

# THE FUTURE CONSTITUTIONAL BATTLE IF THE UNITED STATES RATIFIES THE INTERNATIONAL CRIMINAL COURT TREATY

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## I. INTRODUCTION

For the last century, the prospect of a permanent International Criminal Court (hereinafter the “ICC”) to adjudicate crimes of international concern has been under consideration by the international community.<sup>1</sup> Proponents insist an ICC will provide a neutral forum necessary to overcome legal barriers to bringing war criminals to justice.<sup>2</sup> Clearly, there are benefits to international law by the creation of an ICC,<sup>3</sup> but several valid concerns<sup>4</sup> exist, including the rather monumental problem that the United States may not legally become a part of the ICC without an amendment to its Constitution.

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<sup>1</sup> Bryan F. MacPherson, *Building An International Criminal Court for the 21<sup>st</sup> Century*, 13 Conn. J. Int’l L. 1, 11 (Winter, 1998).

<sup>2</sup> Kai I. Rebane, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 Fordham Int’l L.J. 1636, 1672 (1996); See Richard B. Bilder, *An Overview of International Human Rights Law in International Law* 894, 895 (Barry E. Carter & Philip R. Trimble eds., 1995).

<sup>3</sup> Daniel B. Magraw, Report of the American Bar Association in Support of the ICC, presented to the American Bar Association Mid-Year Conference, San Diego, CA, 1 (19 February 2001).

<sup>4</sup> Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 St. John’s J. Legal Comment 535, 538 (1997); See Joel Caviccia, *The Prospect for an International Criminal Court in the 1990’s*, 10 Dick. J. Int’l L. 223 (1992) (claiming that competing forces of “sovereignty” and “international order” have previously frustrated promulgation of a permanent International Criminal Court.)

On July 17, 1998, a United Nations Conference in Rome, Italy, approved the “Rome Statute of the International Criminal Court.”<sup>5</sup> The vote was one hundred and twenty to seven, with twenty-one abstentions. Most notably, the United States, Israel, and China were among those voting against the convention.<sup>6</sup> Pursuant to the Statute, the ICC will be created when it is ratified by sixty nations.<sup>7</sup> Thus far, one hundred and thirty-nine nations have signed the convention, including the United States, and twenty-nine countries have ratified the treaty.<sup>8</sup> The United States has made it clear, however, it will not ratify the treaty in the near future.<sup>9</sup> One of the major limitations to ratification by the United States is the perceived possible violation of the United States Constitution of becoming a part of such a court. In May 2002, President George W. Bush formally “unsigned” the ICC treaty and began the diplomatic process of negotiating agreements with States that are signatories to “guarantee Americans would not be extradited” to the ICC.<sup>10</sup>

The purpose of this paper is (1) to provide historical background to the ICC; (2) to provide an overview of the ICC structure, including the court’s subject matter and personal matter jurisdiction; and, primarily, (3) to analyze and discuss the constitutional objections to possible United States ratification.

## II. History of the International Criminal Court

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<sup>5</sup> Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, *reprinted* at 37 ILM 998 (1998) (hereinafter “ICC Statute”).

<sup>6</sup> John R. Schmertz, Jr. and Michael Meier, *By Large Majority, U.N. Conference in Rome Approves Permanent International Criminal Court*, 4 Int’l L. Update 88 (July, 1998). (Even if the executive branch of the United States had supported the statute, Senator Jesse Helms, Chairman of the U.S. Senate Foreign Relations Committee, stated that a proposal for an international tribunal that could prosecute American soldiers for war crimes would be “dead on arrival” at his committee).

<sup>7</sup> ICC Statute, *supra* note 5, art 126(1).

<sup>8</sup> See Ratification Status at [www.un.org/law/icc/statute/status.htm](http://www.un.org/law/icc/statute/status.htm) (updated 27 February 2000).

<sup>9</sup> Nicholas S. Curabba, *The Rome Statute of the International Criminal Court: Selected Legal and Constitutional Issues*, *Congressional Research Services*, 12 (February 22, 1999)

<sup>10</sup> Davis, Stephen F., *The International Criminal Court: A Return To Nuremberg?*, *Proceedings*, 70, 72 (March 2003).

The ICC Statute is not a novel idea. The concept of an ICC was first discussed in the late nineteenth century incident to the Hague Conventions.<sup>11</sup> However, world politics, concerns about protecting national sovereignty, and the Cold War all contributed to stifling the ICC's development. Although a complete historical review<sup>12</sup> of the effort to create an ICC is beyond the scope of this paper, there are several important milestones the discussion of which will provide context.

### A. Pre-World War I History

The origin of the creation of an international penal code and ICC can be traced back to the Hague Conventions of 1899 and 1907. The First Hague Convention in 1899 is noteworthy for the creation of the Court of Arbitral Justice.<sup>13</sup> Then, in 1907 at the Second Hague Peace Conference, various States, including the United States, perceived a conflict between the jurisdictional power of the United States Supreme Court and the potential jurisdictional power of the proposed ICC.<sup>14</sup> As discussed *infra*, these same concerns exist relating to the United States joining the ICC today.

The Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, which codified the principles of war on land and set out the foundation for the Nuremberg Trials, was an important instrument in the evolving international consensus that an ICC was needed.<sup>15</sup>

And notably, the later Nuremberg International Military Tribunal specifically recognized the

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<sup>11</sup> Convention (II) with Respect to the Land and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, The Hague, July 29, 1899: 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Oct. 18, 1907, 26 Stat. 2277, T.S. 539.

<sup>12</sup> For an entire historical review of the creation of the ICC see Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 Denv. J. Int'l L. & Pol'y 419, 421 (Spring, 1995); Mark A. Bland, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects*, 2 Ind. J. Global Legal Stud. 233, 252 (Fall, 1994).

<sup>13</sup> Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 Denv. J. Int'l L. & Pol'y 419, 421 (Spring, 1995).

<sup>14</sup> *Id.*

<sup>15</sup> Bland, *supra* note 11, at 252.

1907 pact as declaratory of customary international law and, thus, binding on all nations, regardless of their signatory status.<sup>16</sup>

## **B. The Versailles Peace Conference**

World War I kept the idea of an ICC in the background until 1919, but following the war, United States President Woodrow Wilson proposed the creation of the League of Nations.<sup>17</sup> Significant in the thinking by the League of Nations proponents was the reality that automatic weapons, chemical weapons, aircraft, armored vehicles, and other new weapons were used for the first time. These new instrumentalities of war created far greater potential for non-combatants to suffer from indiscriminate military attacks.

In 1919, the Versailles Peace Conference created the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.<sup>18</sup> The Commission concluded individuals responsible for genocide, regardless of rank or status, should be prosecuted before a multinational tribunal.<sup>19</sup> The tribunal would apply “the principles of the law of nations as they result from the usage’s among civilized peoples, from the laws of humanity and from the dictates of public conscience.”<sup>20</sup> Not surprisingly, many States objected to the concept of having individuals of all rank subject to an international tribunal. The United States, for example, argued that trying the Kaiser before a foreign power would violate Germany’s sovereignty.<sup>21</sup> In the end, the Commission rejected the contention that high officials of enemy States could be held

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<sup>16</sup> *Id.*

<sup>17</sup> Jamison, *supra* note 11, at 422.

<sup>18</sup> Matthew Lippman, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 *Ariz. J. Int’l & Comp. L.* 415, 417 (Spring, 1998).

<sup>19</sup> *Id.*; See *Memorandum of Reservations Presented By The Representatives of the United States to the Report Of the Commission On Responsibility*, reprinted in 14 *Am. J. Int’l. L.* 95, 127-143; See Gregory P. Noone and Douglas W. Moore, *An Introduction to the International Criminal Court*, 46 *Naval L. Rev.* 112, 113 (1999).

<sup>20</sup> *Id.*

<sup>21</sup> MacPherson, *supra* note 1, 5.

“personally accountable” for starting war.<sup>22</sup> For the future, however, the Commission did recommend penal sanctions be provided for initiating a war of aggression.<sup>23</sup> One American commentator rationalized that while it “shocks our sense of justice that the monstrous war crimes of Germany should go unpunished, it is perhaps best, in the view of the interest of all the world and the future generations that this should be so rather than further seeds of hatred between the nations should be sown.”<sup>24</sup>

Ultimately, Article 14 of the League of Nations Charter did create a permanent Court of International Justice, and the Executive Council of the League of Nations drafted a statute for a permanent Court of International Justice that was completed in 1921. The Statute called for a High Court of International Justice to try crimes constituting a breach of international public order or against the Universal Law of Nations.<sup>25</sup> This Court’s jurisdiction was limited to disputes in which the States voluntarily submitted to jurisdiction.<sup>26</sup> In due course, many States ratified the Statute,<sup>27</sup> but similar to the Rome Conference, the main exception was the United States,<sup>28</sup> with the United States Senate failing to support a measure produced by its own President. Perhaps the most significant aspect of the permanent Court of International Justice was that it was the predecessor to the International Court of Justice following World War II.<sup>29</sup>

In addition to creating the permanent Court of International Justice, during the 1930’s, the international community took a stance on the punishment of terrorists by setting up a

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<sup>22</sup> *Id.*, at 5

<sup>23</sup> *Id.*

<sup>24</sup> George Gordon Battle, *The Trials before the Leipzig Supreme Court of Germans Accused of War Crimes*, 8 Va. L. Rev. 1, 17 (1921).

<sup>25</sup> MacPherson, *supra* note 1, at 7.

<sup>26</sup> Jamison, *supra* note 11, at 422.

<sup>27</sup> Jamison, *supra* note 11, at 423.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Convention on Terrorism to meet in Geneva.<sup>30</sup> During the Convention, member States discussed the possibility of creating an international criminal code, extraditing terrorists, and creating an ICC.<sup>31</sup> These reasons would very much resemble the calls for a modern ICC.

### **C. World War II, the Nuremberg Tribunals and Control Council Ten**

The theoretical concerns hindering efforts to prosecute war criminals following the Great War were swept aside during World War II. By the end of World War II, consensus within the international community had grown into four general principles of international law.<sup>32</sup> On August 8, 1945, the four allied powers signed the London Agreement,<sup>33</sup> establishing an International Military Tribunal.<sup>34</sup> Unlike World War I, the United States, through the Justice Department,<sup>35</sup> took the principal leadership role by demanding that Germany's leaders be held accountable for war crimes.<sup>36</sup> The Nuremberg Tribunal, as it was commonly called, indicted twenty-four high ranking Nazi officials on October 16, 1945, for war crimes, crimes against peace, and crimes against humanity.<sup>37</sup>

Following the Nuremberg Trials, the Allied Powers agreed to prosecute alleged German war criminals apprehended within their respective zones of occupation.<sup>38</sup> Thereafter, war criminals were tried by international tribunals called "Control Council 10" courts, created by

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<sup>30</sup> *Id.*

<sup>31</sup> Jamison, *supra* note 11, at 423.

<sup>32</sup> Jamison, *supra* note 11, at 424-425. (The four major principles were as follows: (1) Crimes against peace, defined as the planning, preparation, initiation or waging of aggression, or a war in violation of international law, treaties, agreements, or assurances or participation in a common plan or conspiracy for any of the foregoing; (2) Crimes against humanity, defined as crimes such as murder or extermination; (3) War crimes, defined as any delineation of the Hague Conventions; and (4) Conspiracy to commit any of these crimes).

<sup>33</sup> London Agreement, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>34</sup> Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; MacPherson, *supra* note 1, at 8.

<sup>35</sup> Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 Pace Int'l L. Rev. 121, 126 (Winter, 1994).

<sup>36</sup> MacPherson, *supra* note 1, at 8-9.

<sup>37</sup> *Id.*

<sup>38</sup> See Control Council Law No. 10, in IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILIT. TRIB. UNDER CONTROL COUNCIL LAW No. 10 XVIII (1952).

agreement and largely following the Nuremberg precedent. The courts held that crimes against humanity must be connected to a war crime or crime against peace.<sup>39</sup> Thus, crimes committed before the war were not to be considered in Control Council 10 courts.<sup>40</sup>

In addition to the Control Council 10 courts, United States General Douglas MacArthur established war crimes tribunals for Southeast Asia in Tokyo,<sup>41</sup> with less serious Japanese defendants tried in Yokohama.<sup>42</sup> Since the United States controlled the Pacific Theater during the war, an international agreement similar to the London Agreement was not required to establish the Japanese tribunals.<sup>43</sup>

The Tribunals set up at Nuremberg and Tokyo are recognized as the first international tribunals to bring war criminals to justice.<sup>44</sup> The Charter for the Nuremberg Tribunal, hereinafter the Nuremberg Charter, became a piece of the foundation for a permanent ICC. For example, article 6(a) of the Nuremberg Charter provided for the punishment of crimes against peace;<sup>45</sup> Article 6(b) of the Nuremberg Charter provided for the punishment of war crimes;<sup>46</sup> and Article 6(c)<sup>47</sup> of the Nuremberg Charter provided the first formal definition and punishment of crimes

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<sup>39</sup> *Id.*

<sup>40</sup> Lippman, *supra* note 17, at 432.

<sup>41</sup> Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

<sup>42</sup> MacPherson, *supra* note 1, at 8-9.

<sup>43</sup> Although General MacArthur unilaterally set up the Tokyo Tribunals, the nineteen Allied countries appointed a judge to sit in Tokyo. See Joseph Berry Keenan and Brendan Francis Brown, *Crimes Against International Law* 1-2 (1950); M. Cherif Bassiouni, The International Criminal Court in Historical Context, 1999 *St. Louis Warsaw Trans. L.* 55, 62 (1999).

<sup>44</sup> Noone, *supra* note 18, at 114.

<sup>45</sup> See Nuremberg Charter, *supra* note 33, at Art. 6(a) states that crimes against peace are namely the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

<sup>46</sup> *Id.*, at Art. 6(b) provided punishment for violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

<sup>47</sup> See Nuremberg Charter, *supra* note 33, at Art. 6(c), which provides for the punishment of crimes against humanity, namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of

against humanity.<sup>48</sup> The format that was established under Article 6 of the Nuremberg Charter proved highly successful for the Tribunal.<sup>49</sup> These Tribunals set an “important precedent by signaling the international community’s resolve to hold individuals, whether government officials or others, personally accountable for war crimes.”<sup>50</sup> And, by creating individual accountability, the Tribunals thus rejected the World War I position that state sovereignty is a defense for egregious crimes committed against mankind.<sup>51</sup>

The United Nations Charter, formed simultaneously with the Nuremberg Charter, also embodies several of the Nuremberg Principles. For example, the United Nations Charter states that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state....”<sup>52</sup> The ICC’s creation evolved primarily from the Nuremberg Tribunals and the United Nations, which encouraged the progress of international criminal law.<sup>53</sup>

#### **D. The Cold War Era**

In 1948, the General Assembly of the United Nations appointed the International Law Commission (ILC) to investigate the possibility of establishing a permanent ICC. In addition, on December 9, 1948, the United Nations General Assembly recognized “that at all periods of history, genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,” and

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or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of country where perpetrated.

<sup>48</sup> *Id.*

<sup>49</sup> Jamison, *supra* note 11, at 425.

<sup>50</sup> Noone, *supra* note 18, at 114.

<sup>51</sup> *Id.*, at 114-15.

<sup>52</sup> Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. NO. 993, art. 2, para. 4 (entered into force Oct. 24, 1945).

<sup>53</sup> Noone, *supra* note 18, at 113.



adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which called for the creation of an ICC.

In 1950, the ILC proposed a Code of Offenses, which defined crimes such as the violations of customs of war, conspiracy, and crimes against humanity.<sup>54</sup> The ILC also included enforcement provisions, recognizing that, otherwise, the process would be doomed to fail.<sup>55</sup> The ILC argued the aggression of one man should no longer be able to bring the world to its knees, as it had in World War II.<sup>56</sup> However, the General Assembly did not vote on the proposed statute. Instead, the General Assembly decided to postpone consideration of the draft statute pending the adoption of the definition of “aggression.” Today, the United States is still unwilling to support the creation of an ICC because of the continued dispute over the definition of aggression.

During the 1960’s, concern over international crime continued to escalate, re-emerging in the context of apartheid and racial discrimination.<sup>57</sup> In 1978, a report of the American Bar Association (hereinafter the ABA) argued for a court with jurisdiction limited solely to crimes associated with the acts of terrorism, war crimes, crimes against peace, drug trafficking, genocide, and torture. The ABA report was designed to accommodate the perceived need to protect national sovereignty by calling for an ICC whose subject matter jurisdiction encompassed criminal acts solely recognized by international law. In the late 1980’s, the Soviet Union, which had long opposed the idea of an ICC, began advocating the concept of an ICC to deal with terrorism.<sup>58</sup>

## **E. The Modern Approach**

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<sup>54</sup> Jamison, *supra* note 11, at 426.

<sup>55</sup> *Id.*, at 427

<sup>56</sup> *Id.*, at 427

<sup>57</sup> Jamison, *supra* note 11, at 427.

<sup>58</sup> MacPherson, *supra* note 1, at 12.

The modern campaign to establish an ICC can be traced to a speech given by former Soviet President Mikhail Gorbachev before the United Nations General Assembly encouraging the trial of drug traffickers.<sup>59</sup> Contrary to Gorbachev's beliefs, however, other States foresaw a need for an ICC because of the break-up of the former Soviet Union, the demise of bi-polar stability, the rise of nationalistic and aggressive tendencies by many nations and the internationalization of trade and policy.<sup>60</sup>

It was actually a group of Caribbean States, however, that most revitalized the proposal for a permanent ICC at the United Nations General Assembly in 1989.<sup>61</sup> These States agreed with the Soviet position and argued that an international judicial institution could help address narcotics trafficking in the Caribbean.<sup>62</sup> A majority of member States joined in, arguing that drug trafficking, global terrorism, and the birth of new nations created serious new problems in international law.<sup>63</sup>

In 1991, the ILC adopted draft articles called the Code of Crimes Against the Peace and Security of Mankind.<sup>64</sup> The ILC transmitted these articles to the Secretary General of the United Nations, who submitted the articles to all of the governments of the United Nation member States for review.<sup>65</sup> In 1992, the General Assembly established a working group to discuss the proposed international criminal jurisdiction of the ICC.<sup>66</sup>

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<sup>59</sup> Evered, *supra* note 34, at 128.

<sup>60</sup> Jamison, *supra* note 11, at 428.

<sup>61</sup> See U.N. GAOR. 6<sup>th</sup> Comm., 44<sup>th</sup> Sess., 38<sup>th</sup>-41<sup>st</sup> mtgs., U.N. Doc. A/C.6/44/SR.38-41 (1989); See Evered, *supra* note 23, at 127.

<sup>62</sup> Noone, *supra* note 18, at 121.

<sup>63</sup> Rebane, *supra* note 2, at 1665 (1996).

<sup>64</sup> Jamison, *supra* note 11, at 430 *citing* Official Records of the General Assembly, U.N. GAOR., 46<sup>th</sup> Sess., Supp., No. 10, at para. 173-174, U.N. Doc. A/46/10 (1993).

<sup>65</sup> *Id.*, at 431.

<sup>66</sup> *Id.*, at 431.

In 1992, Professor Bryan MacPherson, a noted international law specialist, proposed the creation of an ICC completely independent from the United Nations.<sup>67</sup> This idea is now a principal feature of the ICC, and one of the major points of contention for the United States. The proposal set out the creation of a complete international code of crimes as a long-term goal. As a short-term goal, the MacPherson proposal conferred subject matter jurisdiction only over war crimes and crimes against peace. Soon thereafter, in 1992, Professor M. Cherif Bassiouni, Special Rapporteur of the working group established by the United Nations, published a revised version of a draft statute originally prepared and circulated in 1980.<sup>68</sup> Professor Bassiouni incorporated a solution to the problem of the ICC's applicable law through a system of transferred jurisdiction.<sup>69</sup> Under this concept, the ICC would merely be an extension of the United Nations' member States' jurisdiction, and would apply the transferring States' criminal law and rules of procedure.<sup>70</sup> However, this would be dependent on the consent of the State to transfer the legal proceedings, with its concurrence the crime was recognized under international law.<sup>71</sup> This proposal is similar to the current International Court of Justice structure of States agreeing to jurisdiction. Eventually, this concept never reached the drafters of the ICC because of the "primary jurisdiction" of the Ad Hoc Tribunals created for Yugoslavia and Rwanda, discussed *infra*.

In the modern age, a further complicating trend involves the increased prevalence of wars fought within, not between, States. Perhaps the best example of this is Cambodia, where more than 2 million people lost their lives from 1975 through 1978. Similarly, in the former Yugoslavia Republic of Bosnia, a civil war began in the early 1990's where Muslims, Croats,

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<sup>67</sup> *Id.*, at 434.

<sup>68</sup> Evered, *supra* note 34, at 138.

<sup>69</sup> M. Cherif Bassiouni, Draft Statute, *International Criminal Tribunal* 29-46 (1992).

<sup>70</sup> Evered, *supra* note 34, at 139.

and Serbians sparked the first real concern of genocide in Europe since World War II. This bitter civil war, sparked by ethnic differences, destabilized an entire region of Europe. And, in the African State of Rwanda, the death of the Rwandan President touched off a bloody civil war where countless Tutsi and Hutus were massacred at the hands of the extremist Hutus. Clearly, traditional international diplomacy was unable to respond to this form of intra-State conflict,<sup>72</sup> but there was a move after these situations had stabilized somewhat to bring war criminals to trial, leading to the international community establishing the International Ad Hoc Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994.

## **F. International War Crimes Tribunals**

### **1. Background**

In the evolution of an effective permanent ICC over almost one hundred years, no events have less continuously led to consensus within the international community than the crises resulting in the creation of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda (hereinafter referred to collectively as the “Ad Hoc Tribunals”).

#### **a. The Former Yugoslavia**

The summer of 1991 was extremely volatile and bloody for the former Yugoslavia. Croatia and Slovenia declared their independence on June 25, 1991. Immediately thereafter, a civil war began in Croatia between the majority Croatian and the minority Serbian populations, and the adjacent Republic of Bosnia-Herzegovina, located between the remainder of Yugoslavia

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<sup>71</sup> *Id.*

<sup>72</sup> Speech given by the Honorable Lloyd Axworthy, Canadian Minister of Foreign Affairs, to the Preparatory Committee on the establishment of an international criminal court, April, 1998.

and Croatia, was quickly brought into the civil war.<sup>73</sup> The Serbian dominated Yugoslav Federal Army backed the Serbian combatants.

On October 15, 1991, the Republic of Bosnia-Herzegovina proclaimed its independence and initiated the process to secede from Yugoslavia. The European Community required that Bosnia-Herzegovina hold an independence referendum before it would recognize the Republic as a new State. Although threatened with a blockade by the Federal Army, the Republic nevertheless held its referendum on March 1, 1992. Thereafter, the European Community formally recognized the Republic of Bosnia-Herzegovina as a sovereign State on April 6, 1992, which led to a full-scale civil war within the new State.<sup>74</sup>

#### **b. Rwanda**

Rwanda was the second experiment by the international community in using the Ad Hoc Tribunals. The pre-colonial rule by the Tutsi minority, and the Tutsi role in the governing under Belgian colonial rule, created resentment and distrust among the majority Hutu.<sup>75</sup> In 1962, Rwanda gained its independence from Belgium. From that time until July 1994, a variety of Hutu factions have controlled the military and government.<sup>76</sup> During the post-independence period, sporadic inter-ethnic violence led to the flight of Tutsi's into Uganda, where they formed the Rwandan Patriotic Front (RPF).<sup>77</sup> As a result of a 1973 military coup d' etat, Major-General Juvenal Habyarimana took control of the Rwanda government. Habyarimana's regime was clearly pro-Hutu.<sup>78</sup> With the increased threat from the RPF in the 1990's, the government

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<sup>73</sup> Bland, *supra* note 11, at 238 (The Republic of Bosnia-Herzegovina is a centrally located region composed of 4.35 million people, 43.7% of whom are Slavic Muslims, 31.3% Serbs, and 17.3% Croats).

<sup>74</sup> *Id.*, at 239.

<sup>75</sup> Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 Fla. J. Int'l. L. 421, 422 (1994).

<sup>76</sup> Gerard Prunier, *The Rwanda Crisis: History of Genocide*, 54, 74-213 (1995).

<sup>77</sup> *Id.*

<sup>78</sup> See U.S. Dep't of State, *Rwanda Human Rights Practices* (1994) (all citizens were required to carry ethnic identity card. Ethnicity was determined by patrilineal descent).

interned and persecuted the Tutsi under the pretense that those persecuted were accomplices of the RPF.<sup>79</sup>

On April 6, 1994, Rwandan President Juvenal Habyarimana was assassinated when unknown assailants shot down his airplane. Within hours after his death, extremist Hutu militias, the Presidential Guard, and the Hutu dominated army began widespread and systematic slaughter of moderate Hutus and all Tutsi.<sup>80</sup> The result of this violence was the killing of an estimated nine hundred thousand (primarily Tutsi), the internal displacement of two million Rwandan citizens, and a mass exodus of over two million (mostly Hutu) Rwandan refugees into Zaire, Burundi, Tanzania, Kenya, and Uganda.<sup>81</sup>

In July 1994, the RPF victory over the Hutu dominated Rwandan army brought an end to the genocide campaign of the interim government.<sup>82</sup> In August 1994, the United Nations Security Council called upon the new Rwandan government to ensure Hutu wishing to return to their homes would not be victims of reprisals.<sup>83</sup> The new government, however, indicated it intended to prosecute over 30,000 Hutu citizens for murder, genocide, and other crimes.<sup>84</sup> This prompted the United Nations to take unilateral action to intervene in the crisis.

## **2. Establishment and Jurisdiction of the Ad Hoc Tribunals.**

The Ad Hoc Tribunals, the first such international courts to be set up since World War II, have issued indictments and international arrest warrants, held fair and judicious trials, and handed down well conceived and just judgements and sentences. The creation of the Ad Hoc Tribunals, however, was difficult, even though it was clear domestic proceedings were

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<sup>79</sup> Catherine Newbury, *Background to Genocide in Rwanda*, 23 Issue 12, 14 (1995).

<sup>80</sup> Prunier, *supra* note 79, at 192-257.

<sup>81</sup> *Id.*, at 54.

<sup>82</sup> *Id.*, at 299.

<sup>83</sup> See U.N. SCOR, Statement by the President of the Security Council, 2414<sup>th</sup> mtg, at 1, U.N. Doc. S/PRST/1994/42 (1994).

<sup>84</sup> Holly Burkhalter, *Ending the Cycle of Retribution in Rwanda*, *Legal Times*, 19 (August 22, 1994)

inadequate in dealing with individuals accused of crimes against humanity. The major difficulty was mobilizing the political will amongst the international community, and the resources necessary to establish the Ad Hoc Tribunals.<sup>85</sup>

By June 1992, the situation in Bosnia had deteriorated into chaos. On July 29, 1992, Muhamed Sacirbey, Ambassador and Permanent Representative of Bosnia-Herzegovina, sent a letter to the United Nations Security Council requesting intervention.<sup>86</sup> In response, the Security Council passed Resolution 771, requesting that all States and humanitarian organizations to provide information relating to human rights violations in the former Yugoslavia. Thereafter, the Security Council adopted Resolution 780<sup>87</sup> in October of 1992, which created an impartial commission of experts to examine and analyze the information collected through Resolution 771.<sup>88</sup> After repeated demands that the warring parties in the former Yugoslavia refrain from violating international law, the Security Council on February 22, 1993 created an international tribunal to prosecute offenders.<sup>89</sup>

Unlike the former Yugoslavia situation in which the Bosnia Ambassador sought help from the Security Council, the Security Council in the Rwanda case acted unilaterally. On July 1, 1994, the Security Council adopted Resolution 935, which requested the Secretary General to establish a commission to determine whether serious violations of humanitarian law had occurred in Rwanda, including genocide.<sup>90</sup> The Commission concluded genocide and systematic

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<sup>85</sup> Elisa C. Massimino, *Prospects For The Establishment Of An International Criminal Court*, 19 Whittier L. Rev. 317, 319 (Winter, 1997).

<sup>86</sup> Bland, *supra* note 11, at 239.

<sup>87</sup> S.C. Res. 780, U.N. SCOR, 47<sup>th</sup> Sess., 1992 S.C. Res. & Dec. at 36, para. 2, U.N. Doc. S/INF/48 (1992), *reprinted* in 5 *Crim. L. F.*, Appendix A.

<sup>88</sup> M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 *Crim. L. F.* 279 (1994).

<sup>89</sup> Bland, *supra* note 11, at 240; *See* S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Sess., 3175<sup>th</sup> mtg. at 28, U.N. Doc. S/INF/49 (1993); Statute of the International Tribunal for the Former Yugoslavia, in Report of the Secretary-General Pursuant to Paragraph 2 of the Security Resolution 808, U.N. SCOR, 48<sup>th</sup> Sess., Annex, art.1, U.N. Doc. S/25704 (1993).

<sup>90</sup> S.C. Res. 935, U.N. SCOR, 3400<sup>th</sup> mtg. At 2, U.N. Doc. S/RES/935 (1994).

and widespread violations of humanitarian law had been committed in Rwanda, resulting in an enormous loss of life and large numbers of displaced persons.<sup>91</sup> The International Criminal Tribunal for Rwanda Statute was submitted to the Security Council in November of 1994, with the recommendation that the Security Council create an International Tribunal for Rwanda under the authority of Chapter VII of the United Nations Charter.<sup>92</sup> In response to the Secretary-General's recommendation to create the International Tribunal for Rwanda, the Security Council passed Resolution 955 creating the tribunal responsible for bringing those responsible for the most serious violations of international humanitarian law to justice.<sup>93</sup> At the time Resolution 955 was passed, Rwanda was sitting on the Security Council as one of the non-permanent members and was the only vote against the resolution.<sup>94</sup>

The International Criminal Tribunal for the former Yugoslavia Statute and the Rwanda Statute each has one hundred and twenty eight articles. It is commonly thought the Tribunals are separate, principally because they were authorized by different Security Council resolutions and have different statutes, but actually, the Ad Hoc Tribunals are inseparably intertwined and can be considered one tribunal. The Ad Hoc Tribunal's statutes may well contribute the most to the development of a permanent ICC statute, clearly establishing that the international community has the ability to create a war crimes court *during* a conflict,<sup>95</sup> rather than *afterwards* as in the case of the World War II tribunals.

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<sup>91</sup> U.N. SCOR, at 1, U.N. Doc. S/1994/1125 (1994)

<sup>92</sup> *Id.*

<sup>93</sup> Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453<sup>rd</sup> mtg. at 1, U.N. Doc. S/RES/955 (1994).

<sup>94</sup> Julia Preston, *Tribunal Set on Rwanda War Crimes: Kigali Votes No on U.N. Resolution*, Washington Post, November 9, 1994, at A44 (Rwanda cited three concerns that led it to vote against the Resolution: (1) the Statute contained no provision for capital punishment, (2) the Tribunal would only hear claims arising out of acts that occurred in the 1994 calendar year, and (3) the Tribunal was to sit outside Rwanda).

<sup>95</sup> Noone, *supra* note 18, at 116.



### III. INTERNATIONAL CRIMINAL COURT

#### A. Background on the establishment of the currently proposed International Court

In response to the inadequacies of the Ad Hoc Tribunal,<sup>96</sup> the International Law Commission of the United Nations completed a draft statute for an ICC in 1993 and submitted it to the United Nations. The 1993 ILC proposal limited the ICC's jurisdiction to recognized Conventions,<sup>97</sup> and adopted the Ad Hoc Tribunal's procedures governing the detention of a person awaiting trial or appeal. The Ad Hoc Tribunals, therefore, paved the way for the establishment of a criminal procedure for the ICC. For various reasons, the General Assembly sent the draft back to the ILC for revision.

In 1994, the ILC completed its work on the draft statute and again submitted it to the United Nations General Assembly,<sup>98</sup> whereupon, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After considering the Committee's report, the General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a text for submission to a diplomatic conference.

During the United Nation's fifty-second session, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was convened to finalize the establishment of an ICC. The resulting Rome Statute of the International Criminal Court has 128 Articles. To analyze each Article is beyond the scope of

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<sup>96</sup> See Noone, *supra* note 18, at 117, where it is stated that the Ad Hoc Tribunals were inadequate because (1) they were only temporary forums with both limited jurisdiction and time spans; (2) the difficulty to apprehend persons indicted for international crimes, which jeopardizes the ultimate success of the Tribunals; (3) the encouragement of selective justice; and (4) funding and staffing inadequacies.

<sup>97</sup> Jamison, *supra* note 11, at 434-435. (The ICC's jurisdiction would be limited to the (1) Genocide Convention, (2) Geneva Convention, (3) Unlawful Seizure of Aircraft Convention, (4) Apartheid Convention, (5) Convention Against Taking Hostages, and (6) Safety of Maritime Navigation Convention.)

this paper. However, it is important to address the concerns that many States, most notably the United States, has in accepting the ICC.

The ICC is the permanent court responsible for investigating and prosecuting individuals who commit such offenses as genocide, war crimes, and crimes against humanity. Critical analysis is narrowed to the following areas: (1) a review of the ICC's proposed structure; (2) subject matter jurisdiction of the ICC; and (3) personal matter jurisdiction of the ICC.

## **B. An analysis of the International Criminal Court**

The four organs that make up the structure of the ICC<sup>99</sup> are the Presidency, the Judiciary, the Office of the Prosecutor, and the Registry. These organs are very similar to the structure of the Ad Hoc Tribunals. All who serve in a position with the ICC have diplomatic immunity.<sup>100</sup>

### **1. Structure of the Judiciary of the International Criminal Court**

The hierarchical structure of the ICC is derived from both civil and common law. If an international criminal rule of law is to gain acceptance throughout the world, it will not be sufficient that the trials of the criminals are just, but they must be widely recognized as just. Therefore, perceptions of fairness and due process are paramount in any international criminal justice system.

The Presidency and the different court divisions<sup>101</sup> are made up of eighteen judges who serve on the ICC and are elected on a full-time basis.<sup>102</sup> If the workload of the Court is minimal, the judges may serve in a part-time status;<sup>103</sup> and, if the workload becomes unmanageable, the President may petition the member States to the ICC Statute for an increase in the number of

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<sup>98</sup> Report of the International Law Commission, U.N. GAOR., 49<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), reprinted in 33 I.L.M. 253.

<sup>99</sup> ICC Statute, *supra* note 5, at Art. 34.

<sup>100</sup> *Id.*, art 48(2).

<sup>101</sup> The presidency and the judiciary are considered separate organs of the ICC. However, the judges that make up the presidency also sit on the appeals court. Therefore, both organs are discussed together.

<sup>102</sup> ICC Statute, *supra* note 5, art. 35(1), 36(1).

sitting judges.<sup>104</sup> The member States to the ICC Statute nominate judges based on four different criteria, but there is no established means within the ICC to insure these criteria are followed, except through the Assembly of States, which eventually votes for the individual judges.<sup>105</sup> The Assembly of States may establish an “Advisory Committee on nominations” to advise on the qualifications of the nominated judges.<sup>106</sup>

The first selection criteria considered is that the judge must be of high moral character and qualified to serve on their States’ highest court.<sup>107</sup> Second, the nominee must be competent in either criminal or international law.<sup>108</sup> Third, the nominee must be fluent in one of the working languages of the ICC.<sup>109</sup> Fourth, there may not be two judges from the same State.<sup>110</sup> (These criteria are similar to the requirements to sit on the Ad Hoc Tribunals.) After nomination, judges are selected by secret vote by member States to the ICC Statute.<sup>111</sup> Judges serve nine-year terms.<sup>112</sup> When selecting judges, several considerations, in addition to the required criteria, must be taken into account. First, there must be representation of the principal legal systems of the world. Second, an equitable geographical representation must be achieved. Third, there must be a fair gender representation on the Court.<sup>113</sup>

Judges are to serve without influence from outside sources, including their own States.<sup>114</sup> To ensure impartiality, judges cannot have other employment during their term,<sup>115</sup> or engage in

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<sup>103</sup> *Id.*, art. 35(3).

<sup>104</sup> *Id.*, art. 36(2)(a).

<sup>105</sup> *Id.*, art. 36(8).

<sup>106</sup> *Id.*, art 36(4)(c).

<sup>107</sup> *Id.*, art. 36(3)(a).

<sup>108</sup> ICC Statute, *supra* note 5, art 36(3)(b)(i) and (ii).

<sup>109</sup> *Id.*, art. 36(3)(c) (The Official Languages of the Court are Arabic, Chinese, English, French, Russian, and Spanish, *Id.*, art. 50(1)).

<sup>110</sup> *Id.*, art 36(7).

<sup>111</sup> *Id.*, art 36(6)(a).

<sup>112</sup> *Id.*, art. 36(9)(a) (At the first selection, one third of judges elected shall serve for 3 years, one third for 6 years, and one third for 9 years).

<sup>113</sup> *See* ICC Statute, *supra* note 5, art. 36.

<sup>114</sup> *Id.*, art. 40(1).

activities that may interfere with their impartiality.<sup>116</sup> If a judge's impartiality is questioned, then the judge is disqualified if a pre-trial court determines a conflict exists.<sup>117</sup>

The President and the First and Second Vice President are elected by an absolute majority of the judges and serve a term of three years and are eligible only once for re-election.<sup>118</sup> The President, the First, and the Second Vice Presidents make up the Presidency.<sup>119</sup> If the President is unable to serve due to incapacity or disqualification, the line of succession falls to the First Vice President and then the Second Vice President.<sup>120</sup> The Presidency is responsible for the administration of the different courts and the Registry, but not the Office of Prosecutor.<sup>121</sup>

After the initial selection of judges and the election of the Presidency, the judges are organized into an appeals division and a trial division, which also acts as the pre-trial court. Each division is balanced between experts in criminal law and international law,<sup>122</sup> but there is an expectation that each judge will be competent in both. Once a trial is complete, the convicted person or the prosecutor may bring an appeal based on a procedural, factual, or legal error.<sup>123</sup> (The concept that a prosecutor may bring an appeal after losing a case has caused great concern in the United States.) If the appeals chamber finds an error, it may reverse or amend the sentence, remand a factual issue to the original trial court, or order a new trial before a different trial chamber.<sup>124</sup>

## **2. The Office of the Prosecutor**

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<sup>115</sup> *Id.*, art. 40(3).

<sup>116</sup> *Id.*, art. 40(2).

<sup>117</sup> *Id.*, art. 41(2)(a).

<sup>118</sup> ICC Statute, *supra* note 5, art 28(1).

<sup>119</sup> *Id.*, art. 38(3).

<sup>120</sup> *Id.*, art. 38(2).

<sup>121</sup> *Id.*, art. 38(3)(a).

<sup>122</sup> *Id.*, art. 39(1).

<sup>123</sup> See ICC Statute, *supra* note 5, art. 81.

<sup>124</sup> *Id.*, art. 83.

The Office of the Prosecutor (hereinafter the “prosecutor”) operates separately and independently from the other organs of the ICC,<sup>125</sup> and operates with the assistance of several deputy prosecutors.<sup>126</sup> The prosecutor must have experience in criminal law, competence in international law and expertise relating to sexual, gender, and age violence. As with the judges, if an individual prosecutor’s impartiality is questioned, or if they have prior involvement with a case on a national level, the prosecutor must be disqualified if Appeals Court discovers a conflict exists.<sup>127</sup> The prosecutor is prohibited from engaging in any activity likely to interfere with prosecutorial functions. If there is a question of impartiality, the appeals division decides whether disqualification is necessary.<sup>128</sup>

If a reasonable basis exists, the prosecutor may initiate an investigation into a crime that is within the ICC’s subject matter jurisdiction.<sup>129</sup> (This prosecutorial independence and authority was strongly criticized by many States and was one of the major reasons the United States did not become a signatory of the Statute.<sup>130</sup>) The prosecutor’s authority is not without check since, if a member State disagrees with the decision to either investigate or not to investigate, the issue may be sent to the pre-trial chamber.

### **3. The Registry**

The Registry is responsible for all non-judicial aspects of the ICC.<sup>131</sup> The Registrar is elected by an absolute majority of the Judges<sup>132</sup> and heads the Registry.<sup>133</sup> The Registry is

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<sup>125</sup> *Id.*, art. 42(1).

<sup>126</sup> *Id.*, art. 42(2).

<sup>127</sup> *Id.*, art. 42(7).

<sup>128</sup> ICC Statute, *supra* note 5, art. 42(8).

<sup>129</sup> *Id.*, art. 53(1).

<sup>130</sup> See Statement of David J. Scheffer, U.S. Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court before the Committee on Foreign Relations of the U.S. Senate, July 23, 1998 (Hereinafter Scheffer Statement).

<sup>131</sup> ICC Statute, *supra* note 5, art. 43(1).

<sup>132</sup> *Id.*, art. 43(4).

<sup>133</sup> *Id.*, art. 43(2).

responsible for the Victims and Witnesses Unit, which provides security, counseling, and other assistance to those appearing before the ICC.<sup>134</sup> The Registrar records the proceedings so that no voice will ever be silenced.<sup>135</sup> Recording the proceedings ensures that what has shocked the conscience of humanity should be remembered for all time.<sup>136</sup> The Ad Hoc Tribunals have a similar office, which has been quite effective in recording the tragic events in Rwanda and the former Yugoslavia. A thorough record has proven one of the most important contributions of the Ad Hoc Tribunals.<sup>137</sup>

### **C. Subject Matter Jurisdiction of the ICC**

#### **1. ICC Statutory Subject Matter Jurisdiction**

The majority of the State parties at the Rome Conference recognized the general principles of criminal law and the subject matter jurisdiction of the Court as being grounded in universally accepted and recognized law<sup>138</sup> and decided the ICC has jurisdiction over (1) the crime of genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression.<sup>139</sup> These four crimes are considered part of the ICC's inherent jurisdiction, because violations breach the safety and peace of the international community. Because the controversy over the definition of "aggression" postponed the creation of an ICC during the Cold War, the drafters of the ICC Statute escaped this problem in a typical political manner – they postponed the definition until a later, undefined date. This approach was strongly criticized by the United States and was another reason the Statute was deemed unacceptable.

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<sup>134</sup> *Id.*, art. 43(6).

<sup>135</sup> Mark W. Janis, *An Introduction to International Law*, 280 (3<sup>rd</sup> ed. 1999) (stating that "a record must be kept to ensure that the conscience of humanity will not forget the wrongs that have been committed, that a society simply cannot forget.").

<sup>136</sup> Mark W. Janis, *The Utility of International Criminal Courts*, 12 Conn. J. Int'l L. 161, 166 (1997).

<sup>137</sup> *Id.*, at 167.

<sup>138</sup> See Noone, *supra* note 18, at 135 and 118 which states that general or customary international law results from a "general or consistent practice adhered to by states from a sense of legal obligation."

The ICC's subject matter jurisdiction is derived from customary international law codified in four main treaties: (1) the Genocide Convention, (2) the Geneva Convention of 1949, (3) the Hague Conventions of 1899 and 1907, and (4) the Nuremberg Charter.<sup>140</sup> The crimes codified in these treaties are identical to the subject matter authorized for the Ad Hoc Tribunals.<sup>141</sup> The Genocide Convention<sup>142</sup> provides for the definition of genocide, which the International Court of Justice upheld as a universal crime.<sup>143</sup> The Geneva Conventions, most notably "Common Article III," creates protection for both military members and civilians during war.<sup>144</sup> The Hague Conventions of 1899 and 1907 codify the law of war.<sup>145</sup> These conventions are combined with the Geneva Conventions to make up a complex system known as international humanitarian law.<sup>146</sup> The International Court of Justice has recognized the consolidation of these conventions to represent "fundamental rules" to be followed by all nations, not just State signatories, because they constitute "customary international law,"<sup>147</sup> and that the universal

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<sup>139</sup> ICC Statute, *supra* note 5, art. 5(1) (Article 6 defines the crime of genocide; Article 7 defines Crimes against Humanity; Article 8 defines War Crimes).

<sup>140</sup> Noone, *supra* note 18, at 118.

<sup>141</sup> See ITFY Statute, *supra* note 93, arts. 2(2), 3, 4(2) and 5; See ITR Statute, *supra* note 62, arts. 2(3), 3, and 4.

<sup>142</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 227.

<sup>143</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 1996 ICJ REP (Judgment of July 11).

<sup>144</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3144, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.S. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Convention of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609.

<sup>145</sup> Hague Convention (II) with Respect to the Land and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, The Hague, July 29, 1899: 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Oct. 18, 1907, 26 Stat. 2277, T.S. 539.

<sup>146</sup> Noone, *supra* note 18, at 119.

<sup>147</sup> Nuclear Weapons Advisory Opinion, 1996 ICJ REP para(s). 75, 79 (Opinion of July 8).

interpretation of the Nuremberg Charter makes individuals, in addition to States, responsible for violations of the crimes embodied in these conventions.<sup>148</sup>

#### **D. Personal Subject Matter Jurisdiction of the ICC**

Once a State has ratified the ICC Statute, the ICC gains “complementary jurisdiction” over the relevant crimes committed within those nations in the future.<sup>149</sup> The ICC has personal jurisdiction over a crime through three triggering mechanisms. The first two triggers occur when crimes are referred to the ICC for investigation by a member State or through the Security Council of the United Nations.<sup>150</sup> The third trigger is when the Prosecutor independently initiates an investigation.<sup>151</sup> And if a reasonable basis for an investigation exists, the Prosecutor presents the evidence to a pre-trial chamber, which then decides to continue with an investigation and possible subsequent criminal litigation.<sup>152</sup> The third trigger resembles a Grand Jury investigation in the United States.

##### **1. The ICC’s Complementary Jurisdiction**

With the understanding that a State’s sovereignty should be respected, the ICC Statute emphasizes that the Court will only operate in a complementary nature to national jurisdictions.<sup>153</sup> The ICC is not “intended to replace national judicial systems but to permit the exercise of jurisdiction in the absence of any national prosecution.<sup>154</sup> Therefore, the ICC may

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<sup>148</sup> See Charter of the International Military Tribunal, London, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (Several principles on individual accountability arising from the Nuremberg Tribunal were later enumerated in the 1950 United Nations Declaration on Principles of International Law); See also International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 Am. J. Int’l. L. 172, 220-21 (1947).

<sup>149</sup> ICC Statute, *supra* note 5, art. 11(2) and art. 12(1) (There is no retroactivity in regards to investigating the inherent crimes before a member State signs the ICC Statute).

<sup>150</sup> *Id.*, art. 13(a) and (b).

<sup>151</sup> *Id.*, art. 15(1).

<sup>152</sup> *Id.*, arts. 15(2), (3), (4), and (5).

<sup>153</sup> ICC Statute, *supra* note 5, art.1 and ¶10 of the Preamble. (Article 1 states “An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of the international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”).

<sup>154</sup> Magraw, *supra* note 3, at 2.



not obtain personal jurisdiction if a member State has its own investigation, has decided not to prosecute, or the prosecution has already taken place.<sup>155</sup> However, if a State does not genuinely carry out its prosecutorial powers pursuant to Article 20(3),<sup>156</sup> the ICC may assume jurisdiction.<sup>157</sup> In determining whether a State has genuinely carried out its duties, the Court looks at the purpose, timing, and impartiality of the national investigation or hearing.<sup>158</sup> In this framework, it is argued the ICC actually enhances a State's sovereignty through recognition<sup>159</sup> and understanding that no State, however powerful, may shield its affairs completely from external influence.<sup>160</sup>

The ICC's complementary jurisdiction is somewhat different than the Ad Hoc Tribunals, which have concurrent jurisdiction. By having concurrent jurisdiction, one could conclude the Ad Hoc Tribunals could exercise primacy over any national court system.<sup>161</sup> Although Ad Hoc Tribunals must make formal requests to the national courts to defer to the Tribunal's competence, Ad Hoc Tribunals may usurp the national courts only when the national judicial system is determined to be disingenuous, or if the inherent crimes are tried as ordinary crimes, with possible lesser sentences.

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<sup>155</sup> ICC Statute, *supra* note 5, art. 17(1).

<sup>156</sup> *Id.*, art. 20(3) states "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 unless the proceedings in 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) Otherwise were not conducted independently or impartially in accordance with the norms of due 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."

<sup>157</sup> *Id.*, art. 17(1)(a) and (1)(b).

<sup>158</sup> *Id.*, art. 17(2).

<sup>159</sup> See Gregory H. Fox, The Right to Political Participation in International Law, 17 *Yale J. Int'l L.* 539, 550-51 (1992); See McKeon, *supra* note 4, at 536.

<sup>160</sup> See Oyvind Osterud, Sovereign Statehood and National self-determination: A World Order Dilemma, in *Subduing Sovereignty*, 19 (Marianne Heiberg ed., 1994) (Calling uses of sovereignty "murky and ambiguous," which is hardly more than a regulatory concept and not actual supreme authority.)

<sup>161</sup> See Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), S/25704, art. 9 (ITFY Statute), May 3, 1993; Security Council Resolution 955 (1994), S/RES/955, art. 8 (ITR Statute), November 8, 1994.

Although in practice the ICC will be able to take jurisdiction from national courts for the same reasons, the ICC has veiled what the Ad Hoc Tribunals consider concurrent jurisdiction and primacy over national courts by use of the definition of complementary jurisdiction.<sup>162</sup> But, unlike the Ad Hoc Tribunals, if the ICC takes jurisdiction over a matter, a State may object to the ICC at the earliest opportunity after the ICC's assumption of jurisdiction.<sup>163</sup> With a few exceptions,<sup>164</sup> in that circumstance, ICC investigations are suspended until the jurisdictional dispute is resolved.<sup>165</sup> (The ICC Statute also allows the accused to avoid the ICC's jurisdiction if they have been successfully prosecuted in a State for one of the inherent crimes.<sup>166</sup> This is to negate double jeopardy.<sup>167</sup>)

## 2. Extradition and Personal Jurisdiction

A major point of contention surrounding sovereignty and personal jurisdiction of the ICC is the issue of extradition. The practice of extradition has existed for over three thousand years, during which treaties and custom slowly formalized the extradition process and defined methods for pursuit of fugitives.<sup>168</sup> A basic tenet of international law, respect for the territory and sovereignty of other nations, has both encouraged treaties and discouraged irregular rendition, such as kidnappings or other violations of a State's sovereignty.<sup>169</sup> Quite less evolved under

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<sup>162</sup> Lohr, Michael F., and Lietzau, William K., *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. Leg. Stud. 33, 40 fn. 33 (1998/1999). [Rear Admiral Michael Lohr is currently the Deputy Judge Advocate General of the United States Navy; Lieutenant Colonel William Lietzau is the senior legal advisor the United States Chairman of the Joints Chiefs of Staff. Both military officers were instrumental in the current United States position on the ICC and have intimate knowledge of the Rome Conference proceedings.]

<sup>163</sup> ICC Statute, *supra* note 5, art. 19(5).

<sup>164</sup> *Id.*, art. 19(8) (Includes collecting witnesses statements, issuing of warrants, etc.).

<sup>165</sup> *Id.*, art. 19(7).

<sup>166</sup> *Id.*, art. 17(1).

<sup>167</sup> *See* Evered, *supra* note 34, at 142.

<sup>168</sup> Ivan A. Shearer, *Extradition in International Law*, 138 (1971).

<sup>169</sup> Rebane, *supra* note 2, at 1644-45 (1996).

international law is extradition from States to the ICC,<sup>170</sup> which may be for the United States, unconstitutional.

Member States to the ICC Statute, upon the written request by the ICC, are required to “surrender,”<sup>171</sup> not extradite, a suspected criminal.<sup>172</sup> The word surrender is used because extradition involves the surrender, by one nation to another, of an individual who has been accused or convicted of an offense outside the territory of the former and within the jurisdiction of the latter.<sup>173</sup> Extradition operates under a type of treaty formally called “rendition.” Illegal rendition, such as abduction, arises from the concept of reprisal and occurs outside the provisions of a treaty.<sup>174</sup> In the United States, the extradition process requires an extraditing judge to “either deny extradition or commit for extradition, and then places the authority to extradite in the hands of the Secretary of State, who may or may not extradite.”<sup>175</sup> The Secretary of State cannot extradite an accused if the extradition judge denies such action.<sup>176</sup>

As with current extradition law, the ICC Statute appears to allow an accused a hearing by a member State’s court before surrender.<sup>177</sup> Ideally, if the national court either does not agree

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<sup>170</sup> Jamison, *supra* note 11, at 424; See Magraw, *supra* note 3, at 5 stating that the United States “argues that there should be a prohibition against the surrender of indicted individuals to the ICC without the consent of the accused’s country of origin, if that country has not ratified the Rome Statute.”

<sup>171</sup> See UN Press Release, Friday 26 June 1998, which stated that “extradition refers to action between States and thus would not apply to an action between the States and the Court. Thus, surrender would be more appropriate. It was also stressed that the Conference was mandated to establish a *sui generis* institution and there was a need to abandon traditional ways of thinking, and to use terminology’s not particularly associated with certain systems.”

<sup>172</sup> ICC Statute, *supra* note 5, at Art. 89(1) states “The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory on which that person may be found and shall request the cooperation of the State in the arrest and surrender of such a person. State parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with the requests and surrender.”

<sup>173</sup> *Terlinder v. Ames*, 184 U.S. 270, 289, 22 S. Ct. 484, 46 L.Ed. 534 (1902); *Rebane*, *supra* note 2, at 1636; See M. Cherif Bassiouni, *International Extradition and World Public Order* 572 (1974).

<sup>174</sup> See Kristin Berdan Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. Davis L. Rev. 459, 465 (1994).

<sup>175</sup> M. Cherif Bassiouni, *International Criminal Law*, 198 (2<sup>nd</sup> ed. 1998).

<sup>176</sup> *Id.*

<sup>177</sup> ICC Statute, *supra* note 5, art. 89(1) and (2).

with the ICC's jurisdiction,<sup>178</sup> or there is a procedural problem under the national law,<sup>179</sup> the suspect will not be surrendered to the ICC. Therefore, although labeled surrender, the ICC Statute attempts to model the current treaty system on extradition. But, additionally, the ICC Statute requires member States to "ensure that there are procedures available under their national law for all forms of cooperation."<sup>180</sup> This can be interpreted to mean the ICC Statute is not self-executing, but requires member States to pass national laws permitting or requiring surrender to the ICC, which would be separate from the extradition treaty system already established.<sup>181</sup> As discussed *infra*, it cannot be argued the United States can use the current system of extradition to ignore potential constitutional questions.

#### IV. United States Constitutional Objections to the ICC

It has been argued that there is "no point of having an International Criminal Court without the United States as member" because the ICC "would be utterly ineffective."<sup>182</sup> Although this may be true, the United States will not properly be able to join the ICC under its current Constitution.<sup>183</sup> The constitutional objections to the ICC fall under two categories: (1) constitutional institutional concerns, and (2) constitutional protection concerns.<sup>184</sup> These two categories are barriers to effective participation by the United States within the ICC.

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<sup>178</sup> *Id.*, art. 89(2).

<sup>179</sup> *Id.*, art. 89(1).

<sup>180</sup> *Id.*, art. 88.

<sup>181</sup> The ICC Statute does not state whether the treaty is self-executing. However, art. 88 states that "State Parties shall ensure that there are procedures available under their national laws..." ICC Statute, *supra* note 5, at art. 88. In addition, the fact that States that have ratified the treaty have also implemented legislation or changed their Constitutions to accommodate the ICC treaty makes it clear that it is not self-executing. See Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 Duke J. Comp. & Int'l L. 5, 23 (2001).

<sup>182</sup> Fareed Zakaria, *There's More To Right Than Might*, Newsweek, p. 43 (July 9, 2001).

<sup>183</sup> Since the ICC Statute violates the Constitution, the treaty would actually be invalid under international and domestic law. A treaty is invalid if the treaty violates municipal law of one of its parties when that violation is "manifest and concerned a rule of internal law of fundamental importance." See Janis, *supra* note 142, at 35.

<sup>184</sup> Curabba, *supra* note 9, at 12 (February 22, 1999); John Seguin, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 19 B.U. Int'l L.J. 85, 108 (2000).

The constitutional institutional concerns refer to the assertions that United States participation in the ICC would be impermissible because of substantial legal imperatives of the United States Constitution.<sup>185</sup> Generally, a United States citizen could not be prosecuted by an international court for offenses that would be cognizable under the judicial power of the United States.<sup>186</sup> Specifically, the constitutional imperatives make United States participation in the ICC impermissible because the ICC fails to recognize certain fundamental rights guaranteed under the United States Constitution – the most important of which is the right to jury by trial.<sup>187</sup> One way to understand the United States constitutional objections is to present two scenarios and discuss the two main constitutional barriers within the scenario contexts when possible.

#### **A. Scenarios involving conflict between the United States and the ICC**

##### **1. The Vice-President’s Scenario**

The President of the United States is scheduled to attend a Super Bowl game, and a terrorist sponsored by the Islamic Republic of Iran<sup>188</sup> detonates a nuclear weapon within the stadium. Due to the electromagnetic interference, the Vice-President of the United States is unable to ascertain whether the President has survived so he convenes a majority of the “principal officers of the executive departments” who all sign a written declaration to the President Pro Tempore of the Senate and the Speaker of the House of Representatives stating the President is unable to discharge “the powers and duties of his office.”<sup>189</sup> Pursuant to the Twenty-

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<sup>185</sup> *Id.*

<sup>186</sup> Seguin, *supra* note 193, at 108.

<sup>187</sup> Curabba, *supra* note 9, at 12; *See* U.S. Const. Fifth Amendment, which states “[i]n 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; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

<sup>188</sup> The Islamic Republic of Iran is a signatory to the Rome Statute, but has not yet ratified the treaty.

<sup>189</sup> *See* U.S. Const. Amend. XXV.

Fifth Amendment to the United States Constitution, the Vice President assumes the duties and powers of Acting President.

While these events are occurring, the Director of the Central Intelligence Agency learns through an unreliable source within the Iranian government that Iran, in coordination with several Islamic terrorist cells throughout Arabian Gulf States, is preparing tactical nuclear strikes against United States forces and its allies within the middle-east region. Acting as the National Command Authority<sup>190</sup> from the White House situation room in Washington, D.C., the Acting President orders an immediate full-scale nuclear strike against Tehran and all Iranian military bases. The military and civilian casualties number in the millions.

Immediately after the United States strikes Iran, the President communicates with the relevant parties and reassumes his duties. The remnants of the Iranian government immediately protest the United States' action to the United Nations Security Council as a violation of the United Nations Charter. The United States blocks the Iranian protest through its veto power, but Iran, a signatory to the ICC treaty, requests that the ICC Prosecutor initiate an investigation into possible international crimes by the Vice-President. Pursuant to a legal interpretation set forth in an International Court of Justice advisory opinion that states nuclear weapons are only allowed in self-defense<sup>191</sup> "under extreme circumstances in which the very survival of a State is in question,"<sup>192</sup> the ICC prosecutor initiates an investigation into the Vice-President's conduct.<sup>193</sup>

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<sup>190</sup> See the National Emergencies Act, 50 U.S.C. 1621, *et seq*; See also 10 U.S.C. §162(b).

<sup>191</sup> Self Defense has been interpreted according to the Caroline Rule which states that self-defense must be confined to cases which the "necessity of that self-defense is instant, over-whelming, and leaving no choice of means, and no moment for deliberations." See Louis Henkin, *International Law* 872 (3d ed. 1993).

<sup>192</sup> Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion, 25 I.L.M. 809 (July 9, 1996); See The Department of the Army, *Operational Law Handbook* 5-14 (2000) [hereinafter *Army Handbook*], which states nuclear weapons are "not prohibited by international law."

<sup>193</sup> See ICC Statute, *supra* note 5, art. 28(1)(b) where civilian leaders are held responsible to the ICC where they "as a result of his or her failure to exercise control properly over such subordinates, where (i) the superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes; (ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) the superior failed to take all necessary and reasonable measures within his or her power to

It is eventually revealed that Iran was not behind the nuclear detonation at the Super Bowl, nor did Iran plan to attack the United States or its allies in the Gulf region. Thereafter, the Director of the Central Intelligence Agency and the Vice-President both resign and a Grand Jury is impaneled to decide whether to bring criminal charges. The President, in an effort to move on from the tragedy, uses his powers under the Constitution<sup>194</sup> to pardon both the Vice-President and the Director of the Central Intelligence Agency. This prompts the ICC Prosecutor to declare the United States has failed to properly investigate<sup>195</sup> and prosecute the Vice-President for his alleged war crimes and orders the Vice-President to be surrendered pursuant to Article 17 of the ICC Statute.<sup>196</sup> The United States attempts to protect<sup>197</sup> the ICC Prosecutor through the United Nations Security Council, and before the ICC pre-trial chamber,<sup>198</sup> but fails. The Department of Justice begins the process of surrendering the Vice-President to the ICC. In response, the Vice-President immediately requests relief from the United States federal courts.

## 2. The General's Scenario

The de-militarized zone between North and South Korea<sup>199</sup> becomes the site for increased hostilities between the United States and North Korean forces. Ultimately, the North Korean military strikes preemptively Allied forces. The Allied forces withstand the first attack, but it becomes inevitable that the Allied forces will not be able to withstand a second push. The United States Commanding General, while personally in the territory of South Korea and understanding that his forces will soon be overwhelmed, orders tactical nuclear weapons to be

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prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

<sup>194</sup> U.S. Const. art. II, §2, cl. 1, which states “...and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

<sup>195</sup> ICC Statute, *supra* note 5, art. 20(3).

<sup>196</sup> See *Id.*, art. 17(1)(a) and (b).

<sup>197</sup> *Id.*, art. 19.

<sup>198</sup> *Id.*, art. 15.

<sup>199</sup> The Republic of Korea (South Korea) is a signatory to the Rome Statute, but have not ratified the treaty.

used against North Korean forces pursuant to his interpretation of the pre-set<sup>200</sup> rules of engagement<sup>201</sup> prescribed by the National Command Authority.<sup>202</sup> This halts the second advance.

After a cease-fire is instituted, the President of the United States, succumbing to international pressure, relieves the commanding general, and convenes a Court of Inquiry to determine any violations of the Uniform Code of Military Justice and the laws of war.<sup>203</sup> The three Generals assigned to the Court of Inquiry personally know the accused General. For national security concerns, the Court of Inquiry convenes in private. After two weeks of investigation, the court clears the General of any wrongdoing stating that a concrete and direct military advantage was gained, and the General acted reasonably.<sup>204</sup> The Secretary of the Army approves the court's findings and no court-martial is convened or further action is taken. North Korea, although not a signatory to the ICC Statute, requests the ICC to investigate.<sup>205</sup> As with the Vice-President scenario, the ICC Prosecutor requests the United States surrender the General.<sup>206</sup> The Department of Justice begins the process of surrendering the General to the ICC

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<sup>200</sup> The President has pre-delegated the use of nuclear weapons to military commanders to such a degree that half of the United States' strategic nuclear weapons can be used without the President's direct participation. *See* Louis Henkin, et al., *Foreign Affairs and the U.S. Constitution* 78 (1990); *See also* 10 U.S.C. §164.

<sup>201</sup> Rules of Engagements, or ROE, "are directives issued by competent military authority to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with other forces encountered. They are the means by which the National Command Authority (NCA) and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law." The Department of the Army, *Army Handbook 8-1* (2000).

<sup>202</sup> John R. Bolton, *40<sup>th</sup> Anniversary Conference Panel: The Risks and the Weaknesses of the International Criminal Court from America's Perspective*, 41 *Va. J. Int'l L.* 186, 190 (2000), where it is assumed that the defensive use of nuclear weapons would probably be considered a violation of the ICC subject matter.

<sup>203</sup> *See* Article 135 of the Uniform Code of Military Justice.

<sup>204</sup> *See* *Army Handbook*, *supra* note 210, at 5-4, which states that if the military commander acts reasonably in the use of force, they will not be held accountable.

<sup>205</sup> *See* ICC Statute, *supra* note 5, art. 28(a)(i) and (ii) which states that the military commanders responsibility for ICC jurisdiction occurs when the commander "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and...that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

<sup>206</sup> *See* Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, Congressional Research Services, 10 (January 6, 1999), which states that, hypothetically, complaints



and, like the Vice-President, the General seeks immediate relief from United States Federal courts.

## **B. Preliminary analysis of whether the Constitution is implicated**

### **1. The ICC as an extension of the United States**

Before the issue of the ICC's constitutionality is discussed, it must be determined whether the ICC "is best viewed as an instrumentality of the United States or as a foreign entity."<sup>207</sup> Paul Marquardt, a noted commentator<sup>208</sup> on the constitutionality of the ICC, argues the ICC is not an extension of the United States government, especially since the ICC will operate under its own laws and protocols from the authority of the entire international community.<sup>209</sup> If the ICC is not considered an extension of the United States, but rather a separate foreign entity, the institutional and possibly the protection concerns of the Constitution are diminished.

Other promoters of the ICC, however, argue the ICC must be viewed as an extension of the United States.<sup>210</sup> Indeed, the United States Supreme Court has held in United States v. Balsys,<sup>211</sup> that:

If it could be said the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character...then an argument could be made that

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could be lodged against United States personnel serving in United Nations forces overseas; However, these is an argument that the ICC will not be able to pass judgment on the decisions taken by the United Nations and its organs. See ICJ Reports, Namibia Opinion 16, 45 (1971).

<sup>207</sup> Paul D. Marquardt, *Law Without Borders: The Constitutionality of the International Criminal Court*, 33 Colum. J. Transnat'l L. 73, 105 (1995) (This article is the most cited authority on the constitutionality of the ICC. The Congressional Reporting Service, the research arm of Congress used this article as its sole authority in reporting to Congress on the constitutionality of ratifying the ICC.); See Matthew A. Barrett *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 Ga. J. Int'l & Comp. L. 83, 108 (1999), which states that "one way to avoid the argument that either the full range of United States constitutional guarantees or key constitutional rights must be incorporated into the Rome Statute is to view the Court as an entity separate from the United States."

<sup>208</sup> It should be noted that Marquardt and other pro-ICC commentators raise constitutional issues and then argue that such concerns are not complete bars to the United States joining the United States. Anti-ICC commentators, such as David Scheffer and John Bolton, argue that joining the ICC would violate the Constitution, but they fail to offer legal analysis in support of their claims – i.e. they fail to discuss the major cases and analysis the Constitution.

<sup>209</sup> *Id.*, at 105.

<sup>210</sup> Duffy, *supra* note 190, at 23.

<sup>211</sup> *United States v. Balsys*, 524 U.S. 666, 683, 118 S.Ct. 2218, 1412 L. Ed. 2d. 575 (1998).

the Bill of Rights should apply...the point would be that the prosecution was as much on behalf of the United States as the prosecution nation.

Justice Stevens, in his concurrence, writes that the primary purpose of the Bill of Rights is “to afford protection to persons whose liberty has been placed in jeopardy in an American tribunal.”<sup>212</sup> Therefore, if the ICC is prosecuting in the place or on behalf of the United States, the ICC would be considered an extension of the United States judicial system.

This analysis is supported further by the Supreme Court’s decision in Reid v. Covert.<sup>213</sup>

In Reid, the Court stated that:

any party may appeal to the Supreme Court from an interlocutory or final judgment, decree, or order of any court of the United States...holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.<sup>214</sup>

In the scenarios presented, and if the United States was a member of the ICC, this holding would have double meaning. The Court uses the term “party,” which in United States legal practice means any individual or legal entity involved in a suit, on either side.<sup>215</sup> And since the Vice-President and the General are officers of the United States, and if the United States ratified the treaty, the United States would be obligated to provide judges,<sup>216</sup> finances, support, and information to the ICC. In these circumstances, since the ICC would be acting on behalf of the

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<sup>212</sup> *Id.* at 690.

<sup>213</sup> *Reid v. Covert*, 351 U.S. 487, 76 S.Ct. 880, 100 L. Ed. 1352 (1956).

<sup>214</sup> *Id.* at 489.

<sup>215</sup> See *Black’s Law Dictionary*, 1144 (7<sup>th</sup> ed. 1999), which defines “party” as “one by or against whom a lawsuit is brought <a party to a lawsuit>.”

<sup>216</sup> There is also a constitutional argument that the United States could not be a part of the ICC because the Court would not follow the Article III guidelines in picking judges, allowing the judges to have life tenure, and also granting the judges appropriate salaries. See Curabba, *supra* note 9, at 14-15.

United States, it would be an extension of the United States.<sup>217</sup> Thus, since the ICC would be, essentially, a part of the United States, the constitutional rights would have to be applied.<sup>218</sup>

## 2. The use of extradition to eliminate any Constitutional concerns

If the ICC is not considered an extension of the United States, it could be argued the use of the extradition process would eliminate any ICC concerns involving the Constitution. According to some commentators, if the surrender of a United States citizen were likened to the federal government's use of extradition treaties,<sup>219</sup> the ICC would not violate the Constitution.<sup>220</sup> Marquardt argues the extradition analogy provides the strongest evidence of the compatibility between the ICC and the United States Constitution.<sup>221</sup> The reason the extradition analogy is encouraged is because of the "rule of non-inquiry," and the legal precedent that extradition proceedings are not criminal prosecutions.

According to the rule of non-inquiry, United States courts generally do not review the procedural or substantive rights that an extradited individual would have in the requesting State.<sup>222</sup> Rather, during an extradition hearing, review is limited to whether the Federal court has jurisdiction, whether the offense charged is within the extradition treaty, and whether there is

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<sup>217</sup> *Reid*, 351 U.S. at 490, In *Reid*, a superintendent of a prison, who was not a federal employee, but rather a district employee, was deemed an officer of the United States because he was required to keep prisoners of the United States and therefore he was to an extent an officer of the United States. See Scott W. Andreasen, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States*, 85 Iowa L. Rev. 697, 729 (2000), which states that "any prosecution undertaken by the court – whether involving the actions of Americans in the United States or overseas – would be as much on behalf of the United States as of any other party."

<sup>218</sup> Barrett, *supra* note 216, at 106-107; See Marquardt, *supra* note 216, at 101-102, where the Judicial Conference is quoted as stating that "all the provisions governing domestic courts must apply in full if the United States is to participate in such a court without violating the Constitution."

<sup>219</sup> See 18 U.S.C. §3181 *et. seq.*

<sup>220</sup> Marquardt, *supra* note 216, at 105; Curabba, *supra* note 9, at 14; Barrett, *supra* note 216, at 108 stating that surrender should be viewed as extradition for purposes of the United States constitutional analysis.

<sup>221</sup> *Id.* at 132.

<sup>222</sup> Barrett, *supra* note 216, at 107 citing *Glucksman v. Henkel*, 221 U.S. 508, 512, 31 S.Ct. 704, 55 L. Ed. 830 (1911) and *Neely v. Henkel*, 180 U.S. 109, 123, 21 S.Ct. 302, 45 L. Ed. 448 (1901); Curabba, *supra* note 9, at 14.

evidence to support a finding of probable cause.<sup>223</sup> Federal courts are bound by the existence of an extradition treaty to presume the trial will be fair.<sup>224</sup> “This is because, before entering into an extradition treaty, the United States first determines whether the potential treaty partner has a judicial system that provides due process and humane treatment of detainees.”<sup>225</sup> In the ICC context, surrender would entail “much more than an extraordinary extradition treaty.”<sup>226</sup>

It is tempting to analogize the surrender under the ICC, and extradition under a treaty, but such an analogy is misplaced.<sup>227</sup> Extradition and surrender are fundamentally different. Article 102 of the ICC Statute defines surrender as “the delivering up of a person by a State to the Court.”<sup>228</sup> Extradition, on the other hand, is the “delivering up of a person by one State to another.”<sup>229</sup> The concept of surrender is already a specialized principal within Status of Forces Agreements (hereinafter referred to as “SOFA”) that are more akin to the ICC model, rather than the extradition model.<sup>230</sup> Under a SOFA, surrender is understood to mean<sup>231</sup> as the release back from a foreign sovereign of a military member to the individual’s State’s authorities – military and/or law enforcement – for certain criminal activities.<sup>232</sup> The reason being that under a SOFA,

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<sup>223</sup> Marquardt, *supra* note 216, at 108 citing Fernandez v. Phillips, 268 U.S. 311, 312, 45 S. Ct. 541, 69 L.Ed. 970 (1925); Spatola v. United States, 925 F.2d 615, 617 (2<sup>nd</sup> Cir. 1991); *Restatement (Third) of Foreign Relations* §478, note 2.

<sup>224</sup> *Id.* at 109.

<sup>225</sup> Patricia McNerny, *The United States and the International Criminal Court: Issues for Consideration by the United States Senate*, 64 Law & Contemp. Prob. 181, 186 (2001).

<sup>226</sup> Audrey I. Benison, *International Criminal Tribunals: Is There A Substantive Limitation On The Treaty Power?*, 37 Stan. J. Int’l L. 75, 90 (2001), which states that the ICC treaty would “subject the territory and citizens of the United States to the jurisdiction of the ICC, would subordinate the United States’ judicial authority to the ICC in cases within its jurisdiction, and would require the United States to surrender its citizens for trial and punishment.”

<sup>227</sup> Andreasen, *supra* note 227 at 730.

<sup>228</sup> ICC Statute, *supra* note 5, art. 102.

<sup>229</sup> Duffy, *supra* note 190, at 20.

<sup>230</sup> For a discussion of Department of Defense policies on foreign criminal jurisdiction, see AR 27-50/SECNAVINST 5820.46/AFR 110-12; Dep’t. of Def. Dir. 5525.1, Status of Forces Policies and Information (7 Aug 74); see 32 C.F.R. part 151.

<sup>231</sup> See Monroe Leigh, *The United States and the Statute of Rome*, 95 A.J.I.L. 124, 127 (2001) stating that the NATO SOFA provides for a sharing of jurisdiction that gives the sending State the primary jurisdiction to try its military personnel for “offenses arising out of any act or omission done in the performance of official duty.”

<sup>232</sup> Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 Vand. J. Transnat’l L. 1, 12-13 (2000).

the sending State has primary jurisdiction over any acts that occur while in the exercise of one's official duties. Thus, for example, in the General's scenario, if South Korea captured him, an obligation would exist to surrender him to the United States according to the current SOFA between the two countries.<sup>233</sup>

Another reason the analogy is imperfect, as Marquardt also acknowledges, is that the surrender system was adopted for the ICC specifically to preempt comparisons between surrender and extradition thereby avoiding legal conflicts involving other State's constitutions.<sup>234</sup> Therefore, the inverse argument is that, since the extradition system was specifically excluded to accommodate other States, one cannot then advocate use the extradition system for purposes of avoiding the United States Constitution.<sup>235</sup> Furthermore, although Marquardt discounts the argument,<sup>236</sup> the United Nations International Law Commission has concluded the ICC would not be competent to conclude extradition treaties because it would undermine the traditional concept of existing extradition treaties between sovereigns.<sup>237</sup> In sum, based on the actual differences between the concepts of surrender and extradition, the current extradition system cannot be used to by-pass the need for constitutional protections.

It also can be argued that, if the ICC Statute were equivalent to an extradition treaty, the ICC Statute would be self-executing<sup>238</sup> in the United States, eliminating the need to have

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<sup>233</sup> See 2 U.S.T. 1652, T.I.A.S. No. 4510, 373 U.N.T.S. 248.

<sup>234</sup> Marquardt, *supra* note 216, at 103-104, which states that "the ICC Statute speaks of surrender rather than extradition of individuals, apparently to accommodate those states having constitutional difficulties with extradition by allowing them to characterize surrender of suspects as a direct, non-discretionary treaty obligation rather than as a discretionary extradition."

<sup>235</sup> See Bassiouni, *supra* note 184, at 249 which states that in the event of a conflict between an extradition treaty and constitutional provision, the latter prevails.

<sup>236</sup> Marquardt, *supra* note 216, at 107.

<sup>237</sup> United Nations Int'l Law Comm'n, Eleventh Report on the Draft Code of Crimes Against Peace and Security of Mankind, U.N. Doc. A/CN.4/449 (1993).

<sup>238</sup> Extradition treaties have been deemed by the Supreme Court to be self-executing, therefore, there does not need to have implementing legislation by Congress. See Bassiouni, *supra* note 184, at 199.

implementing legislation<sup>239</sup> and possibly avoid any constitutional concerns. However, because the ICC Statute specifically distinguishes itself from the extradition system<sup>240</sup> and requires member States to pass legislation to ensure full cooperation with the ICC surrender system,<sup>241</sup> the ICC treaty is not self-executing.<sup>242</sup> Therefore, implementing legislation would seem clearly be required for the United States to enforce any ICC obligations.<sup>243</sup>

A final difference between extradition and the ICC's concept of surrender is that under the United States extradition system there is not an "obligation to extradite."<sup>244</sup> The United States, like many nations, may refuse to extradite based on the "political offense doctrine."<sup>245</sup> The political offense doctrine is made up of three principles. First, the State is at odds with the requesting State and public outrage would ensue if the individual were extradited. Second, the State does not believe the suspect would receive a fair trial within the requesting State. Third, the suspect is being pursued essentially, for a political offense. Based on these international realities, frequently, international criminals seek refuge in States with sympathetic ideology, which makes extradition less likely under the political offense doctrine.<sup>246</sup>

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<sup>239</sup> *Id.*

<sup>240</sup> ICC Statute, *supra* note 5, art. 102.

<sup>241</sup> *Id.* at Art. 88.

<sup>242</sup> See *Restatement (Third) Foreign Relations Law of the United States* §111, comment (h) (1987), which states that if a treaty is silent as to execution, then implementing legislation is usually required. Since the ICC could be considered silent, legislation is required.

<sup>243</sup> Implementing legislation was required for the United States to deal with extradition to the Ad Hoc Tribunals. See 18 U.S.C. §3181.

<sup>244</sup> See Bassiouni, *supra* note 184, at 211 n.121, which states that this view is founded on the notion that the "State's right to protect its sovereignty and its freedom to provide asylum to whomever it chooses may override the State's obligation under the treaty."

<sup>245</sup> MacPherson, *supra* note 1, at 20.

<sup>246</sup> *Id.* at 20. (For example, in 1988, Italy asked Greece to extradite Abdel Osama al-Somar, a Palestinian terrorist who had bombed a synagogue in Rome. The Greek government bowed to popular political pressure and released Abdel after he served a short sentence for violating Greek Law. Greece declined extradition and allowed Abdel to fly to Libya. Another example, is when the United States and the United Kingdom requested Libya to extradite Abdel Basset Al-Megrahi and Lamem Fhimah, who were indicted for the destruction of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. Libya refused extradition, claiming that it did not believe the accused would receive a fair trial in either the United States or the United Kingdom.)

The political offense doctrine is not addressed in the ICC Statute, most likely because it uses the system of surrender and not extradition, which the political offense doctrine is attached. The extradition system cannot be used under the ICC's surrender model because a failure to cooperate with the ICC by surrendering a suspect leads to a referral to the United Nations Security Council or the ICC's Assembly of States.<sup>247</sup> Thus, the attempt by commentators to use the extradition system as an escape for a review of possible constitutional objections has no merit.

### 3. Territorial Jurisdiction and the issue of Status of Forces Agreements

There is a continuous concern that territorial jurisdiction<sup>248</sup> questions make constitutional protection concerns moot if the extradition analogy fails.<sup>249</sup> In the scenarios presented *supra*, this would only affect the General in Korea<sup>250</sup> because he was physically in South Korea when he ordered the nuclear attack. Since the General was present in South Korea's territory, South Korea's territoriality jurisdiction trumps the United States nationality jurisdiction.<sup>251</sup> In regards to the Vice President, however, since he committed the act while in the United States, the territoriality argument combined with nationality jurisdiction would trump Iran's territoriality jurisdiction for having the effect of the act in that State.<sup>252</sup> The ICC, however, would still argue that it has jurisdiction.<sup>253</sup>

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<sup>247</sup> ICC Statute, *supra* note 5, art. 87(7).

<sup>248</sup> See *Restatement (Third) Foreign Relations Law of the United States* §402, which discusses the different principles of jurisdiction. (1) Objective Territoriality Principle (Effects Doctrine) at §402(1)(c); (2) Protective Principle at §402(3); (3) Nationality Principle at §402(2); (4) Passive Personality Principle at §402, Comment g.; and (5) Universality Principle at §404.

<sup>249</sup> Marquardt, *supra* note 216, at 113.

<sup>250</sup> However, the Vice-President may be required to answer to crimes which had an effect in Iran, based on *The Lotus Case*, (France v. Turkey), PCIJ, Ser. A, No. 10, p. 23 (1927). However, the governing principle is that Iran cannot take measures against the Vice-President while he is in the territory of the United States without the consent of the United States. See Ian Brownlie, *Principles of Public International Law*, 307 (4<sup>th</sup> ed. 1990).

<sup>251</sup> See Seguin, *supra* note 193, at 127.

<sup>252</sup> See Seguin, *supra* note 193, at 127; See also Leigh, *supra* note 241, at 127; For the alternative argument that the Vice-President would be subject to South Korean law first because the effect of his acts were felt there, see Andreasen, *supra* note 227, at 726 citing *Melia v. United States*, 667 F.2d 300 (2<sup>nd</sup> Cir. 1981), which held that an

Based on the facts of the scenarios, in the absence of some kind of agreement<sup>254</sup> – like a SOFA<sup>255</sup> – the jurisdiction of the State in which the offense is committed will usually prevail over other claims of jurisdiction.<sup>256</sup> An exception to the general rule of receiving State jurisdiction is deployment for combat, wherein United States forces are generally subject to exclusive United States jurisdiction.<sup>257</sup> As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the receiving State.<sup>258</sup> Thus, since the General’s acts took place outside the United States, constitutional rights appear not to be applicable.<sup>259</sup> And, this seems true whether or not the General was acting under the direction of the “nation to which he owes his allegiance.”<sup>260</sup>

The Schooner Exchange case highlights this rule, when Justice Marshall wrote, “the jurisdiction of the nation within its own territory is absolute and subject to no qualification except such as it has agreed to.”<sup>261</sup> This, taken with Article 98(2) of the ICC treaty, which states commitments to the ICC do not supercede SOFA treaties,<sup>262</sup> would mean, absent such an

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individual whose actions took place in the United States, but were intended to produce criminal effects in another country was subject to territoriality jurisdiction.

<sup>253</sup> McNerny, *supra* note 235, at 184, where it is stated that “if an act that is defined as a crime by the Rome treaty were to take place in Bosnia, but the President of the United States ordered the act from Washington, D.C., the ICC would claim jurisdiction to prosecute.”

<sup>254</sup> See Neely, 180 U.S. at 123, which states that “when an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided by treaty stipulations between that country and the United States;” See Magraw, *supra* note 3.

<sup>255</sup> See Stone v. Robinson, 431 F.2d 548, 549 (3rd Cir. 1970), dealing with a military member who was sent to Japan to answer for crimes of raping a Japanese civilian.

<sup>256</sup> Leigh, *supra* note 241, at 127.

<sup>257</sup> See Army Handbook, *supra* note 210, at 16-8.

<sup>258</sup> *Id.*

<sup>259</sup> Shannon K. Supple, *Global Responsibility and the United States: The Constitutionality of the International Criminal Court*, 27 *Hastings Const. L.Q.* 181, 185 (1999) citing Neely, 180 U.S. at 122.

<sup>260</sup> Leigh, *supra* note 241, at 128; However, the *Restatement (Third) of Foreign Relations Law of the United States* §721, comment b, states that “the Constitution governs the exercise of authority by the United States government over United States citizens outside the United States...” If the ICC is considered an extension of the United States as discussed *infra*, then the General may also have the rights guaranteed under the Constitution. In support of this argument, see Andreasen, *supra* note 227, at 729.

<sup>261</sup> The Schooner Exchange v. McFaddon, 11 U.S. 116, 136, 3 L. Ed. 287, & Cranch 116 (1812).

<sup>262</sup> See ICC Statute, *supra* note 5, at Art. 98(2); See also Grigorian, *supra* note 215, at 22.



agreement, if the United States sent the General to South Korea to face judgment, South Korea, as a sovereign nation, would have the authority to surrender the General to the ICC.<sup>263</sup>

Based on Article 98(2), there appears to be some protection for Commanding Generals operating in countries that have SOFA's with the United States. Under Article VII(3)(a)(ii) of the NATO SOFA,<sup>264</sup> for example, the United States has primary concurrent jurisdiction over "offenses arising out of any act or omissions done in the performance of official duty."<sup>265</sup> However, under both international<sup>266</sup> and United States law,<sup>267</sup> acts that are considered international crimes may not properly classified as an act or omission done in the performance of official duty – by definition criminal conduct may not be official duty. Therefore, for the types of crimes enumerated within the ICC Statute, a SOFA would not shield a military leader – like the General or the Vice-President – from surrender to the ICC and the ICC could try military commanders operating in foreign territory without a SOFA, if the State was able to obtain personal matter jurisdiction.

### C. Constitutional institutional concerns

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<sup>263</sup> See Paust, *supra* note 242, at 3.

<sup>264</sup> See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1791, T.I.A.S. No. 2846 [hereinafter NATO SOFA].

<sup>265</sup> Paust, *supra* note 242, at 11; See Bassiouni, *supra* note 184, at 216; See NATO SOFA, *supra* note 274, at Art. VII, §3, which states that "[i]n cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offenses solely against the property or security of the States, or offences solely against the person or property of another member of the forces or civilian component of that State or a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty."

<sup>266</sup> See International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 Am. J. Int'l. L. 172, 220-21 (1947), which states that "the authors of these acts cannot shelter themselves behind their official positions," and one "cannot claim immunity while acting in pursuance of the authority of the State in authorizing action moves outside its competence under international law."

<sup>267</sup> See *Xuncax v. Gramajo*, 886 F.Supp. 162, 175-176 (D.Mass. 1995); See also *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.C. 1980).

The United States Constitution authorizes a finite number of federal government institutions, namely, the legislative branch,<sup>268</sup> the executive branch,<sup>269</sup> and the judiciary.<sup>270</sup> Each of the institutions have limited powers. One argument against United States participation in the ICC is that to do so would “amount to an impermissible use of constitutionally prescribed powers.”<sup>271</sup> That is, if the ICC infringes any powers prescribed by the Constitution to the different federal branches of government, the participation of the United States in such a court would be unconstitutional.

**1. The ICC as a violation of the Constitutional powers**

**a. The ICC versus Article III of the Constitution**

**(1) The ICC as inferior to the Supreme Court**

Article III of the United States Constitution empowers and limits the Supreme Court and the federal judiciary. A major concern when discussing institutional objections is that the ICC will operate in violation of Article III,<sup>272</sup> which states 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 ordain and establish.”<sup>273</sup> The problem then is with the ICC not being subject to Supreme Court appellate review, even though vested with authority over United States citizens by congressional direction.

A further problem is that if the United States ratified the ICC treaty, Congress would be creating a court that potentially could try United States citizens for acts that are crimes under

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<sup>268</sup> U.S. Const. art. I.

<sup>269</sup> U.S. Const. art. II.

<sup>270</sup> U.S. Const. art. III.

<sup>271</sup> Curabba, *supra* note 9, at 12.

<sup>272</sup> *Id.* at 14.

<sup>273</sup> U.S. Const. art. III, § 1.

both international and domestic United States law.<sup>274</sup> One of the top human rights counsel in the United States, who is in favor of United States ratification of the ICC treaty, despite the constitutional issues, admits that “the ICC can properly be considered an extension of the state’s own domestic jurisdiction.”<sup>275</sup> Thus, in her view, if approved by Congress and signed by the President, the ICC would be considered a court inferior to the Supreme Court, whether or not it the ICC would be considered an Article III court.<sup>276</sup> Of note, this concept is not addressed in the ICC treaty, and the final authority in regards to ICC cases is the Appeals Chamber of the ICC.<sup>277</sup>

It appears clear the ICC will not be inferior to the United States Supreme Court in violation of the rule established in Reid v. Covert, which stated that the Supreme Court “has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”<sup>278</sup> Rather, as discussed *supra*, the ICC will be complementary to the member States judicial systems.<sup>279</sup> Since the subject matter of the ICC may also be crimes within the United States, the ICC and the United States judicial system will, in reality, have parallel jurisdiction.<sup>280</sup> Therefore, as in the case of the Vice-President and the General, once the ICC gains jurisdiction, there would be no appeal of any ruling, error, or sentence to the United States Supreme Court.<sup>281</sup> Since the ICC

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<sup>274</sup> See ICC Statute, *supra* note 5, art. 21(c), which allows the ICC to apply national law; See also Frank Newman, *et. al.*, *International Human Rights: Law, Policy, and Process*, 556 (2<sup>nd</sup> ed. 1996) *citing* Justice Blackmun who stated that “international law is part of our law, and must be ascertained and administered by the courts.”

<sup>275</sup> Duffy, *supra* note 190, at 23, *citing* Cherif Bassiouni, Observations on the Structure of the (Zutphen) Consolidated Text, *Observations on the Consolidated ICC 12* (Ileila Sadt Wexler ed. 1998), where the professor states that “the surrender process in this case is akin to a transfer from one part of the national legal system to the international extension of the national system which would be the ICC.”

<sup>276</sup> If the ICC is inferior to the Supreme Court and the other two political branches acting together contravene an international legal norm, the Supreme Court is unable to review such conduct. U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988). Therefore, if the ICC were subject to jurisdiction by the Supreme Court, a great majority of cases could be dismissed as political questions.

<sup>277</sup> ICC Statute, *supra* note 5, art. 39.

<sup>278</sup> Reid, 351 U.S. at 488.

<sup>279</sup> ICC Statute, *supra* note 5, art. 1.

<sup>280</sup> See Brownlie, *supra* note 260, at 692, which states that an international organizations and its constituent treaty will normally leave the reserved domain of domestic jurisdiction untouched.

<sup>281</sup> This is in complete contradiction to the declaration that the United States filed with the United Nations in regards to the International Court of Justice which stated that “disputes with regard to matters which are essentially within

treaty attempts to create a judicial system outside the framework of the United States system, where the Supreme Court is the final authority, the ICC conflicts with Article III and is, therefore, unconstitutional.

## (2) Non-military citizens before military tribunals

In addition to concerns about superiority of the Supreme Court, the ICC system appears to violate the Constitution and established precedent interpreting the relationship of the judiciary to the other two branches of government. For example, in Ex Parte Milligan,<sup>282</sup> a case involving United States citizen being convicted before a military court when civilian courts were operable.<sup>283</sup> Thus, the Supreme Court held the military court was not an Article III court, and, therefore, the military court could exercise no part of the judicial power of the country.<sup>284</sup>

This concept is taken further in light of Reid v. Covert,<sup>285</sup> where Justice Black tested the theory that Article III would be usurped if a foreign court attempted to adjudicate crimes committed by United States citizens within the jurisdiction of the United States. The Court held that an American civilian “could not be subjected to trial in a military court overseas, even though an international agreement between Britain and the United States appeared to allow such a trial.”<sup>286</sup> Justice Black wrote that “at the beginning we reject the idea that when the United States acts against civilians abroad,” it could do so free of the Constitution.<sup>287</sup>

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the jurisdiction of the United States of America as determined by the United States of America,” See Brownlie, *supra* note 260, at 728.

<sup>282</sup> See Ex Parte Milligan, 71 U.S. 2, 18 L. Ed. 281, 4 Wall. 2 (1866).

<sup>283</sup> Andreassen, *supra* note 227, at 726.

<sup>284</sup> Ex Parte Milligan, 71 U.S. at 121.

<sup>285</sup> Reid v. Covert, 354 U.S. 1 (1957).

<sup>286</sup> Andreassen, *supra* note 227, at 728 citing *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearings on the U.N. Int'l Criminal Court Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. (1998); Also see Reid, 354 U.S. at 5-6.

<sup>287</sup> Reid, 254 U.S. at 5.

Given the cases, it is clear non-military citizens cannot be tried in a military tribunal, either in the United States or in a foreign State, for crimes occurring within the jurisdiction of the United States. And, this is true despite any treaty to the contrary. This is instructive in considering the ICC is, essentially, a military tribunal in the sense that its subject matter is solely related to crimes occurring during war or armed hostilities – whether internal or between States. Therefore, the ICC could not try the Vice-President, in the scenario presented, because he is a civilian and such a trial would be in violation of Article III of the Constitution.

### **(3) Enemy aliens and military tribunals**

But, Marquardt asserts Ex Parte Milligan can be distinguished.<sup>288</sup> In his view, Ex Parte Milligan is limited to civilian crimes committed by civilians, such as petty larceny.<sup>289</sup> In support of this, he argues Ex Parte Quirin v. Cox<sup>290</sup> stands for the proposition that in times of war, non-Article III courts can be convened to adjudicate violations of the laws of war by civilians even though civilian courts are still operable.<sup>291</sup> Thus, since the subject matter of the ICC deals exclusively with the laws of war, the ICC would be constitutional.

Marquardt's argument would be more persuasive if Ex Part Quirin dealt with United States citizens. But, that case concerned a trial by military commission of German military personnel accused of acting as spies and saboteurs within the United States. These soldiers were brought to the United States by a German submarine and deposited in key locations wearing German military uniforms. Only when they reached American soil did they transferred to civilian garb.

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<sup>288</sup> See Marquardt, *supra* note 216, at 73.

<sup>289</sup> *Id.* at 130.

<sup>290</sup> Ex Parte Quirin v. Cox, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942).

<sup>291</sup> *Id.*

Justice Stone, writing for the Supreme Court, held in Ex parte Quirin that a United States military court could try enemy forces for the violations of the law of war if captured within the United States,<sup>292</sup> which clearly limited this type of case to *enemy* aliens.<sup>293</sup> Furthermore, Justice Stone stated that “in time of war and in the times of peace, it is the duty of the Supreme Court to preserve unimpaired the constitutional safeguards of civil liberty.”<sup>294</sup> Thus, to argue Ex Parte Quirin should extend to the proposition that United States military members could be surrendered to a foreign court exercising Article III powers is a questionable leap, especially since Justice Stone hinted at the limited scope of Ex Parte Quirin when he stated the Court had “no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunal to try persons according to the law of war.”<sup>295</sup> He did, however, clearly state that if the military tribunal was in violation of the Constitution, the military tribunal would be invalid.<sup>296</sup>

In addition Ex Parte Quirin, Marquardt and other commentators attempt to use the Supreme Court’s interpretation of its authority over military tribunals of enemy aliens captured abroad as persuasive authority for the proposition the ICC does not violate Article III of the Constitution.<sup>297</sup> In Re Yamashita, Justice Stone, again writing for the Supreme Court, held enemy aliens had no constitutional based objections to being tried by a military tribunal set up by the victors to adjudicate war crimes.<sup>298</sup> General Yamashita was the Japanese commanding general of the Imperial Japanese forces occupying the Philippines, which at the time of World

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<sup>292</sup> Ex Parte Quirin, 317 U.S at 23.

<sup>293</sup> *Id.* at 25 stating that “constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty;” *See also* Ex Parte Milligan, 316 U.S. at 132; Hill v. Texas, 316 U.S. 400, 406, 62 S.Ct. 1159, 86 L. Ed. 1559 (1942)

<sup>294</sup> *Id.* at 6.

<sup>295</sup> Ex Parte Quirin, 317 U.S. at 45-46.

<sup>296</sup> *Id.* at 25.

<sup>297</sup> Marquardt, *supra* note 216, at 130; Andreasen, *supra* note 227, at 726.

<sup>298</sup> In Re Yamashita, 327 U.S. 1, 66 S.Ct. 340, 90 L. Ed. 499 (1946).

War II was a territory of the United States.<sup>299</sup> Upon surrender, General Yamashita was immediately put on trial for war crimes before a military court.<sup>300</sup>

Justice Stone clearly stated the holdings In Re Yamashita and Ex Parte Quirin dealt only with military tribunals dealing with *enemy* combatants,<sup>301</sup> holding it was “an important incident to the conduct of war” for the “adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our effort, have violated the law of war.”<sup>302</sup> Justice Stone also emphasized the United States had actually declared war on the State of the petitioner, which effected the military commander’s ability to discipline “without qualifications as to the exercise of this authority so long as a state of war exists – from its declaration until peace is proclaimed.”<sup>303</sup> Therefore, although Justice Stone points out in In Re Yamashita that United States military members were also subject to trial by military tribunals,<sup>304</sup> with a United States judicial panel deciding guilt, the limited power to review such tribunal decisions and requires constitutional guarantees is limited to declared war.<sup>305</sup> Thus, since in the scenarios presented, a state of war was not declared against either Iran or Korea, the cases cited by Marquardt can be distinguished on the facts.

When the Supreme Court revisited the In Re Yamashita and Ex Parte Quirin decisions in Johnson v. Eisentrager, the Court found in war, alien enemies do not receive constitutional

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<sup>299</sup> See Johnson v. Eisentrager, 339 U.S. 763, 780, 70 S. Ct. 936, 945 L. Ed. 1255 (1950), where the Supreme Court points to these territorial distinctions.

<sup>300</sup> In Re Yamashita, 327 U.S. at 7.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 11.

<sup>303</sup> *Id.* at 11-12.

<sup>304</sup> *Id.* at 7 referring to the statutory authority under the Articles of War which specifically stated that United States servicemembers were subject to military commissions.

<sup>305</sup> *Id.* at 8.

protections.<sup>306</sup> To use these decisions, therefore, to argue that the Vice-President and the General in the presented scenarios should be surrendered to the ICC does not follow. Both, the Vice-President and the General believed they were acting according to their constitutional duties to protect and defend the United States and her allies.

Even if these cases were persuasive authority, they are inappropriate within the context of the ICC. As discussed *supra*, once a case is adjudicated within the ICC, there is no opportunity to appeal to the United States Supreme Court. Justice Black, dissenting in Eisenrager, argues that when hostilities have ceased with an enemy nation, the enemy alien at least has the ability to file a *writ of habeas corpus* with the courts.<sup>307</sup> Since the argument is that the ICC is an extension of the United States judicial system, and since the General and the Vice-President are both United States citizens, it would appear that, when hostilities have ended, they too would have the ability to seek *habeas corpus* relief from the United States judiciary. But under the ICC treaty, this is not allowed, which calls into question whether the court is unconstitutional.

#### **(4) Enemy aliens and international tribunals**

Ex Parte Quirin, In Re Yamashita, and Johnson v. Eisenrager are all case dealing with United States military tribunals. But, Marquardt raises another argument that the Supreme Court has never held Article III restricted the United States from participating in the international military tribunals at the end of World War II.<sup>308</sup> In support of this argument Marquardt refers to Hirota v. MacArthur, where the Court held:

the military tribunal set up in Japan by General MacArthur as the agent of the Allied Powers is not a tribunal of the United States and the courts of the United States have no power or authority to

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<sup>306</sup> Johnson, 339 U.S. at 772. In addition, the Johnson court reiterated this when it stated that aliens “have no power to sue in the public courts of an enemy nation.” *Id.* at 776.

<sup>307</sup> *Id.* at 794 (Black Dissent), stating that Quirin and Yamashita, although not giving constitutional protections to the enemy aliens under Article III, stood for the proposition that “courts could inquire whether a military commission, promptly after hostilities had ceased, has lawful authority” to adjudicate war crimes.

<sup>308</sup> Marquardt, *supra* note 216, at 106; Curabba, *supra* note 9, at 16.



review, affirm, set aside, or annul the judgments and sentences imposed by it on these petitioners, all of whom are citizens of Japan.

Based on this, Marquardt relies on Hirota for the proposition that the ICC is an international body, not a domestic court, and, therefore, Article III is not violated.<sup>309</sup>

But this argument fails on several points. First, as was articulated by David Scheffer, the United States Ambassador-At-Large for War Crimes and the lead negotiator to the ICC treaty negotiations, reminded that “we must recall that the Nuremberg and Tokyo Tribunals actually operated with the consent of the state of nationality of the defendants as a consequence of the surrender instruments signed by Germany and Japan, respectively. In the case of Nuremberg, the Allied Powers also had supreme authority in Germany,”<sup>310</sup> and the international tribunals was not founded on international law, but was “one of political power and one of war.”<sup>311</sup> Therefore, since the accused Japanese and German citizens had never been to the United States, the petitioners in Hirota could never have expected to have constitutional protections. In addition, as discussed *supra*, the cases dealing with international military tribunals reaffirmed the concept that “one state or group of states can set up military tribunals” to try *enemies* for war crimes that are captured within the territory they control.<sup>312</sup>

Second, the Supreme Court in Hirota was clear that its ruling would have been different if a United States citizen was making the appeal.<sup>313</sup> And, this is consistent with the Court’s rulings in Ex Parte Quirin and In Re Yamashita, which dealt with enemy aliens. Hirota also strengthens the argument presented in Reid v. Covert that United States citizens are still protected by the Constitution, even if tried abroad by a court of the United States. Therefore, if the Vice-President

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<sup>309</sup> Marquardt, *supra* note 216, at 106.

<sup>310</sup> See David Scheffer remarks to the United States Congress at [www.state.gov/documents/organization.6552.doc](http://www.state.gov/documents/organization.6552.doc), March 26, 1999.

<sup>311</sup> Hirota v. MacArthur, 338 U.S. 197, 215, 69 S. Ct. 197, 93 L. Ed. 1902 (1948).

or the General were making requests as United States citizens, under Hirota, courts would have been less inclined to take the international tribunals decisions at face value.

The third argument is that because the enforcing power of the Tokyo tribunal was General MacArthur's, an official of the United States, actions, even abroad, could be questioned by the Court. In this regard, Justice Douglas's concurrence in Hirota specifically asserted the Supreme Court would always have jurisdiction when the "conduct of its own officials" was in question.<sup>314</sup> Justice Douglas went on to state, "the Constitution follows the flag" and General MacArthur was "an American citizen who [was] performing functions for our own government. It is our Constitution which he supports and defends."<sup>315</sup> By this reasoning, however, General MacArthur's actions, not the tribunal's decisions, could be questioned. In the scenarios presented, the Vice-President and the General were performing official functions on behalf of the United States government. Because of the "official status" of their acts, the Douglas concurrence would add credence to the fact that their actions, done under the authority of the United States Constitution, must be reviewed by governmental courts of that same authority. Thus, since they were conducting official acts and can't be considered enemy aliens, the ICC would conflict with the powers of Article III and, therefore, appear to be unconstitutional.

Audrey Benison, a recent commentator of the constitutionality of the ICC, argues the recent case of Ntakirutimana v. Reno<sup>316</sup> allows for non-enemy surrender to international criminal tribunals.<sup>317</sup> The general rule in Ntakirutimana is there is no constitutional bar to prevent the surrender of a *Rwandan* citizen to face charges of genocide in the absence of an Article II

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<sup>312</sup> See Paust, *supra* note 242, at 3. The concept of territorial jurisdiction is discussed *supra*.

<sup>313</sup> Hirota v. MacArthur, 338 U.S. at 205-09.

<sup>314</sup> *Id.* at 204 (Douglas, J., concurring).

<sup>315</sup> *Id.*

<sup>316</sup> Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999).

<sup>317</sup> Benison, *supra* note 236, at 94.

extradition treaty.<sup>318</sup> This holding, however, is clearly limited to the rule that an extradition treaty is not required for a state to surrender an accused, and the Court did not even consider the constitutionality of the tribunal. Finally, the Court was dealing with a Rwandan citizen, not a United States citizen. The Rwandan citizen was a public figure in Rwanda during the tragedy in that State. Therefore, Rwanda, and through it the Ad Hoc Tribunal, had a claim for jurisdiction. Unquestionably, the only issue was whether extradition could occur without a treaty, and therefore, the Ntakirutimana case is limited in scope and can never stand for the proposition United States citizens are to be surrendered to an international criminal tribunal.

#### **(5) United States military and courts-martials**

Although the enemy alien cases are distinguishable from the scenarios presented, it is true Article III courts do not judge United States military members tried by court-martial for violations of the Uniform Code of Military Justice.<sup>319</sup> Courts-martial are convened under the authority of Article II Commander-In-Chief powers, which permits courts-martial to sit in territory outside the United States.<sup>320</sup> In Williams v. Froehlke, the appellate court stated “there must be federal criminal jurisdiction for a trial to properly occur in an Article III court.”<sup>321</sup> In Williams, a military member was accused of committing a crime against a German citizen while stationed in Germany. Since the crime was a violation of the Uniform Code of Military Justice and also a federal crime under 10 U.S.C. §922, a United States military court-martial was proper to try the accused military member in Germany.<sup>322</sup>

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<sup>318</sup> Ntakirutimana, 184 F.3d at 426, 427.

<sup>319</sup> 10 U.S.C. §810 *et. seq.*

<sup>320</sup> See U.S. Const. art. III, §2, cl. 3, which states that “such trial should be in the state where said crimes shall have been committed.” This excludes Article III courts from sitting outside the jurisdiction of the United States. However, Article II courts, like courts-martial, are not so restricted.

<sup>321</sup> Williams v. Froehlke, 490 F.2d 998, 1003 (2nd Cir. 1974).

<sup>322</sup> *Id.*

Thus, in the General's scenario, the Court of Inquiry assumed jurisdiction over the General's acts under the same legal standard. However, because the courts-martial is a United States court, albeit not an Article III court, the Supreme Court still retains review authority under Article III.<sup>323</sup> Therefore, Article III would be violated in the scenarios presented if the General would be barred from seeking relief from the Supreme Court.

The courts-martial distinction does not affect the Vice-President scenario. Although acting as Commander-In-Chief, he is not subject to courts-martial jurisdiction because he is a United States civilian; and he is a United States civilian and within the territory of the United States where civil courts are available. Also, under Ex Parte Milligan, the Vice-President is only subject to Article III courts.<sup>324</sup> Conversely, the General acted outside the United States in the independent country of South Korea, and under the Williams case, the General would be subject to a court-martial by United States military authorities in South Korea.

Nonetheless, the Williams case does not stand for the proposition that the United States is to surrender the General over to the ICC. The General was cleared by a Court of Inquiry, and he would not face extradition because a United States tribunal has determined no probable cause in as much as the General acted reasonably. Clearly, the Constitution was designed to control and limit the powers of government through separation of powers that must include an independent judiciary.<sup>325</sup> Therefore, the executive and legislative branches cannot transfer the essential powers of the judiciary to a non-constitutional institution. Such a transfer would appear to violate Article III of the Constitution.

#### **b. The ICC as a violation of Article II powers**

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<sup>323</sup> U.S. Const. art. III, §1.

<sup>324</sup> Ex Parte Milligan, 71 U.S. 2.

<sup>325</sup> See Henry J. Steiner, *International Human Rights in Context: Law, Politics, Morals*, 711 (1996).

Under Article II of the United States, the executive branch of the government has three powers that would come into conflict with the ICC structure. First, the structure would conflict with the executive power to negotiate treaties; second, the powers enumerated as Commander-In-Chief; and third, the pardon powers. Although, for the United States to become a member of the ICC, the President is obligated to sign the treaty, which was done by President Clinton before he left office, the Supreme Court has held that the President is unable to surrender any executive authority.<sup>326</sup> An argument that a federal court should bar an accused's surrender to the ICC would be that the President has abandoned his constitutional duties under Article II.

### **(1) The treaty powers**

Under Article II of the United States Constitution, the President has the power to make treaties with foreign nations, if two-thirds of the United States Senate consents.<sup>327</sup> This treaty power is restricted only by the Constitution and “considerations of public policy and justice which controls civilized nations.”<sup>328</sup> (Although it is hotly debated, the President has the exclusive authority to terminate a treaty outright,<sup>329</sup> without the consent of the Senate.)<sup>330</sup> Thus, Professor Louis Henkin argues the President's treaty making power authorizes delegation of power to the ICC as long as the delegated power is subject to the same constitutional checks and balances of the other branches of government the President would face.<sup>331</sup> In his view, President would be able to assign enforcement powers to the ICC, much as a State court can adjudicate

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<sup>326</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 631, 9 S.Ct. 623, 32 L.Ed. 1068 (1889).

<sup>327</sup> U.S. Const. art. II, §2, cl. 2.

<sup>328</sup> *Ping*, 130 U.S. at 629. It should be noted that the Court stated “controls civilized nations,” not relations amongst civilized nations. Therefore, the use of this wording to further an argument in favor of the ICC is faulty.

<sup>329</sup> See Janis, *supra* note 142, at 40 citing American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* §226.

<sup>330</sup> See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), *vacated by* 444 U.S. 996 (1979); See also David G. Adler, *The Constitution and the Conduct of American Foreign Policy*, 34 (1996).

<sup>331</sup> Louis Henkin, *Arms Control and Inspection in American Law*, 135-6 (1996).

federal crimes.<sup>332</sup> The obvious counter-argument is that, by joining the ICC, the President would abdicate portions of his executive powers, which is a violation of the Constitution.

Under Article 86 of the ICC Statute, member States have an obligation to cooperate fully with the ICC.<sup>333</sup> The ICC determines what cooperation is required, not the member State.<sup>334</sup> A failure to cooperate would result in a referral of the matter to the United Nations, or the Assembly of State Parties,<sup>335</sup> which is not controlled by the United Nations and is outside the United Nations veto power of the United States. Compounding the inability of the member State to control ICC powers is the provision of the ICC Statute that permits withdrawal from the ICC, but takes effect only after one year of the announced intention to withdrawal.<sup>336</sup> During that year period, the member State is required to fulfill obligations to the ICC<sup>337</sup> or face referral to the Assembly of State Parties. Thus, these are clear restrictions on the ability of the United States President to fulfill his executed duties.<sup>338</sup> Although the President would be able under domestic law to terminate the treaty, in theory, under the ICC treaty, the executive branch abdicates this ability for at least a one-year period.<sup>339</sup>

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<sup>332</sup> Louis Henkin, *Arms Control and Inspection in American Law*, 135-6 (1996).

<sup>333</sup> ICC Statute, *supra* note 5, art. 86, which states that “State Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

<sup>334</sup> *Id.* at Art. 87.

<sup>335</sup> *Id.* at Art. 87(7), which states that “[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of State Parties, or, where the Security Council referred the matter to the Court, to the Security Council.”

<sup>336</sup> *Id.* at 127(1).

<sup>337</sup> *Id.* at Art. 127(2)

<sup>338</sup> In *De Geoffrey v. Riggs*, 133 U.S. 258, 267, 10 S. Ct. 295, 33 L.Ed. 642 (188), the Supreme Court stated that the “treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments...it would not be contended that it extends so far as to authorize what the Constitution forbids.” By taking the inverse of the argument, the treaty power cannot extend so far as to *forbid* what the Constitution *authorizes*.

<sup>339</sup> *See* ICC Statute, *supra* note 5, art. 127.

Marquardt argues the inverse of this point, citing Missouri v. Holland<sup>340</sup> as persuasive authority that the existence of the ICC treaty actually enhances the President's ability to execute his constitutional duties, and, therefore, the ICC does not interfere with any constitutional provisions.<sup>341</sup> As with the In Re Yamashita and Ex Parte Quirin cases discussed *supra*, however, Justice Holmes limited any such shadow on the Constitution.<sup>342</sup> Justice Holmes stated the Federal government could enter into a treaty only where it does "not contravene any prohibitory words to be found in the Constitution,"<sup>343</sup> explaining the Constitution's superiority, as it relates to United States citizens, to any other instrument of international significance.<sup>344</sup> In short, the United States is able to make treaties, but only so long as the treaty does not encumber any of the powers laid out in the Constitution, or change the "character of government."<sup>345</sup>

Marquardt also uses Wilson v. Girard to argue the Supreme Court avoids weighing in on decisions by other branches of government to enter into a treaty with a foreign country.<sup>346</sup> Wilson is most commonly used to buttress the President's authority to enter into executive agreements to implement a treaty provision.<sup>347</sup> The Court in Wilson, however, stated the wisdom of a treaty arrangement "is exclusively in the determination of the executive and the legislature."<sup>348</sup> But, this case can be distinguished on two points. First, the Court was discussing a jurisdictional treaty issue between the United States and another sovereign nation, which

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<sup>340</sup> Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L. Ed. 641 (1920).

<sup>341</sup> Marquardt, *supra* note 216, at 131-132.

<sup>342</sup> Holland, 252 U.S. at 433.

<sup>343</sup> *Id.*

<sup>344</sup> Andreasen, *supra* note 227, at 727.

<sup>345</sup> See De Geoffrey, 133 U.S. at 267 (1890). "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments... It would not be contended that it extends so far as to authorize what the Constitution forbids."

<sup>346</sup> Marquardt, *supra* note 237, at 114 citing Wilson v. Girard, 354 U.S. 524, 530, 77 S.Ct. 1409, L. Ed. 2d. 1544 (1957).

<sup>347</sup> Thomas M. Franck, *et al.*, *Foreign Relations and National Security Law*, 427 (2nd ed. 1993); Stephen Dycus *et al.*, *National Security Law*, 199 (2nd ed. 1997).

<sup>348</sup> Wilson, 354 U.S. at 530.

reiterated the territoriality jurisdiction rule decided in the Schooner Exchange case,<sup>349</sup> and discussed *supra*.

Second, the treaty in question was the SOFA between the United States and Japan.<sup>350</sup> The Wilson case involved a Specialist Third Class Girard, who while stationed in Japan, fired spent shells out of his grenade launcher toward Japanese civilians and killed one.<sup>351</sup> Under the SOFA, primary jurisdiction over Girard was with the United States military,<sup>352</sup> yet, the United States waived primary jurisdiction in the case of Girard.<sup>353</sup> Clearly the United States never abrogated its right to retain jurisdiction under the SOFA, as it would in the ICC treaty, but instead merely waived its primary jurisdiction and in the isolated case of Girard. This permitted Japan to assert its jurisdiction of the military member under the territoriality doctrine.

Given these distinctions, Wilson clearly does not stand for the proposition that the Court will avoid interference with the ability to make treaties that grants away criminal jurisdiction, as Marquardt infers. The case merely stands for the proposition that, in a treaty which gives the United States primary criminal jurisdiction,<sup>354</sup> the executive may waive jurisdiction to another sovereign State that also has jurisdiction.

This reasoning cannot be used in the context of the ICC treaty, which allows for concurrent jurisdiction, but which, in reality, permits the ICC to assert primary jurisdiction if the member State fails to meet expectations. In addition, the ICC cannot be considered a sovereign

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<sup>349</sup> Wilson, 354 U.S. at 529 *citing* The Schooner Exchange, 7 Cranch at 136 stating that sovereign nations have exclusive jurisdiction to punish offenses within its borders.

<sup>350</sup> Treaty of Mutual Cooperation and Security Between the United States and Japan, Jan. 19, 1960, 11 U.S.T. 1632, 1652, T.I.A.S. No. 4509, 4510. This treaty superceded Administrative Agreement Under Article III of the Security Treaty Between the United States and Japan, Feb. 28, 1952, 3 U.S.T., T.I.A.S. No. 2492, which was in force when Wilson case arose.

<sup>351</sup> Wilson, 354 U.S. at 526.

<sup>352</sup> Bassiouni, *supra* note 184, at 135.

<sup>353</sup> *Id.*

<sup>354</sup> It should also be noted that without the SOFA treaty with Japan, the military member would be subject to Japanese law for criminal acts under the territoriality principle. Therefore, if the General were arrested in Korea for his acts, he could be tried there or in the ICC for his crimes.



State. In the scenarios presented, the United States did not waive jurisdiction, but rather handled both cases within the United States judicial system. Therefore, Wilson would not be persuasive authority for the scenarios presented because the United States acted upon its jurisdiction, rather than waiving this right.

As discussed *supra*, within the context of the territoriality jurisdiction principle, the United States may negotiate as to which country will exercise primacy of jurisdiction even when the offenses remain within the judicial power of the United States.<sup>355</sup> In effect, the United States may give up jurisdiction of an individual to another sovereign State when it concludes that State has a stronger claim on the criminal offense. The ICC, not being a sovereign nation, but rather an international organization, therefore will not have standing to assert territorial jurisdiction. Thus, since the ICC treaty would change not only the powers under the United States executive branch, but also the legislative and judicial branches, the ICC treaty is unconstitutional.

## **(2) The power of the Commander-In-Chief**

The United States Constitution provides for the power over the United States military to be held, principally, by the executive branch.<sup>356</sup> As Commander-In-Chief, the President has vast authority to respond to attacks against the United States.<sup>357</sup> In responding to attacks, the President will be granted absolute immunity for any official acts taken within that authority.<sup>358</sup> In Nixon v. Fitzgerald, Justice Powell stated for the Court that alternative checks, such as impeachment and congressional scrutiny, would provide adequate assurances the President was not “above the law.”<sup>359</sup> Since, in our scenario, the Vice-President was Acting President under the Twenty-Fifth Amendment, the Vice-President would also be entitled to this absolute

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<sup>355</sup> Wilson, 354 U.S. at 529.

<sup>356</sup> U.S. Const. art. II, §2, cl. 1.

<sup>357</sup> See The Prize Cases, 67 U.S. 635, 17 L. Ed. 459, 2 Black 635 (1863) which held that the determination of the extent of an armed challenge to the United States rests with the President.

immunity.<sup>360</sup> Since the immunity has its foundation in the separation of powers, a treaty could not contravene it. (However, it is noteworthy that, if the Vice-President was impeached for the acts stated in the scenario, the Vice-President would then be liable and subject to indictment.)<sup>361</sup>

The ICC treaty would undermine this presidential immunity. Article 27 of the ICC Statute clearly states that immunities, whether under international or national law, is not a bar for the jurisdiction of the ICC.<sup>362</sup> Thus, the Ad Hoc Tribunals have set the standard for this elimination of immunities when it requested the surrender of ex-President Soloban Milosevic from the Former Yugoslavia.<sup>363</sup> This same approach could be applied in the case of the Vice-President's scenario, and a claim of absolute immunity would not be a viable defense to an assertion of jurisdiction by the ICC. Thus, since the Vice-President would not have this defense, a serious issue of constitutionality of the ICC treaty, which constrains the powers and immunities of the United States executive branch, would be raised.

Another, serious issue is that the President, who is responsible for directing the Department of Justice to investigate alleged criminal acts, as in the case of the Vice-President, could be hindered from carrying out his constitutional duties. As with the ICC, the Ad Hoc

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<sup>358</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

<sup>359</sup> *Id* at 758.

<sup>360</sup> There is also an argument that the General would have the same "privileges and immunities therein referred to shall be those accorded to diplomatic envoys by international law." See *Army Handbook*, *supra* note 210, at 16-21. In the General scenario, the General was the Commander of the Military Component of the United Nations Peacekeeping operation in Korea.

<sup>361</sup> U.S. Const. art. I, §3, states that any party convicted of impeachment "shall...be liable and subject to indictment, trial, judgment, and punishment according to the law."

<sup>362</sup> See ICC Statute, *supra* note 5, art. 27, which states: "(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

<sup>363</sup> See Jeremy Rifkin, *The Milosevic Precedent Is One We Are Bound To Regret*, Los Angeles Times, July 2, 2001, at B11.

Tribunals are assumed to have complimentary jurisdiction.<sup>364</sup> An aspect of this jurisdiction is that, if a State is conducting its own investigation and beginning the preparation of criminal proceedings against the individual, the ICC and the Ad Hoc Tribunals should defer investigation and assumption of jurisdiction until the State is finished.<sup>365</sup> In the Milosevic case, the Ad Hoc Tribunal did not wait until the national court had finished its judicial process before demanding jurisdiction.<sup>366</sup> This problem could also permit the ICC to interfere with executive powers of the President of the United States<sup>367</sup> – such as law enforcement duties – in violation of the United States Constitution.

In addition, the President will be hindered in the application of military force – such as in peacekeeping missions.<sup>368</sup> Commanding generals could second guess the orders of the President because the ability to defend their decision before a Court of Inquiry will be diminished. Under the scenarios presented, the Vice-President, the General, and others who followed the orders of these officials might be subject to prosecution by the ICC.<sup>369</sup> Thus, political and military leaders

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<sup>364</sup> See David Scheffer, Development In International Criminal Law: The United States and the International Criminal Court, 93 *A.J.I.L.* 12, 19 (1999) which states that complimentary jurisdiction is flawed. [“Complimentary is not a complete answer, to the extent that it compels States to investigate the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. Even if the United States has conducted an investigation, the ICC could decide by a 2-to-1 vote and launch its own investigation of the United States citizens.”]

<sup>365</sup> See ICC Statute, *supra* note 5, art. 18(2).

<sup>366</sup> See Rifken, *supra* note 372.

<sup>367</sup> The ICC may also interfere with Congress’ War Powers under Article I. A Court must give “particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.” See Middendorf v. Henry, 425 U.S. 25, 43, 96 S.Ct. 1281, 47 L. Ed. 2d 556 (1976) *citing* Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953), which stated that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demand of discipline and duty, and the civil courts are not agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress.”

<sup>368</sup> See McNerny, *supra* note 235, at 188, who states that in the wake of the war in Kosovo, many Non-Governmental Organizations were calling for the Yugoslavia War Crimes Tribunal to investigate the United States and NATO Allies for their bombing campaigns; See Henry Kissinger, *Does America Need A Foreign Policy? Toward A Diplomacy for the 21<sup>st</sup> Century*, 280 (2001), which states that Amnesty International supported a complaint to “Louis Arbour, then prosecutor of the International Criminal Tribunal for the Former Yugoslavia, alleging that crimes against humanity had been committed during the NATO air campaign in Kosovo. Arbour ordered an internal staff review.”

<sup>369</sup> Grigorian, *supra* note 215, at 12; See Seguin, *supra* note 193, at 91.

who are constitutionally responsible for the United States' foreign policy could be hindered in their ability to carry out their duties.<sup>370</sup>

### (3) The pardon power

The United States Constitution provides for the President to have “the power to grant reprieves and pardons for offenses against the United States.”<sup>371</sup> Although the concept of presidential pardon is not specifically discussed within the ICC treaty,<sup>372</sup> it is clear the subject matter of the ICC includes acts that are crimes under United States law.<sup>373</sup> Thus, an interpretation of Article 27 would show such a pardon irrelevant in the eyes of the ICC, even when the subject matter is within the scope of the United States judiciary.<sup>374</sup> So, for example, in the case of the Vice-President scenario, under the ICC, the fact that he was pardoned by the President would be irrelevant and not bar prosecution by the ICC.

Historically, the pardon power has been a powerful tool for the United States in uniting the country after a contentious period.<sup>375</sup> In fact, the last time a United States military member was convicted of war crimes during the Vietnam War,<sup>376</sup> the President used his pardon powers to first commute the death penalty sentence to life imprisonment, and then, later, to afford another

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<sup>370</sup> See Bolton, *supra* note 211, at 194.

<sup>371</sup> U.S. Const. art II, §2, cl. 1.

<sup>372</sup> The other issue is one of granted immunity, which is different from the absolute immunity discussed *supra*. If the Vice-President of the General were to enter into an immunity deal with the United States government before a required turnover to the ICC, then the executive has an obligation to enforce the immunity agreements and not surrender a person to the ICC, despite the treaty. See Bassouni, *supra* note 184, at 247. For similar court decisions arising under a Status of Forces Agreement see Plaster v. United States, 720 F.2d 340 (4<sup>th</sup> Cir. 1983).

<sup>373</sup> See 18 U.S.C. §§1091, 2441, which makes genocide and war crimes federal crimes.

<sup>374</sup> See ICC Statute, *supra* note 5, art. 27.

<sup>375</sup> The pardon by President Gerald Ford of President Richard Nixon after the Watergate scandal is one example. The general amnesty proclaimed by the United States in relation to Confederate soldiers during the Civil War is another example.

<sup>376</sup> See United States v. Calley, 22 U.S.C.M.A. 534, 1973 CMA LEXIS 627; 48 C.M.R. 19 (December 21, 1973), where the conviction of appellant soldier for murdering unarmed prisoners of war was valid because person of any level of intelligence should have realized orders to kill everyone encountered by platoon were illegal.

reduction to parole.<sup>377</sup> The President’s rationale for this action was the necessity to heal the nation and move forward by putting the past behind the nation. In addition, as discussed *supra*, commentators argue that the ICC cannot interfere with a SOFA.<sup>378</sup> However, the SOFA treaties specifically states that if an individual has been pardoned, “he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party.”<sup>379</sup> This language, therefore, directly contradicts the authority to be ceded to the ICC, thus making the SOFA’s less effective.

The promoters of the ICC argue that when there is a “clear conflict between the constitutional and international law, national law determines the hierarchy between the two.”<sup>380</sup> National law encompasses treaties, statutes, common law, and the Constitution. When there is a conflict between international law and the Constitution, the Constitution trumps every time pursuant to the Supremacy Clause.<sup>381</sup> The pardon power, being a part of the Constitution, cannot be amended because the “Executive, or the Executive and Senate combined” cannot amend the Constitution by “means other than those prescribed by the Constitution.”<sup>382</sup> Since joining the ICC would theoretically amend the Constitution by taking away powers that the Constitution grants, the ICC is unconstitutional without a constitutional amendment.

### **c. The ICC as a violation of Article I**

Under Article I of the United States Constitution, Congress has the power to “constitute tribunals inferior to the Supreme Court.”<sup>383</sup> Under Article II, the Senate must concur by two-

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<sup>377</sup> See Grigorian, *supra* note 215, at 12 stating that United States citizens have been accused of and are capable of committing atrocities and using the My Lai case as an example..

<sup>378</sup> Paust, *supra* note 242, at 11.

<sup>379</sup> See NATO SOFA, *supra* note 274, at Art. VII, §8.

<sup>380</sup> Duffy, *supra* note 190, at 16.

<sup>381</sup> U.S. Const. art. VI, §2; *Reid*, 351 U.S. 487, brought about the general acceptance of the fact that international agreements of all kinds are subject to constitutional limits.

<sup>382</sup> Frank, *supra* note 356, at 299.

<sup>383</sup> U.S. Const. art. I, §8, cl. 9.

thirds vote United States entry into a treaty.<sup>384</sup> The ICC as an inferior court to the Supreme Court was discussed, *supra*, and it appears clear the ICC would violate Article III and Article I if the ICC was anything other than an inferior to the Supreme Court. However, one of the favorite arguments of pro-ICC commentators is that the constitutional concerns are negated by the Define and Punish Clause<sup>385</sup> of Article I.<sup>386</sup> Marquardt, for example, argues this clause can “sustain the creation of a non-Article III tribunal to try citizens of the United States.”<sup>387</sup> He goes on to argue that this clause justifies the ICC in the same way territorial and military courts are permissible, because the creation of these types of courts is an exercise of powers of general governance.<sup>388</sup> He also argues, since there is no other reference to “laws of nations” in the Constitution, Congress can determine how to enforce violations of such laws outside of Article III.<sup>389</sup>

As discussed *supra*, in dealing with the contradictions of the ICC with Article III, Marquardt relies on Ex Parte Quirin, In Re Yamashita, and Missouri v. Holland to support the notion that Congress has authority to recognize international courts under the Define and Punish Clause.<sup>390</sup> The two war related cases of Ex Parte Quirin and In Re Yamashita dealt with enemy non-citizen aliens, and the treaty case of Missouri v. Holland established that the Constitution could not be violated or superceded by a treaty. Noteworthy, the Court in the In Re Yamashita case does not refer to the Define and Punish clause, but rather relates to the Articles of War passed by Congress.<sup>391</sup> The power to declare war falls under a different clause<sup>392</sup> than the Define and Punish Clause. Finally, Marquardt’s argument is, at best, novel, since the Define and Punish

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<sup>384</sup> U.S. Const. art. II, §2, cl. 2.

<sup>385</sup> U.S. Const. art. I, §8, cl. 10, which states that a power of Congress is “[t]o define and punish piracies and felonies committed on the high seas, and offenses against the laws of nations.”

<sup>386</sup> Marquardt, *supra* note 216, at 131.

<sup>387</sup> *Id.* at 127.

<sup>388</sup> *Id.* at 128 *citing* Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 130.

<sup>391</sup> In Re Yamashita, 327 U.S. at 6.

Clause has never been used to justify the creation of an international tribunal to punish crimes or cited in conjunction with the Article II treaty power.<sup>393</sup>

Contrary to Marquardt's argument, the more persuasive interpretation of the Define and Punish clause is, first, that Congress is empowered to recognize violations of the law of nations, i.e., *jus cogens*; second, Congress may define punishments for such violations by United States citizens to be enforced by the executive and adjudged by the judiciary under the constitutional framework.<sup>394</sup> (Congress is not authorized to pass judgment on a violation of the laws of nation, because that power is reserved to Article III courts.<sup>395</sup>) This interpretation squares with historical definitions of the Define and Punish Clause. The Clause may have been placed in the Constitution to allow the Federal government to have jurisdiction over criminal acts that occur against Ambassadors by common citizens, which is not only a violation of the laws of nations, but also, such acts are within the jurisdiction of State authorities.<sup>396</sup> Thus, the Define and Punish Clause does not appear to be authority permitting the United States to join the ICC.

## **B. Constitutional Protection Concerns**

Besides the institutional concerns discussed *supra*, the Constitution would not allow United States citizens to be tried before an international court that does not guarantee the full

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<sup>392</sup> See U.S. Const. §8, cl. 11.

<sup>393</sup> Benison, *supra* note 236, at 103.

<sup>394</sup> Administrative Office of the U.S. Courts, Report of the Judicial Conf. of the U.S. on the Feasibility of and the Relationship to the Fed. Judiciary of an Int'l Crim. Court, *reprinted in* Senate Comm. on Foreign Relations, International Criminal Court, S. Rep. No. 71, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 182 (1993), which stated this "provision authorizes Congress to legislate on international crimes, and therefore implicitly empowers the U.S. courts created under Article III to adjudicate violations of such laws."

<sup>395</sup> Newman, *supra* note 284, at 556, *citing* Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, ASIL NEWSL (American Soc'y of Int'l Law, Wash., D.C.), Mar-May 1994 at 1, 6-9 which states that although Congress has the power to define and punish offenses against law of nations, the task of defining this role of international law "in the nations fabric has fallen to the courts."

<sup>396</sup> Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 Va. L. Rev. 1281, 1334 (1996).

range of constitutional protections<sup>397</sup> criminal defendants have when they are tried before a United States court.<sup>398</sup> One commentator argues this “criticism that under the ICC United States service personnel will be denied due process protections that they would enjoy under the Constitution is totally misplaced. I can think of no right guaranteed to military personnel by the United States Constitution that is not also guaranteed by the treaty of Rome.”<sup>399</sup> This statement is not correct. Although there are several questionable comparisons between the rights guaranteed under the ICC Statute and that of the Constitution, it is clear a defendant before the ICC will not receive a trial by jury.

As discussed *supra*, since the ICC may be considered an extension of the United States, the level of protection should not change merely because the government agrees to participate in the ICC through ratification of a treaty.<sup>400</sup> Although many commentators argue the ICC does not guarantee several of the rights contained in the Bill of Rights,<sup>401</sup> the most glaring exception is the right to a jury trial.<sup>402</sup> The ICC does not have the option for a defendant to be tried by a jury of

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<sup>397</sup> The ICC takes a leap when discussing procedural rights of individuals before an international organization because “the assumption of the classical law that only states have procedural capacity is still dominant and affects the contents of most treaties...” See Brownlie, *supra* note 260, at 581; See Stenier, *supra* note 334, at 712 stating that “these rights are indispensable to setting limits to governmental action, particularly when they are coupled with judicial review of the constitutionality of legislation.”

<sup>398</sup> Curabba, *supra* note 9, at 12; Administrative Office of the U.S. Courts, Report of the Judicial Conf. of the U.S. on the Feasibility of and the Relationship of the Fed. Judiciary and Int’l Crim. Court, *reprinted in* Senate Report Senate Comm. on Foreign Relations, International Criminal Court, S. Rep. No. 71, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 182 (1993); See Scheffer, *supra* note 137, at 17, which states that due process protection occupied an enormous amount of the United States’ delegations efforts because they were trying to satisfy that the United States Constitution requirements would be met with respect to the rights of defendants before the ICC.

<sup>399</sup> Leigh, *supra* note 241, at 131.

<sup>400</sup> Curabba, *supra* note 9, at 12-13, stating that because ratified treaties and federal statutes have equal force, and both are subordinate to the Constitution, as discussed *supra*, the federal government cannot do through a treaty what it cannot do through federal legislation.

<sup>401</sup> Constitutional protections that are absent from the ICC are: (1) the protection against unreasonable searches and seizures under the Fourth and Fourteenth Amendments, see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 889 (1968); (2) the protection against double jeopardy, see Marquardt, *supra* note 216, at 133.; and (3) that many of the subject matter crimes would be void for vagueness, see Scheffer, *supra* note 137, at 21, Supple, *supra* note 269, at 196, Barrett, *supra* note 216, at 104, Bolton, *supra* note 211, at 189 discussing the crime of aggression as being vague.

<sup>402</sup> Curabba, *supra* note 9, at 13



their peers.<sup>403</sup> Commentators argue the right to trial by jury is not required by the Constitution for military members, however, they are silent when discussing civilians such as the Vice-President.<sup>404</sup>

The argument that the right to a trial by jury is not required for military members is faulty. Article V of the United States Constitution specifically states that the trial of *all* crimes shall be by jury.<sup>405</sup> Commentators who argue that a military member is not entitled to a trial by jury do not cite Article V, but rather point to the Fifth and Sixth Amendments for justification.<sup>406</sup> This argument has several flaws. First, The constitutional language of the Fifth Amendment discusses Grand Jury investigations only and when discussing military forces, Grand Juries are only not necessary when the member is actual service “in time of War or public danger.”<sup>407</sup> In fact, military members who face a general court-martial do receive a pre-trial hearing to determine whether there is probable cause to proceed with trial.<sup>408</sup> Second, if the Sixth Amendment is taken by itself or only in coordination with the Fifth Amendment, it is conceivable that a jury trial is only applicable within the United States<sup>409</sup> – which would exclude the ICC from following this rule because the Court will be based in The Hague, Netherlands. However, Article V clearly requires trial by jury for criminal acts for which the United States has

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<sup>403</sup> ICC Statute, *supra* note 5, art. 39, which provides for trial by judges only.

<sup>404</sup> See Leigh, *supra* note 241, at 130; See Magraw, *supra* note 3, at 7; See Marquardt, *supra* note 216, at 126; See Seguin, *supra* note 193, at 108; See Supple, *supra* note 269, at 185.

<sup>405</sup> U.S. Const. art. V, §2, cl. 3, which states that “the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by law have directed.”

<sup>406</sup> Leigh, *supra* note 241, at 130, which states that “trial by jury is not available to service members under the Fifth Amendment. They are excepted from coverage by the text of the Fifth Amendment. And the same exception is generally assumed to be applicable under the Sixth Amendment.”

<sup>407</sup> U.S. Const. amend. V, which states that “no person shall be held to answer for a capital, or otherwise infamous crimes, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”

<sup>408</sup> See Uniform Code of Military Justice, Article 32.

<sup>409</sup> U.S. Const. amend VI, which states that “[i]n 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...”

jurisdiction even if the act was not committed within the United States.<sup>410</sup> The concept that a defendant is entitled to a trial by a jury when the criminal act was within the jurisdiction of the United States was reiterated in Reid, where the defendant was tried by court-martial without a jury while in England.<sup>411</sup>

The American Bar Association cites Middendorf v. Henry as stating that the Constitution does not support the argument that a jury trial is available to military members,<sup>412</sup> even as crimes against the United States.<sup>413</sup> Middendorf does not stand for that proposition. In that case, ex-Marines, who were discharged pursuant to a summary court-martial, argued that their Sixth Amendment rights were violated because they were not given counsel and did not receive a jury by trial.<sup>414</sup> A summary court-martial cannot be compared to a trial before the ICC.<sup>415</sup> First, summary court-martial can not be used for capital offenses,<sup>416</sup> which under the Uniform Code of Military Justice includes all the offenses within the subject matter of the ICC – i.e. rape,<sup>417</sup> murder,<sup>418</sup> war crimes,<sup>419</sup> etc. For these types of offenses, a jury trial by general court-martial is required.<sup>420</sup>

Second, a summary court-martial is not mandated. A military member could elect not to be judged by a summary court-martial and then either a special or general court-martial would

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<sup>410</sup> See U.S. Const. art. V., §2, cl. 3.

<sup>411</sup> Reid v 354 U.S. at 6-10.

<sup>412</sup> See Benison, *supra* note 236, at 99, where Ex Parte Milligan is attempted to be used by the commentator to show that military members lose their right to a trial by jury upon entering the military. However, the use of that case is disingenuous in the sense that Ex Parte Milligan deals with civilians, not military members. In addition, in times of conflict, certain rights that military members could expect to have as citizens are set aside during the conflict period. See Reaves v. Ainsworth, 219 U.S. 296, 31 S.Ct. 230, 55 L.Ed. 225 (1911); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2574, 41 L.Ed.2d. 439 (1974); Ben-Shalom v. Marsh, 881 F.2d 454 (7<sup>th</sup> Cir. 1989). In addition, Benison agrees that the “civilian-military distinction has eroded in the modern conduct of war.”

<sup>413</sup> Magraw, *supra* note 3, at 7.

<sup>414</sup> Middendorf, 425 U.S. at 30.

<sup>415</sup> One of the biggest distinctions is that summary courts-martial cannot adjudicate cases involving officers. See 10 U.S.C. §820. The ICC Statute specifically targets military commanders. See ICC Statute, *supra* note 5, at Art. 28.

<sup>416</sup> See Uniform Code of Military Justice at Art. 20.

<sup>417</sup> *Id.* at Art. 120.

<sup>418</sup> *Id.* at Art. 118.

automatically be convened with a sitting jury.<sup>421</sup> Article 20 of the Uniform Code of Military Justice specifically provides that “[n]o person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary courts-martial if he objects thereto...”<sup>422</sup> Therefore, as in civilian courts, if a military member wishes to waive a jury trial by having a summary court-martial, that is within their prerogative.

Third, a summary court-martial is procedurally different from a regular criminal trial. “In the first place, it is not an adversary proceeding.”<sup>423</sup> The ICC is adversarial in nature.<sup>424</sup> Since it is an adversary proceeding, a necessary element is met to conclude that the Sixth Amendment right to a jury trial is required.<sup>425</sup> Finally, the Court specifically stated in Middendorf, that they have not had the occasion to determine whether the Sixth Amendment should apply to general and special courts-martial, which are adversarial in nature, because military are guaranteed that right through federal statute.<sup>426</sup> However, Justice Marshall’s dissent in Middendorf is clear indication that if Sixth Amendment rights were in question, “surely those sworn to risk their lives to defend the Constitution should derive some benefit from” the Sixth Amendment.<sup>427</sup>

Using the right to a jury trial as an example, it is evident that, for the United States to be a member of the ICC, the ICC must allow comparable rights found in the Bill of Rights. This is especially true since the ICC will be considered an extension of the United States and its judicial

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<sup>419</sup> See Rules of Courts-Martial, §201(f)(1)(B).

<sup>420</sup> *Id.* at §501.

<sup>421</sup> Middendorf, 425 U.S. at 28.

<sup>422</sup> Uniform Code of Military Justice at Art. 20; See 10 U.S.C. §820.

<sup>423</sup> Middendorf, 425 U.S. at 40.

<sup>424</sup> See ICC Statute, *supra* note 5, art. 67.

<sup>425</sup> See Middendorf, 425 U.S. at 40.

<sup>426</sup> *Id.* at 50 (Powell, J., concurring) *citing* 10 U.S.C. §827; See also Ex Part Quirin, 317 U.S. at 39 where the Court states that “the trial by jury must be reserved in all cases that such a right is recognized.” Since the right is recognized by statute, then trial by jury is mandated.

<sup>427</sup> Middendorf, 425 U.S. at 51 (Marshall, J., dissenting).

authority. Without the procedural due process guarantees, the United States cannot become a member State to the ICC.

## V. Conclusion

The movement towards human rights and the modern concept of international humanitarian law is directly linked to the concept of democracy and constitutionalism.<sup>428</sup> The United States would not be encouraging this movement by forsaking certain principles upon which the United States Constitution is founded. By forcing the ICC into a parallel existence with the United States judicial system, the constitutional framework and separation of powers that has worked extremely well for the United States would be in jeopardy. Constitutional compatibility must be addressed before the United States considers joining the ICC.<sup>429</sup>

At the very least, the constitutional rights – such as a right to a jury trial – that every United States citizen expects should be required of the ICC. The only possibility of the United States joining the ICC treaty is through a constitutional amendment, as France recently did with its Constitution.<sup>430</sup> However, before the United States gives away the constitutional rights of its military and political leaders, it should consider that these people are the same individuals who have pledged to defend the constitutional privileges of their fellow citizens. The ICC “represents such a fundamental change in American constitutional practice that a full national debate and the full participation of Congress are imperative.”<sup>431</sup>

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<sup>428</sup> Steiner, *supra* note 334, at 710.

<sup>429</sup> See Duffy, *supra* note 190, at 38.

<sup>430</sup> On the basis of the advice of its Conseil Constitutionnel (No. 98-408 DC of 22 January 1999, summarized in 2:5 ASIL INTERNATIONAL LAW IN BRIEF 9-10 (May 1999)), France recently amended its Constitution in order to allow it to ratify the ICC Statute.

<sup>431</sup> Kissinger, *supra* note 377, at 279.

If the rest of the world feels the need to band together to form an international court because their own national systems are inadequate – so be it.<sup>432</sup> However, the United States should not break a constitutional system – albeit with some flaws – that balances power and protects the common citizen by rushing blindly into a treaty that will be unconstitutional. The United States currently refuses to ratify the ICC treaty until its concerns – which include constitutional compatibility – are met.<sup>433</sup> This should continue to be the United States policy.

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<sup>432</sup> See Bolton, *supra* note 211, at 203, which states that if “the Signatories of the Rome Statute have created an ICC to their liking, and they should live with it.”

<sup>433</sup> See Curabba, *supra* note 9, at 22.