited Aug. 5, 2008). For a summary of the UK and some other European

perhaps much more, would be required of the U.S. Congress and the President before the United States would join the ICC.

The Rome Statute is actually an extreme example of what a non-self-executing treaty might require in the form of implementing legislation in order to be enforceable in a domestic judicial system. Thus the majority ruling in *Medellín*, regardless of the merits of the strong dissenting opinion written by Justice Stephen Breyer and joined by Justices Souter and Ginsburg,²⁵⁵ only reinforces the reality of what will be required for U.S. ratification of the Rome Statute. The judgment does not diminish the fundamental tenets of the Constitution's treaty power and the options available to the next president to forge ahead towards full participation in the critical work of the ICC.

V. THE ARTICLE I DEFINE AND PUNISH CLAUSE AS CONSTITUTIONAL GROUNDS FOR RATIFICATION OF THE ROME STATUTE

The Constitution is a document of enumerated powers, and there is a very powerful one that often goes unnoticed. Article I, Section 8, Clause 10 of the Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."²⁵⁶ Particularly with respect to atrocity crimes, it would be an entirely logical and warranted exercise of such constitutional power to create, in concert with other governments, an international criminal court that defines, prosecutes, and punishes such incontrovertible "Offences against the Law of Nations," namely, atrocity crimes, and to legislate that such an international court's judgments and sentences be given effect in the United States to the same extent as they are recognized by and enforced in other State Parties to the Rome Statute.²⁵⁷

countries, see David Turns, *Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 337, 340 (Dominic McGoldrick et al. eds., 2004); for a review of Latin American implementation of the Rome Statute, see Hugo Relva, *The Implementation of the Rome Statute in Latin American States*, 16 *LEIDEN J. INT'L L.* 331 (2003).

²⁵⁵ *Medellín*, 128 S. Ct. at 1376 ("I believe the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind the courts no less than would 'an act of the [federal] legislature.'" (Breyer, J. dissenting).

²⁵⁶ Congress has used the Clause as a power to enact legislation in the Alien Torts Claims Act, 28 U.S.C. § 1350 (1994) and the Torture Victim Protection Act, 28 U.S.C. § 1350 (1994).

²⁵⁷ For a discussion of how the Offenses Clause can and should be applied, see Beth Stephens, *Federalism and Foreign Affairs: Congress' Power to 'Define and Punish . . . Offenses Against the Laws of Nations,'* 42 *WM. & MARY L. REV.* 447 (2000);

What was regarded as the “Law of Nations” at the signing of the Constitution is now embodied in, and vastly expanded by, modern “customary international law.”²⁵⁸ There is considerable debate as to the scope of the Define and Punish Clause.²⁵⁹ Yet, there is consensus that the Clause confers power to govern the conduct of individuals who transgress international law by enabling Congress to enact legislation and create criminal tribunals.²⁶⁰

That the Define and Punish Clause enables Congress to establish criminal tribunals is of direct relevance to American participation in the ICC. The Supreme Court cited the Define and Punish Clause in *Quirin* as support for the military tribunal to try German spies, one of whom was a U.S. citizen:

Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2002).

²⁵⁸ LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 237 (2d ed. 1996); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1987); INTRODUCTORY NOTE TO CHAPTER 2 (1990) (“[T]he law of nations, [was] later referred to as international law.”); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 819 (1997); J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 845 (2007) (citing *Flores v. S. Peru Cooper Corp.*, 343 F.3d 140 (2d Cir. 2003)); Stephens, *supra* note 257, at 449; *but see* Morley, *supra* note 257, at 118 (“[T]he phrase ‘law of nations,’ as understood by the Framers and used in the Constitution, is not synonymous with ‘international law’ [T]he law of nations governs actual interactions between countries, and by extension between their citizens, in discrete areas such as war, trade, navigation, and diplomacy.”).

²⁵⁹ *E.g.*, Stephens, *supra* note 257 (arguing that the Define and Punish Clause authorizes Congress to legislate over civil and criminal matters and that the laws of nations is an evolving construct that can include domestic matters); *contra* Morley, *supra* note 257 (agreeing that the Define and Punish Clause empowers Congress to legislate over criminal and civil matters, but disagreeing with Stephens that customary international law means anything but what the Founding Fathers considered, i.e., navigation, trade, war and diplomacy).

²⁶⁰ [T]he first category [of congressional invocations of the Define and Punish Clause] include . . . congressional action regarding military tribunals discussed in the World War II-era cases *Ex parte Quirin* and *In re Yamashita*. The Military Commissions Act of 2006, establishing tribunals to try alleged al-Qaeda members for violations of international law, was enacted pursuant to the Law of Nations Clause. Kent, *supra* note 258, at 861-62 (2007); *see also* Morley, *supra* note 257, at 137-38 (citing interpretations of the Define and Punish Clause that empower Congress to “establish military commissions to try violations of the law of war”); Stephens, *supra* note 258, at 478-79 (explaining that Congress cited the Define and Punish Clause as authority to establish a military commission at issue in *Ex parte Quirin* and that the Supreme Court “found Congress’ actions within the reach of the [Define and Punish] Clause.”) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority *to define and punish offenses against the law of nations* by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of *the law of nations*, and more particularly the law of war, are cognizable by such tribunals.²⁶¹

U.S. ratification of the Rome Statute would constitute an exercise by Congress of its authority to define and punish offenses against the law of nations, that is, customary international law, by sanctioning the jurisdiction of the ICC to try persons for atrocity crimes. The Define and Punish Clause was clearly intended to have direct consequence for U.S. citizens as well as aliens falling within the jurisdiction of the United States. The primary means by which Congress can exercise its authority to “punish offenses against the law of nations” is to ensure that courts are empowered to prosecute such crimes. The Define and Punish Clause of the Constitution does not limit the power to punish only to Article III courts.²⁶² It presents the option to Congress to establish non-Article III courts and tribunals in connection with the punishment of offenses against the law of nations.

A few years after *Quirin*, the Define and Punish Clause was used to support the creation of a military tribunal in occupied Japan.²⁶³ Decades later the military commissions created to prosecute Guantanamo detainees were based on the precedent of *Quirin* and, thus indirectly upon the Define and Punish Clause.²⁶⁴ Although not cited as such in any of the *Ntakirutimana* federal rulings, certain scholars consider the clause to be

²⁶¹ *Ex parte Quirin*, 317 U.S. at 28 (emphasis added).

²⁶² See, e.g., Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 129-31 (1995) (discussing the Nuremberg and Tokyo trials as persuasive authority for a permanent International Criminal Court that would not be created pursuant to Article III).

²⁶³ In *In re Yamashita*, 327 U.S. 1, 7 (1946), the Court explained:

In *Ex parte Quirin*, 317 U.S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by art. I, sec. 8, cl. 10 of the Constitution to “define and punish . . . Offenses against the Law of Nations . . .,” of which the law of war is a part, had by the Articles of War (10 U.S.C. §§ 1471-1593, 10 U.S.C.A. §§ 1471-1593) recognized the “military commission” appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

²⁶⁴ See, e.g., The Petitioner’s Reply Brief at 11-13, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (“Hamdan does not argue that alternative tribunals cannot be created to try cases arising from this new conflict. He simply argues that any such extension—with all its complications and balancing of fundamental interests—must be taken by Congress under its Article I power to, *inter alia*, define and punish such offenses.”).

authority for the surrender of indicted fugitives to the ICTY and ICTR pursuant to the agreements approved by Congress between the United States and the ICTY and ICTR.²⁶⁵

If the Define and Punish Clause has justified the creation of military tribunals and has legitimized U.S. cooperation in surrender arrangements with the ICTY and ICTR, then this constitutional provision should be persuasive legal authority for U.S. participation in the ICC. The Supreme Court in both *Quirin* and *Yamashita* noted that “the law of war” is but one example of the “laws of nations.”²⁶⁶ Other laws of nations include those atrocity crimes confirmed in customary international law that form the subject matter jurisdiction of the Rome Statute, namely, genocide, crimes against humanity, war crimes, and aggression, although the latter crime is neither defined nor enforceable yet for ICC purposes. The Define and Punish Clause thus provides an additional constitutional pillar, together with the treaty power, that supports the constitutionality of U.S. participation in the ICC.

However, the Define and Punish Clause may compel a rethinking of how the United States should enter into the Rome Statute. It may be that a congressional-executive agreement would be the most pragmatic means by which the U.S. should ratify the Rome Statute. This would enable the full Congress, both the Senate and the House of Representatives, to approve U.S. participation in the ICC in satisfaction of the Define and Punish Clause. As additional constitutional insurance, the president could ask the Senate to render a two-thirds vote on the measure and to define its measure as an approval for ratification as well as a joint resolution with the House of Representatives. This would satisfy any concerns about whether the ratification fully complies with the treaty power. This will be discussed further below.

VI. LIMITS TO THE RIGHT TO TRIAL BY JURY

Any defendant coming before the ICC appears before a chamber of judges and not before a jury.²⁶⁷ Nothing in the U.S. Constitution requires a foreign or international court located outside of the United States to hold its criminal trials before juries of common law character, as opposed to the far more prevalent means of trial before judges that is found in most of the

²⁶⁵ Klarevas, *supra* note 221, at 119-24.

²⁶⁶ *Quirin*, 317 U.S. at 29-30; *Yamashita*, 327 U.S. at 7.

²⁶⁷ Rome Statute, *supra* note 1, arts. 39, 64.

world's civil law legal systems.²⁶⁸ But the Constitution's provisions on jury trials present a considerable challenge to any prospective U.S. ratification of the Rome Statute.

The Constitution requires in Article III, Section 2 that, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."²⁶⁹ The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"²⁷⁰ The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law"²⁷¹ The Article III, Section 2 requirement and the Fifth and Sixth Amendments contain the most serious, and also the most sweeping, invocations regarding the right to trial by jury.

We begin with two fundamental statements of principle about the significance of the right to trial by jury. Supreme Court Justice Antonin Scalia has written, "When the Court deals with the content of this guarantee [to a trial by impartial jury]—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy."²⁷² The Supreme Court, in the *Milligan* case discussed below, ruled that "another guarantee of freedom was broken" by the lack of a jury in *Milligan's* trial:

[U]ntil recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.²⁷³

The Court further explained, "citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice."²⁷⁴

²⁶⁸ For instance, as explained in Part IV(B), *supra*, the United States routinely extradites non-citizens and citizens to civil law countries that do not operate with trials by jury. *See generally*, BASSIOUNI, *supra* note 76, at 604-42, 738-45.

²⁶⁹ U.S. CONST. art. III § 2.

²⁷⁰ U.S. CONST. amend. V.

²⁷¹ U.S. CONST. amend. VI.

²⁷² *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

²⁷³ *Ex parte Milligan*, 71 U.S. 2, 123 (1866) (emphasis in original).

²⁷⁴ *Id.*

The Rome Statute offers, through the complementarity principle, full adherence to these strictures regarding a U.S. citizen who is not a member of the armed services or otherwise an enemy combatant, and who is charged with an atrocity crime of the ICC. Certainly, in the unlikely event that the atrocity crime is committed on U.S. territory, any concern about a U.S. national being tried at the ICC before judges, as opposed to before a U.S. jury, can be overcome with a jury trial in a U.S. court in full satisfaction of the Constitution and the Fifth and Sixth Amendments by exercising the privilege of complementarity under the Rome Statute. If the U.S. national commits the atrocity crime on foreign territory, the Sixth Amendment becomes irrelevant since it requires an impartial jury from the “State or district wherein the crime shall have been committed.”²⁷⁵ There can be no other interpretation of such language than to mean “State or district” within the United States.

However, the Article III, Section 2 and Fifth Amendment requirements of trial by jury should control if a U.S. national who is not a member of the armed forces or an enemy combatant commits an atrocity crime outside the United States, such atrocity crime is criminalized under U.S. law, and U.S. statutory law applies extraterritorial jurisdiction over its citizens who commit such U.S. crimes overseas. But for such extraterritorial jurisdiction to be enforced by the courts, the U.S. citizen must fall within the physical custody of U.S. authorities and appear on U.S. territory to stand trial before a jury. If such physical custody cannot be achieved, and the U.S. citizen remains on foreign territory or in the custody of foreign law enforcement authorities to stand trial overseas for commission of the atrocity crime, then the U.S. national obviously is not entitled to trial by jury before whatever foreign court prosecutes him. The Rome Statute holds out the possibility that a U.S. citizen would be captured outside the United States and charged with committing an atrocity crime outside the United States, and that he or she either would be prosecuted by a foreign national court (perhaps exercising its own complementarity privilege under the Rome Statute) or surrendered to the ICC to stand trial there if he or she is presented with charges by the ICC. The foreign court may use the jury trial system, but most foreign courts do not. The ICC does not use juries. There would be no violation of the U.S. Constitution in any of these scenarios.

There are situations in the history of U.S. constitutional law where not all of the due process rights guaranteed by the Constitution for criminal trials, including the right to trial by jury, are in fact enforced by U.S. courts even though the U.S. government is engaged in some way with the criminal

²⁷⁵ U.S. CONST. art. VI.

prosecution.²⁷⁶ It is entirely possible that an ICC trial of a U.S. citizen following a complementarity effort would not precisely duplicate each and every constitutionally-guaranteed due process right that would have been enforced in a U.S. courtroom. Certain World War II and so-called war on terror cases in U.S. courts (particularly the Supreme Court) regarding “unlawful enemy combatants” who are also U.S. citizens offer some guidance in this respect.²⁷⁷ The conclusion presented by these cases is that a jury trial can be denied in instances where a U.S. citizen who is a member of the armed forces is tried before a military tribunal or where a U.S. citizen, who need not be a member of the armed forces but is designated as an enemy combatant, is prosecuted before a military commission established by the president and lacking a jury. If the U.S. citizen is a civilian, then there is a constitutional right to a jury trial for any crime committed in the United States, although the *Milligan* case would require that the federal courts be open for business (a most likely scenario) to guarantee the trial by jury, as opposed to a military commission trial which may not have a jury.

The Supreme Court, in the case of *Ex parte Milligan*, considered whether a U.S. citizen may be tried for crimes without a jury trial in a military tribunal, even though shortly after the Civil War, the federal courts were fully functioning.²⁷⁸ The Court concluded that a U.S. citizen, Lamdin P. Milligan, was entitled to a jury trial, but for reasons that are distinguishable from the situation that would arise for a U.S. citizen tried before the ICC pursuant to U.S. ratification of the Rome Statute.²⁷⁹

Milligan was a resident of Indiana,²⁸⁰ a state that was part of the Union during the Civil War and was under threat of invasion by rebel forces from the Confederacy.²⁸¹ He was alleged to be a part of a secret society with the aim of overthrowing the government and was charged with conspiring against the government, aiding rebels, inciting insurrection, disloyal practices, and violating the laws of war.²⁸² After Milligan was found guilty by a military tribunal and sentenced to hang, the Supreme Court heard

²⁷⁶ *E.g.*, *In re Yamashita*, 327 U.S. 1 (1946) (U.S. military tribunal tried Japanese general); *see infra* notes 324-46 and accompanying text (analyzing case law where defendants were denied due process rights, including the right to trial by jury, even though the U.S. government was a party).

²⁷⁷ *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁷⁸ *Ex parte Milligan*, 71 U.S. 2, 123 (1866).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 107.

²⁸¹ *Id.* at 126-27.

²⁸² *Id.* at 6-7.

Milligan's petition for a writ of habeas corpus.²⁸³ The Supreme Court acknowledged that the privilege of petitioning for the writ of habeas corpus was properly suspended during the Civil War.²⁸⁴ Nevertheless, the Court found that the federal courts had jurisdiction to consider Milligan's habeas petition.²⁸⁵

The Supreme Court considered whether the military tribunal that convicted Milligan had the "legal power and authority to try and punish this man."²⁸⁶ The Court reasoned that, "it is the birthright of every American citizen when charged with crime, to be tried and punished according to law."²⁸⁷ The Court considered, in turn, what judicial power the military tribunal had to try Milligan.²⁸⁸ Because the tribunal was not authorized or established by Congress, it was not an Article III court.²⁸⁹ Further, the Court reasoned that the Constitution "is a law for rulers and people," so the President's executive power could not empower the military tribunal for the trial of a U.S. citizen without an act of Congress.²⁹⁰ Finally, the Court considered whether the tribunal had jurisdiction under the "law and usages of war."²⁹¹ The Court held that military law "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."²⁹²

The Supreme Court thus indirectly confirmed that military trials of military personnel need not be conducted by use of a jury.²⁹³ The Court's confirmation that a U.S. citizen who is not in military service is entitled to trial by jury rested on the two key factors—one unspoken and the other directly addressed. First, Milligan's alleged crime occurred on U.S. territory, namely, in the state of Indiana.²⁹⁴ The Court was not examining the right to jury trial for crimes committed outside the United States, which probably would be the case if a U.S. citizen is ever brought before the ICC, preceded by the collapse or disuse of complementarity procedures in the

²⁸³ *Id.* at 107-09.

²⁸⁴ *Id.* at 115.

²⁸⁵ "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it." *Id.* at 131.

²⁸⁶ *Id.* at 118 (emphasis in original).

²⁸⁷ *Id.* at 119.

²⁸⁸ *Id.* at 119-30.

²⁸⁹ *Id.* at 122.

²⁹⁰ *Id.* at 120.

²⁹¹ *Id.* at 76.

²⁹² *Id.*

²⁹³ See EUGENE R. FIDELL ET AL., *MILITARY JUSTICE CASES AND MATERIALS* 687 (2007).

²⁹⁴ 71 U.S. 2, 127.

United States. Second, the Court emphasized that domestic courts were open and thus available for trial by jury of a civilian citizen.²⁹⁵

In the context of the ICC, the complementarity principle encourages using national courts, particularly if they are functioning and open for business, and thus trial by jury would be available for any U.S. citizen who is a civilian and physically drawn into the personal jurisdiction of a federal court. The Supreme Court assumed that the crime for which Milligan was charged could be prosecuted under domestic law.²⁹⁶ In the case of the ICC, unless federal law is amended to incorporate all of the Rome Statute's atrocity crimes (as we believe it should be), the ability of a federal court to prosecute a U.S. citizen for a particular atrocity crime may be severely impaired. Thus the easy retreat to domestic courts that was evident in the *Milligan* judgment can be distinguished from the reality of what would confront a U.S. civilian charged with an atrocity crime. Such a crime may, under the complementarity principle, trigger domestic jurisdiction where trial by jury would be sustained. Alternatively, the act may, in the absence of a prosecutable crime in federal (or for that matter, state) courts, entitle the ICC to seek custody of the U.S. indictee for trial in The Hague without a jury. If the U.S. citizen is a member of the armed forces, where trial by jury is not guaranteed, then the *Milligan* precedent would be particularly supportive of U.S. participation in the ICC where a trial by jury will not exist.

In the case of *Ex parte Quirin*,²⁹⁷ the Supreme Court revisited, during WWII, the issue of habeas corpus petitions and of right to trial by jury of alleged government enemies.²⁹⁸ Although this case followed *Milligan*, the Court found that the petitioners were not to be afforded trials by jury, because these petitioners, unlike petitioner Milligan, were unlawful

²⁹⁵ *Id.* ("It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.") (emphasis in original).

²⁹⁶ *Id.*

²⁹⁷ *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁹⁸ The petitioners had attended sabotage school in Germany, traveled to the United States aboard submarines, landed on the Atlantic coast, and were found in plain clothes without uniforms. *Id.* at 21. The FBI arrested them. *Id.* Petitioners were charged and set to be tried in a military tribunal, following a Presidential Proclamation that:

[T]hose who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

Id. at 22-23.

combatants.²⁹⁹ The Supreme Court reasoned that “[t]he Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, [Section] 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article.”³⁰⁰ The Court recognized that the practice of trying unlawful combatants before military tribunals had a history that predated the Constitution’s drafting and continued during the Mexican and Civil Wars.³⁰¹ The Court then described a series of situations in which offenses are triable without a jury.³⁰² Because there “are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, [Section] 2 or the provisions of the Fifth and Sixth Amendments relating to ‘crimes’ and ‘criminal prosecutions,’” the Court further reasoned that:

[W]e must conclude that [Section] 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.³⁰³

All petitioners in *Ex parte Quirin* had at some point in their lives resided in the United States,³⁰⁴ and one was a U.S. citizen,³⁰⁵ yet this gave them no right to a trial by jury in light of their unlawful combatant status.³⁰⁶ The petitioners argued that they were “entitled to be tried in civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses.”³⁰⁷ The Court noted that:

Since the [Fifth and Sixth] Amendments, like section 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that

²⁹⁹ *Id.* at 36-48.

³⁰⁰ *Id.* at 39.

³⁰¹ *Id.* at 31.

³⁰² [P]etty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions.

Id. at 39-40 (internal citations omitted).

³⁰³ *Id.* at 40.

³⁰⁴ *Id.* at 20.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 20-48.

³⁰⁷ *Id.* at 24.

they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies.³⁰⁸

The Court distinguished the petitioners' case with *Milligan* by pointing out that *Milligan* was not an enemy belligerent and so could not be an unlawful combatant.³⁰⁹ Thus, the Court found that the charged offenses did not require trial by jury.³¹⁰

Quirin and to an extent *Milligan* have been key precedents in recent habeas corpus petitions made during the so-called war on terror since 2001.³¹¹ In *Hamdi v. Rumsfeld*, petitioner Hamdi—an American citizen—was arrested in Afghanistan during active warfare in the region.³¹² He was categorized as an enemy combatant and held in detention at a military base.³¹³ Hamdi sought to challenge his status as an enemy combatant, a status that the government argued justifies holding someone without charging him or her with a crime.³¹⁴ Justice Sandra Day O'Connor, who wrote for the majority, framed the issue as “the narrow question . . . [of] whether the detention of citizens falling within the definition [of enemy combatant] is authorized.”³¹⁵ A majority of the Court found that Congress authorized Hamdi's detention through the authorization for use of military force, which had “authorize[d] the President to use all necessary and appropriate force against nations, organizations, or persons associated with the September 11, 2001 terrorist attack.”³¹⁶ The Court addressed Hamdi's

³⁰⁸ *Id.* at 44.

³⁰⁹ *Id.* at 45.

³¹⁰ *Id.* at 45-48.

³¹¹ The body of cases involving American citizen Jose Padilla are not mentioned in the text of this Part because he was ultimately tried in an Article III court, and thus his case is not completely apposite to this Part's discussion. The Executive avoided a Supreme Court review of the President's power to hold Padilla indefinitely without charging him, a power the Executive argued arose from the President's determination that Padilla was an unlawful enemy combatant. *Hanft v. Padilla*, 546 U.S. 1084 (2006) (approving the Government's request for authorization to transfer Padilla to a federal detention center); *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) (denying the government's motion to transfer Padilla to federal custody because the purpose of the motion seemed to be to avoid Supreme Court review of the issues in this case and these issues were too important to permit the government such last-minute evasion of review). On the eve of such a test, the Executive requested that Padilla be transferred to federal court for criminal trial, and the Supreme Court approved. *Hanft*, 546 U.S. 1084; see Eric Lichtblau, *Justices are Asked to Permit Padilla Move*, N.Y. TIMES, Dec. 29, 2005, at A16.

³¹² 542 U.S. 507, 510 (2004).

³¹³ *Id.* at 510-11.

³¹⁴ *Id.* at 509-11.

³¹⁵ *Id.* at 516.

³¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C.A. 1451 (2001)) (internal quotation marks omitted)).

citizenship and found that “there is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”³¹⁷ The Court cited *Quirin* to support this proposition and distinguished *Milligan* based on the fact that Milligan was not a prisoner of war.³¹⁸

Bound by the Due Process Clause but balancing Hamdi’s due process interest against the competing interest of the political branches’ war powers, a majority of the Supreme Court held that Hamdi must “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”³¹⁹ Notably, the Court did not require all of the due process rights that would normally be available in a criminal trial prosecuted by the United States government. For instance, the Court ruled:

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.³²⁰

These cases show that U.S. citizens are not afforded the full protection of the Constitution at all times. Hamdi and at least one petitioner in *Quirin* were American citizens, yet this status did not afford these citizens full due process rights or a jury trial. These citizens were classified as enemy combatants, and more controversially as “unlawful” enemy combatants, and thus further isolated from traditional constitutional protections.

As part of its ratification of the Rome Statute, the United States could attach a declaration requiring that any U.S. national charged by the ICC, particularly for an atrocity crime committed in the United States, would be investigated and, if merited, prosecuted before a U.S. court by jury trial. For crimes occurring within the United States, such a condition would help ensure compliance with the Sixth Amendment. However, if the United States fails to implement its complementarity rights under the Rome Statute for an atrocity crime committed on U.S. territory, it would remain possible

³¹⁷ *Id.* at 519 (going on to cite *Ex parte Quirin*, 317 U.S. 1 (1942)).

³¹⁸ *Id.* at 519, 521-22.

³¹⁹ *Id.* at 533. The majority decision was written by Justice O’Connor, joined by Rehnquist, Kennedy, and Breyer. Justice Souter, joined by Justice Ginsburg, concurred in part because they also rejected any limit on the exercise of habeas jurisdiction, and dissented from the idea that if Hamdi is properly considered an enemy combatant that his detention is authorized by an Act of Congress, but concurred in the judgment that Hamdi should have some opportunity to show that he is not an enemy combatant. Justice Scalia, joined by Justice Stevens, dissented because they would grant the habeas petition and release Hamdi from military custody. Justice Thomas dissented because he would not place due process burdens on the political branches in wartime.

³²⁰ *Id.*

to surrender a U.S. citizen to the ICC in compliance with U.S. obligations under the Rome Statute. The declaration attached to the ratification instrument could set forth the procedures, similar to extradition practice, which would have to be satisfied before a U.S. citizen would be surrendered to the ICC by the Secretary of State. If the crime occurs outside of the United States, the same complementarity option for a jury trial would apply. But if the United States fails to achieve custody of the U.S. national, then there is no presumption of the right to jury trial in the event the U.S. national charged with such crime is prosecuted before the ICC or, for that matter, a foreign court. In the latter case, no opportunity would have arisen to activate the U.S. citizen's constitutional rights because the individual would have acted and remained on foreign territory and thus subject to a foreign government's national criminal court system and its own participation in the ICC, with the foreign State's attendant obligation to surrender the individual for trial to the ICC if the State decides not to investigate and prosecute him or her domestically.

The Constitution does not necessarily follow U.S. citizens who commit crimes abroad. In *Reid v. Covert*,³²¹ the Supreme Court held in a plurality opinion that two military wives charged with the murder of their husbands were improperly tried in court-martial proceedings. Dicta in the opinion written by Justice Black stated:

[W]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away simply because he happens to be in another land . . . Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to government arbitrariness.³²²

Justice Harlan, however, wrote in concurrence:

I do not think it can be said that these safeguards [constitutional guarantees in an Article III court, including indictment by grand jury and jury trial] of the Constitution are never operative without the United States, regardless of the particular circumstances . . . [o]n the other hand, I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world.³²³

Justice Harlan relied, in part, on the Insular cases to support this proposition. These cases, discussed in further detail below, generally held that certain due process rights, including the right to trial by jury, were not

³²¹ 354 U.S. 1 (1957).

³²² *Id.* at 10; The Third Restatement of Foreign Relations also adopts this approach. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987).

³²³ 354 U.S. at 74 (Harlan, J., concurring in the result).

constitutional requisites in territories that the United States had acquired but not yet fully incorporated (e.g., the Philippines and Puerto Rico).³²⁴

Putting aside for a moment Justice Harlan's middle ground interpretation of applicable Supreme Court precedent, if the dicta quoted from Justice Black above were taken at face value, this means that when the *United States* punishes a citizen who commits a crime outside the United States, then the United States may not strip the criminally accused of Constitutional protections. This is a very different circumstance than when a *foreign or international criminal court* obtains custody of and prosecutes a U.S. citizen for the commission of any atrocity crime, for in that event the U.S. citizen is not entitled to the protections of the Constitution, particularly the right to a jury trial. Had the murders at issue in *Reid v. Covert* not occurred on a U.S. military base, the foreign country in which each murder occurred (the United Kingdom or Japan) would have had primary jurisdiction not only under the Status of Forces Agreement but also under basic principles of territorial jurisdiction, and could have requested extradition had the defendant returned to the United States.

Similarly, if a U.S. national or resident alien commits an atrocity crime falling within ICC jurisdiction but outside the United States, that individual could be surrendered to the ICC by U.S. authorities if the United States is a State Party to the Rome Statute and fails or refuses to exercise its complementarity privilege to prosecute before a jury in a U.S. courtroom. As explained in Part I, the U.S. government has the first opportunity to investigate an atrocity crime committed by its citizens and provide a jury trial, if trial is warranted, in full accordance with Article III and the Fifth and Sixth Amendments. If the United States chooses to waive its right to investigate, and the ICC claims jurisdiction, this hypothetical fact scenario is analogous to an extradition case wherein a U.S. citizen commits a crime outside the territory of the U.S. and under a foreign court's jurisdiction. Both the treaty power and well-settled extradition practices support the surrender of such a citizen to the ICC.³²⁵

Recently, in *Boumediene v. Bush*, the Supreme Court revisited *Reid v. Covert* and emphasized the relevance of "practical considerations" to the majority's determination that the two military wives were entitled to trial by jury.³²⁶ The majority in *Boumediene*³²⁷ explained that in *Reid* the Court had

³²⁴ These cases were distinguished by the majority as having nothing to do with extending military jurisdiction over civilians. 354 U.S. at 14.

³²⁵ See generally Bassiouni, *supra* note 76, 738-45 (5th ed. 2007) (examining extradition of U.S. citizens to foreign courts).

³²⁶ 128 S. Ct. 2229 (2008).

³²⁷ Even Justice Scalia, who vigorously dissented in *Boumediene*, did not dispute this central point—that there is no automatic right to jury trial with respect to U.S. citizens who

relied upon *In re Ross*,³²⁸ which they “properly understood . . . as standing for the proposition that, at least in some circumstances, the jury provisions of the Fifth and Sixth Amendments have no application to American citizens tried by American authorities abroad.”³²⁹ The fact of U.S. citizenship was not dispositive for determining trial by jury. Rather, Justices Harlan and Frankfurter, in concurring opinions, looked to the practical considerations that made jury trial the “more feasible option for [the military wives] than it was for the petitioner in *Ross* [who was a British citizen but the Court held he should be treated as if he were a U.S. citizen]. If citizenship had been the only relevant factor in the case, it would have been necessary for the Court to overturn *Ross*, something Justices Harlan and Frankfurter were unwilling to do.”³³⁰ Practical considerations abound in any case that would arise before the ICC. In light of the principle of complementarity, one can envisage many different scenarios where a U.S. citizen acting abroad (and of interest to the ICC Prosecutor) may be within reach of federal court jurisdiction, but many where he or she would not be subject either to federal jurisdiction or entitled to a jury trial under U.S. law. In this line of cases, as amplified by *Boumediene*, the Supreme Court has left the door open for a case-by-case examination of when and under what circumstances (guided by “practical considerations”) a U.S. citizen acting outside the United States would be entitled to a jury trial before American authorities seeking to try the case abroad.

Notwithstanding certain sweeping language of *Reid v. Covert*, even when the U.S. government acts abroad, it need not always apply every provision of the Constitution. The Insular cases,³³¹ which pre-dated *Reid v. Covert* and are still good law, generally hold that the U.S. government must only uphold fundamental due process rights when acting in unincorporated but occupied territories. In both *Dorr v. United States*³³² and *Ocampo v. United States*,³³³ the Supreme Court held that the government did not need to provide jury trials in the acquired but unincorporated Philippines. The Philippines had their own Bill of Rights, modeled in large part on the U.S. Bill of Rights. These rights included rights of due process, and provided in relevant part that “no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of

commit crimes abroad. Instead, he argued that aliens are not entitled to identical opportunities under the Constitution. *Id.* at 2301.

³²⁸ 140 U.S. 453 (1891).

³²⁹ *Boumediene*, 128 S. Ct. at 2256.

³³⁰ *Id.* at 2257.

³³¹ See *infra* notes 332-40 and accompanying text.

³³² 195 U.S. 138 (1904).

³³³ 234 U.S. 91 (1914).

law[.]” and that “no person shall be held to answer for a criminal offense without due process of law.”³³⁴ In *Dorr*, the Supreme Court noted how the executive had insisted on securing the new Philippine government the protections of the Bill of Rights, but “was careful to reserve the right to trial by jury.”³³⁵ This was because the area of the island that had an existing rule of law crafted their judiciary based on the civil law model.³³⁶ In the Philippines, the accused was tried before a panel of judges, and additionally had what the Court described as the:

[A]dded guaranty of the rights of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself.³³⁷

The Supreme Court, in *Ocampo*, affirmed *Dorr*’s finding that “the requirement of an indictment by grand jury is not included within the guaranty of ‘due process of law.’”³³⁸

Similarly, in *Balzac v. Puerto Rico*³³⁹ the Supreme Court held that jury trials were not required in Puerto Rico. The Supreme Court reiterated the proposition that:

[P]rovisions for jury trial in criminal and civil cases apply to the Territories of the United States But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the Union . . . and neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States.³⁴⁰

These Insular cases are examples of U.S. participation in the government of certain territories, albeit territories not incorporated as states, where the civil law model of trial by judges—as is the case in the ICC—failed to offend Article III or the Fifth and Sixth Amendments of the U.S. Constitution.

³³⁴ Philippine Bill of Rights (act of July 1, 1902 § 5, chap. 1369, 32 Stat. at L. 692), available at <http://www.thecorpusjuris.com/laws/constitutions/others/9-others/71-philippine-bill-of-1902.html>.

³³⁵ 195 U.S. at 145.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ 234 U.S. at 98.

³³⁹ 258 U.S. 298, 304-14 (1922).

³⁴⁰ 258 U.S. at 304-05.

The case of *United States v. Verdugo-Urquidez*³⁴¹ reconciled the expansive dicta in *Reid v. Covert* with the Insular cases, affirming that the latter are still good law. In *United States v. Verdugo-Urquidez*, a criminal defendant objected to Drug Enforcement Agency agents' warrantless search of his Mexican residence.³⁴² The Ninth Circuit interpreted *Reid v. Covert* as requiring that the government be bound by the Bill of Rights when it acts abroad.³⁴³ The Ninth Circuit thus held that seized evidence was to be suppressed for lack of a search warrant.³⁴⁴ The Supreme Court reversed.³⁴⁵

According to the Supreme Court, if only fundamental due process rights apply to foreign occupied territories as established by the Insular cases, then it is not possible for the Court "to endorse the view that every constitutional provision applies wherever the United States Government exercises its power."³⁴⁶ This decision does not deny the possible requirement for jury trials and other constitutional due process rights, but the Supreme Court has signaled a more flexible approach to the issue once the trial is convened anywhere other than on U.S. territory.

The *Verdugo-Urquidez* court also cited *Johnson v. Eisentrager*,³⁴⁷ where the Supreme Court had previously declined to extend the application of the Fifth Amendment extra-territorially:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of the Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.³⁴⁸

People living in unincorporated territories governed by the United States have no constitutional right to trial by jury.³⁴⁹ Clearly, criminal defendants of the ICC need not be afforded this right. If the U.S. government is neither always nor completely bound by the Bill of Rights when it acts in a foreign land, then the actions of a non-U.S. court, the ICC, on foreign soil at The Hague should not be held to an artificial standard of compliance with the Bill of Rights. U.S. citizen defendants before the ICC cannot somehow claim the right to transform it into a U.S. court complete

³⁴¹ 494 U.S. 259, 263, 267-70 (1990).

³⁴² *Id.* at 262-64.

³⁴³ *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218 (9th Cir. 1988).

³⁴⁴ *Id.* at 1223.

³⁴⁵ 494 U.S. at 275.

³⁴⁶ *Id.* at 268-69.

³⁴⁷ 339 U.S. 763, 784 (1950).

³⁴⁸ 856 F.2d at 269 (citing *Eisentrager*, 339 U.S. at 784).

³⁴⁹ *See supra* text accompanying notes 292-321.

with all U.S. constitutional guarantees arising for criminal trials in the United States, any more than a Canadian defendant can claim the right to duplicate a Canadian trial when being prosecuted before the ICC.

By the terms of the Constitution itself,³⁵⁰ U.S. service personnel are not entitled to a jury trial and they are excluded from the Fifth Amendment's guarantee of grand jury presentment. Congress is empowered, through Article I, Section 8, Clause 14 of the Constitution, "to make rules for the Government and Regulation of the land and naval Forces." This power authorizes military trials of armed forces members that do not necessarily include jury trials and all of the other rights provided by the Bill of Rights.³⁵¹ Thus a situation where U.S. service personnel are charged with committing, *outside* of the United States, atrocity crimes that fall within the jurisdiction of the ICC should raise the fewest constitutional concern if any one of them ultimately, following an unlikely American waiver or gross abuse of complementarity rights, faces trial before the ICC.

VII. ARE DUE PROCESS RIGHTS PROTECTED BY THE ROME STATUTE?

Concern over the lack of a jury trial before the ICC joins other prominent criticism of the Rome Statute, centering on the argument that some of the most fundamental due process rights protected by the Constitution are absent from the ICC.³⁵² If that criticism were accurate, then U.S. participation in the ICC through ratification of the Rome Statute would not necessarily fail the constitutional test of a legitimate use of the Article II treaty power, but it would raise a politically untenable issue that no administration would want to confront. Notwithstanding the political challenge, an examination of the due process rights demonstrates that with the exception of the right to trial by jury, discussed above, the ICC would

³⁵⁰ U.S. CONST. art. I, § 8, cl. 14.

³⁵¹ See *Ex parte* Reed, 100 U.S. 13, 21 (1879); *Dynes v. Hoover*, 61 U.S. (1 How.) 65, 78 (1857); cf. *Neely v. Henkin*, 180 U.S. 109, 122-23 (1901) (stating, in upholding a U.S. service member's extradition to a country with fewer due process rights than provided by the United States, "[U.S.] citizenship does not give [the service members] an immunity to commit crime in other countries, nor entitle [them] to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws [they have] violated . . .").

³⁵² See, e.g., Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 861 (2002) (warning against the U.S. participation in the International Criminal Court because not all guarantees provided by the Bill of Rights would be afforded); Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 259-72 (2004) (arguing that the International Criminal Court's due process standards are insufficient because the statute implementing them is ambiguous, omits important protections, and is vulnerable to political manipulation).

provide a U.S. defendant with essentially the same due process rights as enjoyed in U.S. courts. That does not mean the particular due process right enforced by the ICC would be identical to how it might be exercised and protected in federal courts. However, to pass the U.S. constitutional test for an international criminal court, one would expect that the due process right in its broad character is protected by the Rome Statute and associated Rules of Procedure and Evidence.

Scholars and commentators have long recognized that fundamental due process rights are protected by the Rome Statute.³⁵³ The late Monroe

³⁵³ Wedgwood, *supra* note 3, at 119, 121, 123:

Second, the ICC is carefully structured with procedural protections that closely follow the guarantees and safeguards of the American Bill of Rights and other liberal constitutional systems. Third, the offenses within the ICC's jurisdiction would otherwise ordinarily be handled through military courts-martial or through extradition of offenders to the foreign nation where an offense occurred. Thus, the detailed structure of American common law trial procedure would not ordinarily be applicable to these cases in any event. . . . American negotiators at Rome worked hard to ensure that the permanent ICC would follow demanding standards of due process. To that end, any defendant is guaranteed the right to have timely notice of the charges against him, the presumption of innocence, the right against self-incrimination, also forbidding any adverse inference from the exercise of the right to silence, the right to the assistance of counsel and to the assistance of an interpreter, the right to bail, the right to a speedy trial, the right to conduct a defense in person or through the defendant's chosen counsel, the right to cross-examine the witnesses against him and to call witnesses on his own behalf, the right to disclosure of any exculpatory evidence, the right not to bear any burden of proof but rather to require the prosecution to prove guilt "beyond reasonable doubt," and the right not to be subjected to any form of duress or coercion, or any cruel, inhuman, or degrading punishment. In addition, the ICC Statute even guarantees a form of Miranda warnings—a privilege that has often been criticized in the United States since its enunciation by the Supreme Court in 1966 as offering undue protection of criminal suspects. The Miranda case requires oral notice of rights when a defendant is in custodial interrogation. The ICC statute is even more protective, requiring that the prosecution advise a person of his rights before he is questioned whenever there are grounds to believe that he has committed a crime, even in noncustodial interrogation—including a warning of the right to remain silent, the right to legal assistance, the right to have counsel appointed if he cannot afford it, and the right to be questioned in the presence of counsel.

The major differences from common law procedure in the ICC are the use of a factfinding panel of three Judges instead of a jury, with a verdict to be rendered by the vote of at least two Judges, and the availability of an appeal by the prosecution from errors of fact, law, and procedure.

See also Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 345 (2006) ("Opposition is sometimes voiced in the United States that the procedures of the ICC do not provide the fundamental guarantees that our country holds indispensable for its own trials. Yet all of the international tribunals so far, and certainly the ICC, have adopted the main principles of the International Covenant on Civil and Political Rights, to which the United States is a signatory. . . . Having sat on two year-long trials at the Hague under such rules, I can attest that I did not feel at any time that the defendants were not receiving a basically fair trial. Our refusal to try and work out resolutions of our problems with the ICC may turn out to be the lesson not learned from our prior leadership role in the international court movement."); Patricia M. Wald, *Why I Support the International Criminal Court*, 21 WIS. INT'L L.J. 513, 521 (2003) ("[T]he court operates by

Leigh, who served as the State Department Legal Adviser during the Republican Ford Administration and who was a leading member of the District of Columbia Bar, testified on behalf of the American Bar Association before Congress in 2000.³⁵⁴ In his testimony he supported the position that due process rights of the U.S. Constitution are found in substantial measure in the Rome Statute.³⁵⁵ The Leigh testimony is worth amplifying in this article, and we do so liberally, as observers may have forgotten how clearly Monroe Leigh articulated the obvious strengths of the Rome Statute with respect to due process rights.

Set forth below are due process rights found in and protected by the U.S. Constitution and, with the exception of the right to jury trial, essentially replicated in the Rome Statute. Any federal court examining the constitutionality of a U.S. national being prosecuted before the ICC would have to take notice of the substantial degree of similarity of these rights as they are protected in both U.S. law and in the Rome Statute.

Aside from the right to jury trial, there is no fundamental due process right protected by the U.S. Constitution that is not also found in significant form in the Rome Statute. In a manner similar to that employed by Monroe Leigh in his 2000 Congressional testimony, we set forth below a summary list of those fundamental constitutional rights and their antecedents in the Rome Statute. We draw guidance from Leigh's testimony as we believe it merits re-emphasis eight years later, particularly as it is an expression of the views of the American Bar Association on the Rome Statute. Its clarity diminishes constitutional concerns about the Statute.

Certainly one can quibble about lack of precise parity on some issues, but given the highly sophisticated procedural and substantive structure of the ICC and its minute attention to due process rights both in its own constitutional documents and in the work to date of the Pre-Trial Chamber

rules [that] contain the same or stronger guarantees of fair trial than the ad hoc tribunals which we fully support and where we are quite happy to have the nationals of other countries tried. Ironically, the United States government is currently attempting to deny the most basic of these rights—the right to counsel—to anyone the executive designates as an ‘enemy combatant,’ even American citizens apprehended in the United States. The statutory guarantees and rules governing ICC procedures include the equivalent of a probable cause hearing, liberal pretrial discovery, a public trial in the presence of the accused, right to counsel and to confront one’s accusers, privilege against self-incrimination, rights to notice of the charges and to an interpreter in preparing the defense, right to provisional release pending trial, bars against non-probative and unreliable evidence or evidence secured in violation of human rights, proof of guilt beyond a reasonable doubt, and a right to appeal.”)

³⁵⁴ *The International Criminal Court: Hearings Before the H. Comm. on Int’l Relations*, 106th Cong. 92-101 (2000) (statement of Monroe Leigh on behalf of the American Bar Association) [hereinafter *Leigh Statement*]; Wedgwood, *supra* note 3, at 121, 123.

³⁵⁵ *Leigh Statement, supra* note 354; Wedgwood, *supra* note 3, at 121, 123.

of the ICC,³⁵⁶ disparities between U.S. law and the law and practice of the ICC do not give rise to any serious doubt about the fundamental protection of the defendant's due process rights before the ICC.

Right of confrontation of accusers and cross-examination of witnesses. This Sixth Amendment right³⁵⁷ is addressed in Article 67(1)(e) of the Rome Statute, which entitles the accused, "To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

The right to remain silent and the guarantee against compulsory self-incrimination. This Fifth Amendment³⁵⁸ right is addressed in Article 67(1)(g) of the Rome Statute, which entitles the accused, "Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence." Article 54(1)(a) requires the Prosecutor "to investigate incriminating and exonerating circumstances equally"³⁵⁹

³⁵⁶ The ICC Pre-Trial Chamber and Appeals Chamber have addressed numerous pre-trial issues in more than 38 decisions through July 2008. They have included a wide range of issues concerning pre-trial disclosure of evidence, including exculpatory evidence, the role of the Prosecutor and the Pre-Trial Chamber in the investigation of a case, interim release provisions, confirmation hearings, jurisdiction and admissibility, procedures for the unsealing and execution of arrest warrants, preparation of witness statements, victims' participation, and language translations. All of the decisions can be accessed at <http://www.icc-cpi.int/cases.html>. Many of the Pre-Trial Chamber and Appeals Chamber decisions are described in SCHABAS, *supra* note 17, at 254-82. With respect to the role of the Prosecutor and the Pre-Trial Chamber in investigative matters, see Scheffer, *A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, *supra* note 7. With respect to the execution of arrest warrants, see David Scheffer, *International Criminal Court: Introductory Note to Decision on the Prosecution Application under Article 58(7) of the Statute in the Case of the Prosecutor v. Ahmad Muhammad Harun (Amad Harun) and Ali Muhammad Al Abd-Al-Rahman (Ali Kushayb) ICC Pre-Trial Chamber I*, in 46 I.L.M. 532 (2007).

³⁵⁷ "In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial . . . to be confronted with the witnesses against him" U.S. CONST. amend. VI. See SCHABAS, *supra* note 17, at 295-99; STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 305-26 (2005); ZAHAR & SLUITER, *supra* note 50, at 314-15 (2008); SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 129-40 (2003).

³⁵⁸ "No person shall . . . be compelled in any criminal case to be a witness against himself" U.S. CONST. amend. V.

³⁵⁹ Note that the ICTY and ICTY's statutes, while not identical, have many similarities to the Rome Statute of the ICC. The ICTY has held that under its Statute, defendants have the right to remain silent and the right against self-incrimination. *E.g.* Prosecutor v. Limaj et al., Case No. IT-03-66-T (Nov. 30, 2005); Momir Nikolic, Case No. IT-02-60/1-T (Dec. 2, 2003). See SCHABAS, *supra* note 17, at 298:

The presumption of innocence. This constitutional right, confirmed in *Coffin v. United States*,³⁶⁰ is found in Article 66(1) of the Rome Statute, which reads in part, “Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”³⁶¹ The other sub-paragraphs of Article 66 place the onus for proving the guilt of the accused on the Prosecutor and require that in order to convict the accused, “the Court must be convinced of the guilt of the accused beyond reasonable doubt.”

The right to a speedy and public trial. This Sixth Amendment right³⁶² is found in Articles 67(1) and 67(1)(c) of the Rome Statute. Article 67(1) provides that “the accused shall be entitled to a public hearing . . .” Article 67(1)(c) states that the accused shall be entitled “To be tried without undue delay.”

The right to assistance of counsel. This Sixth Amendment³⁶³ right is provided for in Articles 67(1)(b) and (d) of the Rome Statute. Article 67(1)(b) provides that that accused shall be entitled “to communicate freely with counsel of accused’s choosing in confidence . . .” Article 67(1)(d) requires that the accused shall be entitled “to have legal assistance assigned

There is one witness who can never be compelled to testify, however: the defendant . . . [T]he silence of an accused cannot be a consideration in the determination of guilt or innocence. The text clarifies the fact that an accused may refuse to testify altogether, and not merely to testify when the evidence is “against himself.” The provision reflects concerns with encroachments upon the right to silence in some national justice systems. Specifically, English common law has always prevented any adverse inference being drawn from an accused’s failure to testify.

See also TRECHSEL, *supra* note 357, at 341-59; ZAHAR & SLUITER, *supra* note 50, at 303-07 (“Whereas the US Constitution’s Fifth Amendment is restricted to oral testimony, international human rights jurisprudence has adopted a more expansive approach, extending the privilege against self-incrimination to such materials as the defendant produces willingly.” *Id.* at 305.); ZAPPALA *supra* note 357, at 77-79 (“The various aspects of this right [to remain silent] have been thoroughly recognized in the ICC Statute.” *Id.* at 78).

³⁶⁰ 156 U.S. 432, 453 (1895).

³⁶¹ The ICTY, which operates under a similar statute as the ICC, has held that “the accused enjoys the benefit of the presumption of innocence.” *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, ¶ 833 (Dec. 17, 2004). See SCHABAS, *supra* note 17, at 203-05; TRECHSEL, *supra* note 357, at 153-91; ZAHAR & SLUITER, *supra* note 50, at 302-03; ZAPPALA, *supra* note 357, at 85-100 (“[I]n respect of the presumption of innocence, the rules of the ICC Statute are to be considered as a model.” *Id.* at 94).

³⁶² “In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial . . .” U.S. CONST. amend. VI. See SCHABAS, *supra* note 17, at 209-10; TRECHSEL, *supra* note 357, at 136, 141, 147; ZAHAR & SLUITER, *supra* note 50, at 300-02; ZAPPALA, *supra* note 357, at 114-19.

³⁶³ “In all criminal prosecutions the accused shall enjoy . . . the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. See SCHABAS, *supra* note 17, at 290-92; TRECHSEL, *supra* note 357, at 242-90; ZAHAR & SLUITER, *supra* note 50, at 309-14; ZAPPALA, *supra* note 357, at 59-66.

by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it”

The right to a written statement of charges. This Sixth Amendment right³⁶⁴ is provided for in Article 61(3) of the Rome Statute, which states that within a reasonable time before the Pre-Trial Chamber holds a hearing to confirm the charges, the person charged must “[b]e provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial”³⁶⁵

The right to have compulsory process to obtain witnesses. This Sixth Amendment right³⁶⁶ is addressed by Article 67(1)(e) of the Rome Statute, which states that the accused shall be entitled “to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”

The prohibition against ex post facto crimes. The Constitution requires, “No Bill of Attainder or ex post facto Law shall be passed.”³⁶⁷ Similarly, Article 22(1) of the Rome Statute provides, “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.”

The protection against double jeopardy. The Fifth Amendment states that no person shall “be subject for the same offence to be put in jeopardy of life or limb.” Article 20(3) (*Ne bis in idem*) of the Rome Statute states in relevant part that “No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct” There are two exceptions to this rule, however, which one might argue present a problem. These are if the proceedings before the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) [o]therwise were not conducted independently or impartially in accordance with the norms of due

³⁶⁴ “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and *to be informed of the nature and cause of the accusation.*” U.S. CONST. amend. VI (emphasis added).

³⁶⁵ The ICTY statute shares a similar due process right and the ICTY has upheld it. *See e.g.*, Prosecutor v. Kvočka, Case No. IT-98-30/1-A (Feb. 28, 2005).

³⁶⁶ “In all criminal prosecutions the accused shall enjoy . . . to have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI. *See* International Criminal Court Rules of Procedure and Evidence, 65(1) (“A witness who appears before the Court is compellable by the Court to provide testimony”); CASSESE, *supra* note 37, at 1299-1300; SCHABAS, *supra* note 17, at 298; ZAHAR & SLUITER, *supra* note 357, at 315.

³⁶⁷ U.S. CONST. art. 1, § 9, cl. 3; *see* BASSIOUNI, *supra* note 76, at 747-49 (5th ed. 2007); CASSESE, *supra* note 37, at 746-56.

process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.³⁶⁸

These exceptions have to exist for the ICC to have any viability. Otherwise, nations could conduct a sham trial leading to impunity for an alleged perpetrator for the sole purpose of evading ICC jurisdiction with no recourse by the ICC. If, because of a prior acquittal or other disposition of a case in a U.S. judicial proceeding, it was determined that the United States in fact was “unwilling or unable genuinely” to prosecute the case, there would be such a serious breakdown in the U.S. proceedings that the double jeopardy rule would be severely qualified in any event.

It is worth noting that although double jeopardy is a fundamental constitutional protection,³⁶⁹ where an acquittal is the product of corruption or a final judgment is the result of a sham trial, a defendant may be re-prosecuted.³⁷⁰ In *People v. Aleman*, the defendant moved to dismiss murder charges brought against him due to double jeopardy, where he had bribed the judge to obtain a prior acquittal.³⁷¹ Under the theory that jeopardy means risk, the court held that re-prosecution was proper because the defendant was never at risk during his first case where the outcome was pre-ordained.³⁷² Similarly, in *Commonwealth v. Gonzalez*, the Supreme Court of Massachusetts held that a so-called trial was nothing more than a sham.³⁷³ During the “trial” the judge coached the defense to bring forth one witness (defendant’s daughter who knew no facts relevant to the alleged charges) with the sole intention of attaching double jeopardy.³⁷⁴ The court reasoned that because this witness’s testimony “had no bearing on the defendant’s guilt or innocence,” double jeopardy had *not* attached and the defendant could be re-prosecuted.³⁷⁵ These principles of law qualifying the prohibition against double jeopardy are similar to the sham trial concept found in the Rome Statute’s approach to the issue.

³⁶⁸ Rome Statute, *supra* note 1, art. 20(3)(a)-(b). See BASSIUNI, *supra* note 76, at 749-68; CASSESE, *supra* note 37, at 704-29; SCHABAS, *supra* note 17, at 191-93; ZAHAR & SLUITER, *supra* note 50, at 317-18; ZAPPALÁ, *supra* note 357, at 175-77, 194.

³⁶⁹ U.S. CONST. amend. V. See generally BASSIUNI, *supra* note 76, at 749-69.

³⁷⁰ Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not An Acquittal?*, 27 ARIZ. ST. L.J. 953 (1995) (analyzing how judicial misconduct and corruption may be cited to either prevent jeopardy from attaching or to characterize an acquittal as something else, with the end result being re-prosecution).

³⁷¹ *People v. Aleman*, Nos. 93 CR 28786, 93 CR 28787, 1994 WL 684499 (Ill. Cir. 1994).

³⁷² *Id.* at *6-15 & *20-21.

³⁷³ 771 N.E.2d 134 (Mass. 2002).

³⁷⁴ *Id.* at 138, 282.

³⁷⁵ *Id.* at 282.

Freedom from warrantless arrests and searches. This Fourth Amendment right³⁷⁶ is protected in Articles 57(3)(a) and 58 of the Rome Statute. Article 57(3)(a) establishes that the Pre-Trial Chamber may “at the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation” Article 58 stipulates that the Pre-Trial shall issue a warrant of arrest of a person upon application of the Prosecutor and “if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary”

The right to be present at the trial. This constitutional right, confirmed in *Illinois v. Allen*,³⁷⁷ is protected in Article 63 of the Rome Statute, which requires that, “The Accused shall be present during the trial.”

The exclusion of illegally obtained evidence. This judicially-created prohibition, confirmed in *Illinois v. Krull*,³⁷⁸ is reflected in Article 69(7) of the Rome Statute, which states:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

The prohibition against trials in absentia. This judicially-created prohibition, confirmed in *Diaz v. United States*,³⁷⁹ is found in Article 63(1) of the Rome Statute, which requires that, “The accused shall be present during the trial.” Similar to U.S. practice, Article 63(2) of the Rome Statute provides:

If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

³⁷⁶ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

³⁷⁷ 397 U.S. 337, 338 (1970) (citing *Lewis v. United States*, 146 U.S. 370 (1892)).

³⁷⁸ 480 U.S. 340, 347 (1987) (citing *Weeks v. United States*, 232 U.S. 383 (1914)); *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁷⁹ 223 U.S. 442, 455 (1912). See CASSESE, *supra* note 37, at 1292; SCHABAS, *supra* note 17, at 299; ZAHAR & SLUITER, *supra* note 50, at 380-82; ZAPPALA, *supra* note 357, at 149-52.

*The right to a “Miranda” warning.*³⁸⁰ Article 55(2) of the Rome Statute, set forth below, requires even more extensive protection than does American practice embodied in the “Miranda” warning, and the ICC must ensure such protection at an earlier stage in the proceedings:

Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.³⁸¹

The jurisprudence of the ICTY and ICTR and the ICC Pre-Trial Chamber has shown both over the years and in recent times that fundamental due process rights, historically drawn in part from the Bill of Rights, are consistently protected by these international criminal tribunals. One can always concoct extreme and highly unlikely, if not implausible, hypotheticals to demonstrate the possibility of a due process right being denied to the defendant, particularly if the ICC were to malfunction as a court governed by its own constitutional documents. But the United States exists in the real world and the ICC is not only real, it serves up due process rights on a golden platter to the defendants appearing before it. Taking “yes” for an answer may not serve the interests of extremists, but it does offer both pragmatists and idealists the opportunity to use U.S. constitutional principles in the pursuit of international justice.

³⁸⁰ A Miranda warning is based on the Supreme Court case *Miranda v. Arizona*, and requires that a police officer recite the following in order to inform a person being arrested of his or her constitutional rights: (1) you have the right to remain silent, and need not answer any questions, (2) if you do answer questions, anything you say can be used against you, (3) you have the right to consult with a lawyer before and during questioning by the police, and (4) if you cannot afford a lawyer, one will be provided to you. 384 U.S. 436, 467-73 (1966); see CASSESE, *supra* note 37, at 389-94; SCHABAS, *supra* note 17, at 287-90; ZAPPALA, *supra* note 357, at 125-29.

³⁸¹ Rome Statute, *supra* note 1, art. 55(2).

VIII. OFFICIAL IMMUNITY DEFENSES

Perhaps the most historic provision of the Rome Statute, the rule that revolutionized centuries of state practice, is Article 27, which for State Parties removes any immunity for officials “whether under national or international law.”³⁸² Since the ICC essentially focuses on leadership crimes³⁸³ it would be incompatible with the purpose of the Court to permit the highest leaders of a government, engaged in the planning and execution of atrocity crimes, to avoid prosecution while subordinates were held accountable. This fundamental necessity in the prosecution of atrocity crimes was recognized and codified in the Nuremberg³⁸⁴ and Tokyo Tribunals,³⁸⁵ the Genocide Convention,³⁸⁶ and in International Criminal Tribunals for the former Yugoslavia³⁸⁷ and Rwanda,³⁸⁸ the Special Court for Sierra Leone,³⁸⁹ and other modern-day war crimes tribunals.³⁹⁰ It is not surprising that in the negotiations leading to the Rome Statute both the rationale and practical need to hold leaders accountable before the ICC provided the evidence points to their direct or superior responsibility for the commission of the atrocity crimes under investigation became clear.³⁹¹ Hence, Article 27 is firmly rooted in the document.³⁹²

³⁸² See Rome Statute, *supra* note 1, art. 27; SCHABAS, *supra* note 17, at 253-54.

These rights [to remain silent, receive legal assistance, and be questioned only in the presence of counsel] go well beyond the requirements of international human rights norms set out in such instruments as the International Covenant on Civil and Political Rights, and as a general rule surpass the rights recognized in even the most advanced and progressive justice systems. But the Statute insists that these norms be honoured, even if the questioning is being carried out by officials of national justice systems pursuant to a request from the Court.

Id. at 253; ZAHAR & SLUITER, *supra* note 50, at 305 (“Interestingly, wide-ranging protection during interrogation has rather uncritically been included in the ICC Statute. Article 55 of this statute elevates the ‘Miranda’ rights to a fundamental rule of ICC procedure.”).

³⁸³ SCHABAS, *supra* note 17, at 171-86.

³⁸⁴ Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

³⁸⁵ Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 at 3, 4 Bevans 20.

³⁸⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

³⁸⁷ ICTY Statute, *supra* note 9.

³⁸⁸ ICTR Statute, *supra* note 10.

³⁸⁹ The Special Court for Sierra Leone, <http://www.sc-sl.org/> (last visited Aug. 5, 2008).

³⁹⁰ These include: Extraordinary Chambers in the Courts of Cambodia, <http://www.eccc.gov.kh/english/default.aspx> (last visited Aug. 5, 2008); U.N. Interim Administration Mission in Kosovo, <http://www.unmikonline.org/> (last visited Aug. 5, 2008); The Iraqi Special Tribunal, <http://www.iraq-ist.org/> (last visited Aug. 5, 2008).

³⁹¹ SCHABAS, *supra* note 17, at 210-23.

³⁹² THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 74, at 202; THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A

Some State Parties have had to amend their constitutions, which include express immunity provisions for their highest officials, so as to lift such immunities for the commission of atrocity crimes and thus enable the ICC to reach, for example, the President of France if he or she were to be implicated in such crimes falling within the jurisdiction of the ICC.³⁹³ In contrast, the U.S. Constitution does not include any express grant of official immunity. If the United States were to enter into an international treaty, such as the Rome Statute, that prohibits head of state or other high-level immunity from prosecution before an international court for the commission of atrocity crimes, such an act would not, on its face, be barred by the terms of the U.S. Constitution.

Defining the scope of presidential immunities, the Supreme Court has interpreted the Constitution to grant immunity to officials while in office, but not for criminal matters; absolute immunity is only granted for civil damages.³⁹⁴ The test case has not arisen which would confirm or deny the immunity of the President from criminal prosecution. The remedy explicitly offered by the Constitution is impeachment proceedings, but the question arises whether that is the sole remedy for crimes committed by a sitting President or whether prosecution is an alternative to impeachment in the event of criminal conduct. The further option, explicitly authorized by the Constitution, would be criminal prosecution following a successful impeachment proceeding which convicts and thus removes the individual from the presidency. We do not seek to settle these constitutional arguments here as they remain problematic and untested in U.S. courts. But it should be recognized that the United States has the benefit, if one views it that way, of not being burdened with express constitutional immunities for high officials which would necessitate constitutional amendment if the United States were to ratify the Rome Statute.

COMMENTARY, *supra* note 74, at 975-1000 (offering a detailed examination of official capacity and immunities under international law and Article 27 of the Rome Statute).

³⁹³ Decision No. 98-408 DC, 1999 J.O. (20) 1317; *see also* para. 14 of the Preamble of the Constitution of the Fourth Republic of Oct. 27, 1946 (Constitution de 1946, préambule (Fr.) (reaffirmed in the Constitution du 4 Octobre 1958, préambule)); *see generally* Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5 (2001) (discussing the need for certain countries to amend their constitutions in order to ratify the Rome Statute and arguments relevant to ratifying it without constitutional amendment).

³⁹⁴ *United States v. Nixon*, 418 U.S. 683 (1974) (finding that executive privilege does not protect information subpoenaed pursuant to a criminal investigation); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (finding that the President has absolute immunity from civil cases based on actions taken in official presidential capacity). *Cf. Clinton v. Jones*, 520 U.S. 681 (1997) (finding that the President was not to be afforded temporary immunity from a civil lawsuit because the actions alleged were not related to his duties as President, but rather occurred before he took office).

Nonetheless, the United States almost certainly would attach a declaration to its ratification of the Rome Statute that would recite the Constitutional procedures for impeachment proceedings and their availability to the U.S. Congress in the event the President or Vice-President were indicted by the ICC and the United States exercised its complementarity privilege. If the ICC were to indict the President or another high U.S. official, and the United States were a State Party to the Rome Statute, complementarity would be the first line of defense on the part of U.S. officials. One would expect an investigation by the Justice Department or Congress which may result in clearing the President or other high official of any criminal conduct that might fall within ICC jurisdiction. Whether that would satisfy the ICC under the standards set forth in Articles 17 and 18 of the Rome Statute cannot be foretold. But there should be some good faith effort to examine the ICC charges and whether U.S. law, potentially amended to accommodate the atrocity crimes of the ICC's jurisdiction, has been violated. This would be a practical pathway through the immunity maze for the United States if it were to become a State Party to the Rome Statute.

If, for example, Congress were to amend Titles 10 and 18 of the U.S. Code, as suggested above, there could be an additional amendment explicitly denying the highest officials any immunity defense for commission of atrocity crimes falling within the jurisdiction of the ICC. In other words, any presumed immunity defense would be stripped from federal law with respect to one narrow band of the worst possible crimes: genocide, crimes against humanity, serious war crimes, and aggression if the latter is activated for the ICC. That should satisfy implementation of Article 27 of the Rome Statute in the context of a U.S. ratification of the Rome Statute, particularly since there is no explicit constitutional clause requiring amendment as was the case in France.

The counter-argument could be made that the President and other top officials require immunity from criminal investigations for atrocity crimes in order to conduct foreign policy and military policy without fear of prosecution.³⁹⁵ But that conventional argument belies the huge leap forward in international criminal law during the last fifteen years in which such heinous crimes cannot be tolerated, particularly as acts of political and military leaders who can use the powers of the State to bring death and destruction to large civilian populations. If the United States were to invoke an exceptionalist argument, contending that Washington must stand

³⁹⁵ See Bolton, *supra* note 3, at 170 ("Who will advise a President that he is unequivocally safe from the retroactive imposition of criminal liability if he guesses wrong?"); Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 840, 848-50 (2002).

apart from other nations and shield its own leaders from scrutiny with respect to atrocity crimes, then there would be strong grounds, in defiance of American exceptionalism, for arguing that every other State Party to the Rome Statute should endow its own leaders with identical immunity from prosecution. Such a dismantling of Article 27 of the Rome Statute would decimate the entire purpose and operation of the ICC.

IX. PROPOSALS TO ADDRESS CONSTITUTIONAL CONCERNS

There are a number of measures and initiatives that the United States could undertake to overcome any lingering concerns about the constitutionality of the Rome Statute, and most pertain to the ratification process:

1) As briefly noted already,³⁹⁶ the Executive Branch should consider submitting the Rome Statute to the U.S. Congress for approval as a congressional-executive agreement requiring majority votes in both the House of Representatives and the Senate.³⁹⁷ This procedure would comport with the Article I, Section 8 power of Congress “to define and punish . . . Offenses against the Law of Nations” and confirm Congressional consent to prosecution before the ICC of all of the crimes constituting the subject matter jurisdiction of the Rome Statute. As additional security against constitutional challenge, the Executive Branch could seek a two-thirds vote by the Senate to satisfy the Article II, Section 2 requirement for the Advice and Consent of the Senate for the making of treaties. This would require masterful political preparation by the President and Congressional leaders from both the majority and minority parties in order to achieve such a two-pronged and novel result.

2) A variation on this approach would be a conventional Senate advice and consent to ratification preceded by implementing legislation (a necessity in any event) adopted by Congress and that addresses a range of critical issues: incorporation of atrocity crimes into the federal and military criminal codes, procedures for U.S. cooperation with the ICC pursuant to the Rome Statute, and waiver of official immunity regarding crimes falling under ICC jurisdiction. The implementing legislation could mandate U.S.

³⁹⁶ See Part V, *supra*.

³⁹⁷ As an “inactive” signatory to the Rome Statute following the delivery of the Bolton letter of May 6, 2002, to the United Nations (see note 27, *supra*), we propose that the President deliver a second letter to the United Nations, as depository to the Rome Statute, essentially revoking the May 6, 2002 letter and confirming the resumption of U.S. legal obligations as a signatory State to the Rome Statute (namely, not to defeat the object and purpose of the Rome Statute). This step would enable the President to proceed most efficiently with ratification (rather than accession) procedures for adoption of the Rome Statute.

exercise of the complementarity principle in the event of an ICC investigation that might target U.S. nationals and thus afford such nationals full constitutional protection in U.S. courts if they merit prosecution, with the result of avoiding ICC jurisdiction altogether.

This fusion of two constitutional powers—the treaty power as manifested in two well-established procedures for the making of treaties and the define and punish power as manifested in Congressional approval of the defined atrocity crimes and the courts (domestic and international) before which they could be punished—should demonstrate a constitutional foundation for the Rome Statute.

3) Although the Rome Statute prohibits reservations, the United States would be entitled to attach declarations, understandings, and provisos to the document as part of the ratification process. Many other governments that are State Parties to the ICC have used this procedure to protect vital interests.³⁹⁸ For example, Australia imposed extremely rigorous conditions for the surrender of a person to the ICC and it required that ICC crimes “will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.”³⁹⁹ France interpreted Article 8 of the Rome Statute to relate solely to conventional weapons and not to prohibit the use of nuclear weapons or “impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defense.”⁴⁰⁰

a) The United States could attach an understanding to its instrument of ratification stipulating that procedures similar to extradition procedures would be applied with respect to surrender requests from the ICC, but that the Secretary of State would have to meet further rigorous criteria in making the final determination on surrender of a U.S. citizen to the ICC pursuant to treaty obligations under the Rome Statute. Those criteria could include receipt by the Secretary of State of a recommendation by a distinguished group of outside legal experts, including retired military lawyers, that the United States had failed to meet the complementarity test of the treaty for exclusive and permanent domestic jurisdiction in the particular case, and that therefore compliance with the ICC’s surrender request was justifiable under the circumstances. This effectively would be

³⁹⁸ SCHABAS, *supra* note 17, at 328-29; International Criminal Court, Assembly of States Parties, <http://www.icc-cpi.int/asp/statesparties.html>.

³⁹⁹ The International Criminal Court Act 2002 and the International Criminal Court (Consequential Amendments) Act 2002, June 28, 2002. See Gideon Boas, *An Overview of Implementation by Australia of the Statute of the International Criminal Court*, 2 J. INT’L CRIM. JUST. 179 (2004).

⁴⁰⁰ Declarations Made by France Upon Ratifying the Statute of the International Criminal Court, June 9, 2000, *available at* <http://www.lcnp.org/global/french.htm#attachment>.

second-guessing the ICC judges requesting the surrender of the U.S. indictee, but the Secretary of State would weigh that factor in reaching a final decision on the fate of the indictee. Indeed, it would be surprising if any State Party would blindly accept the view of the ICC judges as to a failure of complementarity without some kind of internal review prior to a surrender of a national indictee to the ICC. The Secretary of State also would be required to determine whether the surrender of the individual to the ICC would so impair national security or the foreign policy of the country that American withdrawal from the Rome Statute should be initiated by the President while the indictee remains in the United States. This is a procedure that, if used, probably would put the United States in violation of the Rome Statute.

b) The United States could attach a proviso of the type used previously in treaty ratification⁴⁰¹ stating “the U.S. intention that nothing in the Rome Statute requires or authorizes legislation, or other action, by the United States that is prohibited by the U.S. Constitution as interpreted by the United States.” We have shown in this article that appropriate use of the treaty and define and punish powers of the U.S. Constitution should resolve the constitutional concerns and thus not lead to any requirement under the Rome Statute for legislation or “other action” prohibited by the Constitution. This is quite apart from considerations about the sufficiency of due process protections under the Rome Statute. The extreme view would counsel not surrendering a U.S. national to the ICC for prosecution if it is determined that he or she would be deprived of a constitutional right that the Rome Statute and the Rules of Procedure and Evidence protect but which, under the actual circumstances of the case, in fact are not being protected.

c) The United States could attach a declaration explaining that any U.S. national subject to an arrest warrant approved by the ICC, particularly for an atrocity crime committed in the United States, would be investigated and, if merited, prosecuted before a U.S. court by jury trial or court martial. The U.S. declaration would further stipulate that if the alleged U.S. citizen perpetrator is outside the United States, the U.S. government will undertake every legal effort to secure custody of such individual so that the United States can exercise its complementarity right over that individual and bring such person to justice before U.S. courts. Finally, the declaration could recite the constitutional procedures for impeachment proceedings and note their availability to the U.S. Congress in the event the President or other

⁴⁰¹ See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 ILM 368 (1967).

high government officials are suspected of committing atrocity crimes,⁴⁰² and that such impeachment procedures would be regarded by the United States as part of the complementarity procedures under the Rome Statute, recognizing that criminal proceedings may still be required before U.S. courts regarding any such official.

d) Another declaration could confirm that the ICC's jurisdictional reach over the United States and its nationals commences on the first day of the month after the 60th day following U.S. ratification, which would accord with the strict terms of the temporal jurisdiction of the Rome Statute.⁴⁰³ The ICC Prosecutor focuses on the most serious atrocities and the Security Council has begun to flex its power to refer atrocity situations pertaining to non-party States and their nationals to the ICC.⁴⁰⁴ But with such a declaration the U.S. Senate (or Congress) would serve notice that the ICC must not seek to investigate U.S. citizens for events occurring prior to U.S. participation in the ICC as a State Party. Such a declaration would confirm the constitutional prohibition against ex post facto crimes. In the long run, other State Parties should accept such an explicit interpretation as a reasonable price to pay for U.S. participation, and one that is implicitly endorsed by existing State Parties anyway.⁴⁰⁵ No government that has

⁴⁰² Such acts should constitute "High Crimes" meriting impeachment under the Constitution. U.S. CONST. art. II, § 4.

⁴⁰³ Rome Statute, *supra* note 1, art. 11(1); David Scheffer, *How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction*, 2 INT'L CRIM. JUSTICE 26, 29 (2004) (a proper interpretation of Articles 11(2), 12(3), 22(1), 24, 121(5), and 126(2), taken together, establishes that the temporal jurisdiction of the ICC over any particular individual is determined in accordance with the date upon which the Rome Statute enters into force for such individual's State of nationality and whether certain circumstances, such as a U.N. Security Council referral of the relevant situation to the ICC or the special consent by the State of nationality of the individual, have occurred prior to the entry into force of the Rome Statute for that State).

⁴⁰⁴ For example, for information regarding the ICC's treatment of the situation in Darfur, Sudan, see International Criminal Court: Darfur, Sudan, <http://www.icc-cpi.int/cases/Darfur.html> (last visited Aug. 5, 2008).

⁴⁰⁵ Bearing in mind the start date for jurisdiction of the Rome Statute for any newly ratified State Party under Article 126(2), the only way Article 24 makes sense is if it means, "No person shall be criminally responsible under this Statute for conduct prior to entry into force of this Statute for the State of nationality of such person." Article 24 is a general principle of criminal law in the Rome Statute and pertains to the non-retroactivity *ratione personae*; its whole purpose is to deal with the "person" with respect to criminal responsibility. When read in conjunction with Article 11(2), Article 24 must refer to entry into force for that person's state of nationality Indeed, if a poll were to be taken today of all States Parties that ratified the Rome Statute after 1 July 2002, how many of those governments would confirm their understanding that their nationals have been fully subject to ICC jurisdiction since 1 July 2002 [and prior to that nation's ratification of the Rome Statute], *pursuant to Article 24*? I submit that not a single one, if it considered the matter seriously, would do so.

ratified the Rome Statute has publicly declared that it accepts the ICC's jurisdiction over itself or its nationals for events occurring prior to such nation joining the Court, absent its consent. Therefore, this should not be a controversial declaration for the United States to make, or to enforce domestically and in its relations with other State Parties and with the Court.

e) A declaration to the Rome Statute could stipulate an intention on the part of the United States to withdraw from the treaty, in accordance with Article 127 of the Rome Statute, if any one of four situations occur: First, if any U.S. citizen convicted by the ICC is imprisoned in any country other than the United States without U.S. consent.⁴⁰⁶ Second, if the Rome Statute is amended despite U.S. opposition to permit the death penalty in its sentencing procedures.⁴⁰⁷ Third, if the President determines that the fundamental due process rights of the Rome Statute are being systematically and irreversibly denied by the judges of the ICC in their decisions and judgments. Fourth, if the President determines that the ICC judges and/or the ICC Prosecutor have become so politically biased or corrupted in the performance of their duties that the United States has lost confidence in the independence, objectivity, and credibility of the ICC as a judicial body and has further determined that such violations of the Rome Statute cannot be remedied within a reasonable period of time.

f) A further declaration or understanding by the United States could stipulate that the United States reserves the right to oppose any amendment to the Rome Statute that seeks to add drug trafficking, terrorism, or other crimes commonly prosecuted domestically or pursuant to specialized multilateral treaty regimes which the United States has determined are superior means of enforcing domestic and international law with respect to those crimes. If any such amendment were to be adopted by the requisite vote of the State Parties, the United States would consider exercising its rights under Article 121 (5 & 6) of the Rome Statute.⁴⁰⁸ If the United States

Scheffer, *How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction*, *supra* note 403.

⁴⁰⁶ Rome Statute, *supra* note 1, art. 103. The reality is that the United States would have to enter into an agreement with the ICC to incarcerate convicted individuals. Perhaps as part of the terms of such agreement, the U.S. could require that any U.S. citizen convicted by the ICC must be incarcerated in the United States unless otherwise agreed with the United States. We recommend that, if successfully negotiated, such a bilateral arrangement between the United States and the ICC could be treated as a supplement to the implementing legislation enabling the United States to join the ICC.

⁴⁰⁷ While the United States invokes the death penalty at the federal level, as do a number of the nation's states, it probably would be politically impossible for the U.S. government to agree to the ICC administering the death penalty to an American, and it is almost inconceivable given the widespread opposition to the death penalty by a large number of the State Parties.

⁴⁰⁸ Article 121(5) reads:

were to join the ICC prior to an amendment to the Rome Statute that activates the crime of aggression, then Washington could exercise its Article 121(5) right as a State Party to opt out of any ICC liability for U.S. citizens with respect to the crime of aggression.

4) If the United States were to become a State Party to the Rome Statute prior to the convening of the Article 123 Review Conference, now scheduled for 2010, it could participate as a voting member of that conference and propose amendments to the Rome Statute and probably to any of its supplemental agreements, particularly the Rules of Procedure and Evidence.⁴⁰⁹ In the realm of constitutional issues, the United States could propose that there be a new rule in the Rules of Procedure and Evidence, or an amendment to Article 19, requiring a special mandatory admissibility review in addition to the review required by Article 19(2) when there is a challenge by any one of several parties.⁴¹⁰ The second review would be based on Article 19(1), which reads: “The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.”

Any amendment to articles 5, 6, 7, and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State party's nationals or on its territory.

Article 121(6) reads:

If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

⁴⁰⁹ Article 123(1) reads:

Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

Note also that Rules can be amended at any time upon adoption by a two-thirds majority of the members of the Assembly of States Parties. Rome Statute, *supra* note 1, art. 51.

⁴¹⁰ Article 19(2) reads:

Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (1) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A state which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12.

See David Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 61.

If the Court were to review a case's admissibility immediately prior the surrender of an indictee to the ICC, then State Parties (including the United States) could be assured that the complementarity principle has been thoroughly followed and the indictee's due process rights have been fully protected up to the point of the planned surrender. It may be that an initial admissibility review early in a case's evolution would require reevaluation months if not years later, when the charged individual stands poised to be surrendered to the ICC. The judges should be required to undertake that review, either with further clarification in the Rules of Procedure and Evidence or through an amendment to Article 19(1). Adoption of a new Rule would be the more pragmatic option. The text of the new Rule would read as follows:

Unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender to the Court of a suspect who has been charged in such case with a crime falling within the jurisdiction of the Court.⁴¹¹

X. CONCLUSION

The fundamental question that arises with respect to the constitutionality of the Rome Statute is if the United States can take "yes" for an answer to the question of whether the ICC protects the due process rights of a defendant. It would be implausible for the United States to stand before no fewer than 108 State Parties to the ICC and argue that the ICC fails the due process test. The collective rebuttal would be deafening.

We have sought to demonstrate the following in this article:

1. U.S. policy towards the ICC has the potential of shifting towards a more cooperative relationship with the ICC and serious consideration by Washington of ratification of the Rome Statute.
2. The fundamental principles of the Rome Statute reflect the merger of common law and civil law systems but are in large part very familiar to American attorneys and judges and compatible with U.S. practice.

⁴¹¹ This was negotiated in 2000 as a U.S. proposal with respect to the draft Relationship Agreement between the International Criminal Court and the United Nations, but it was not followed through by the Bush Administration. See Working Group on a Relationship Agreement Between the United Nations and the International Criminal Court, Proposal Submitted by the United States of America, U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (2000); Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 7, at 61-62 (describing similar wording tailored for the draft Relationship Agreement between the International Criminal Court and the United Nations rather than as an amendment to the Rules of Procedure and Evidence, as is proposed in this article).

3. The admissibility criteria of the Rome Statute establish a regime of complementarity that defers to U.S. jurisdiction over nationals suspected of committing atrocity crimes within the jurisdiction of the ICC, thus presenting the opportunity for conventional protection of U.S. constitutional rights in a criminal trial of any such national in U.S. courts.

4. Special non-surrender agreements entered into under Article 98(2) of the Rome Statute offer further opportunities for U.S. investigation and prosecution of American service personnel and officials charged with atrocity crimes, with constitutional rights protected in trials before U.S. courts, but such agreements must be properly drafted and interpreted to realize their full potential.

5. U.S. participation in the ICC would not contravene the Article III, Section 1 mandate of the Constitution on the establishment of domestic courts. The judicial power of the ICC is not that of the United States, but rather of an independent international criminal court with its own international legal personality and bound to no government's direction or control. Nothing in the Constitution requires that a treaty-based international criminal court established by the world's governments outside of the United States be inferior to the Supreme Court. The ICC investigates and prosecutes international crimes of the most heinous and substantial character for purposes that, as of October 2008, 108 governments will have determined are essential for international justice and the deterrence of atrocity crimes. We conclude that the Constitution does not prohibit the United States from sharing the same objectives through use of the Article II, Section 1 treaty power to build a uniquely-conceived international court. Ratification of the Rome Statute would not implicate the Article III, Section 1 power to establish domestic courts.

6. While it remains important to recognize that in constitutional practice not all crimes committed in the United States by U.S. citizens in fact have warranted trials in Article III courts, we do not seek to avoid the Sixth Amendment requirement that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." Where an atrocity crime is committed in the United States, and the alleged perpetrator is in the country, the United States should exercise its complementarity right under the Rome Statute to prosecute such individual before a U.S. criminal court and thus fully satisfy the Sixth Amendment requirement. If in the extreme case such individual is ultimately surrendered to the ICC to stand trial, he or she will have been investigated by U.S. law enforcement authorities and, if merited,

prosecuted under Sixth Amendment criteria. For the ICC to determine that the United States had somehow failed the complementarity criteria and thus triggered the surrender obligation to the ICC would be an extraordinary decision, and one the United States would be at greatest risk of triggering if the Congress fails to amend the federal criminal code and the military code to fully incorporate the atrocity crimes which frame the subject matter jurisdiction of the Rome Statute.

7. Nonetheless, the United States routinely extradites or transfers individuals, including U.S. citizens, to non-Article III criminal courts in foreign countries pursuant to extradition treaties and Status of Forces Agreements entered into with foreign governments. The Constitution does not preclude the United States from a) entering an international agreement (such as an extradition treaty or a SOFA) to provide for the criminal trial in a foreign court of a U.S. national who has committed a crime abroad (including a crime partially committed in the United States) even if that court's procedures fail to meet all U.S. constitutional standards, or b) enforcing the judgment of a foreign court even if it lacked some U.S. constitutional guarantees of due process. Both practices lend credence to what would be expected of the United States as a State Party to the Rome Statute. The fact that the United States was so instrumental in the creation of the ICC and the drafting of the ICC's constitutional documents suggests that the relatively low bar established in U.S. courts for enforcement of judgments by various foreign criminal courts as well as a robust U.S. extradition practice that refuses to probe the due process standards of foreign criminal courts, including those prosecuting extradited U.S. citizens, makes the highly sophisticated structure of the ICC and its body of due process rights acceptable on constitutional grounds.

8. The Define and Punish Clause of the Constitution enables Congress to establish non-Article III courts and tribunals to punish offenses against the law of nations, which atrocity crimes so qualify as and can be so defined by the Congress pursuant to this constitutional power.

9. The constitutional right to a jury trial is not absolute and would depend on a variety of factors regarding the identity, whether military or civilian, of the alleged perpetrator, the place where the atrocity crime was committed, whether the U.S. government was seeking to exercise extraterritorial jurisdiction over a U.S. citizen located abroad, a failure by U.S. prosecutors and courts to properly exercise complementarity rights, and a resulting determination by ICC judges that the individual must be surrendered to the ICC for trial. The complementarity principle encourages using national courts,

particularly if they are functioning and open for business, and thus trial by jury would be available for any U.S. citizen who is a civilian and physically drawn into the personal jurisdiction of a federal court. This fundamental but peculiar attribute of common law trials—the jury—is not a constitutionally-required element of a criminal trial before a foreign court and it would not be a required feature of an international criminal court, located outside the United States as an independent treaty-based court, and which the U.S. government would join under the Constitution pursuant to its treaty power and the Define and Punish Clause.

10. Fundamental due process rights are protected by the Rome Statute. With the exception of the right to trial by jury, which itself is limited, the ICC would provide a U.S. defendant with essentially the same due process rights as enjoyed in U.S. courts and more protection than would typically be accorded by a foreign court to which a U.S. citizen could be extradited pursuant to an extradition treaty.

11. The Constitution does not include any express grant of official immunity for atrocity crimes committed by its highest officials. Absolute immunity is only granted under federal law for civil damages, although the test case has not arisen which would confirm or deny the immunity of the President from criminal prosecution. Impeachment proceedings are available as an initial remedy to hold the President and other high officials responsible for criminal actions. Implementing legislation for ratification of the Rome Statute could explicitly deny the highest officials any criminal immunity defense for the commission of atrocity crimes falling within the jurisdiction of the ICC.

The declarations, understandings, and provisos we have recommended in connection with U.S. ratification of the Rome Statute, as well as other legislative initiatives and implementing legislation, particularly with respect to amending the federal criminal and military codes to incorporate the full range of atrocity crimes found within ICC jurisdiction, would establish a sound basis for U.S. participation in the ICC in accordance with constitutional law and practice.