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## The Case Against the International Criminal Court

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# The Case Against the International Criminal Court

Lee A. Casey

## **Abstract**

This article argues against participation by the United States in the International Criminal Court. The article attempts to show that participation in the ICC regime would be inconsistent with American democracy, inimical to American national interests and would violate the Constitution. Were the United States to become a State party to the Rome Statute, it would, for the first time since July 4, 1776, acknowledge the superior authority of an institution neither elected by the American people, nor accountable to them for its actions. Not surprisingly, ratification of the Rome Statute also would violate the Constitution

# THE CASE AGAINST THE INTERNATIONAL CRIMINAL COURT

*Lee A. Casey\**

"I would know by what power I am called hither. I would know by what authority, I mean lawful. There are many unlawful authorities in the world, thieves and robbers by the highway."

King Charles I, Jan. 20, 1648/49

"Oh, confound all this . . . I'm not a scholar, . . . and frankly I don't know whether the marriage was lawful or not. But damn it, Thomas, look at those names . . . You know those men! Can't you do what I did, and come with me, for fellowship?"

The Duke of Norfolk  
*Act Two, A Man for All Seasons*

## INTRODUCTION

As one of his final acts in office, President Bill Clinton signed the 1998 Rome Statute of the International Criminal Court<sup>1</sup> ("ICC"). He took this action knowing that the Senate would not consent to U.S. ratification of that instrument, and that many Senators—including many from his own party—had expressed grave doubts about the wisdom of involving the United States in this institution. Indeed, during Senate hearings on the ICC in 1998, Senator Joseph Biden (D-DE) noted that "major changes" were necessary, and suggested that the Senate was wasting its time even discussing the matter: "I would hope my Republican friends would focus on about twelve treaties that require urgent attention up or down for us and we not spend a lot more time on something [the Rome Statute] that I predict to

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9\* (1998), *available at* <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

you is not going to come to fruition anyway.”<sup>2</sup> The President himself signed the Rome Statute acknowledging the instrument’s “significant flaws,” and recommending that President George W. Bush not submit the treaty for the Senate’s consideration “until our fundamental concerns are satisfied.”<sup>3</sup>

Although President Clinton’s judgment in signing a treaty he knew the Senate would not approve can be questioned, his conclusion that the Rome Statute is deeply flawed cannot. The United States should not ratify the Rome Statute. Participation in the ICC regime would be inconsistent with American democracy, inimical to American national interests and would violate the Constitution. Indeed, U.S. ratification of this instrument would mark a profound, and unjustified, departure from the central tenet of American government—that the ultimate right to judge the wisdom and legality of the policies pursued, and actions taken, by the officials and officers of the United States rests in the sovereign American people.

Were the United States to become a State party to the Rome Statute, it would, for the first time since July 4, 1776, acknowledge the superior authority of an institution neither elected by the American people, nor accountable to them for its actions. That institution would then be in a position to interpose itself into the policymaking processes of the United States through the threat of criminal prosecutions against American leaders, officials, officers, and soldiers, to and including ordinary American citizens. After ratification of the Rome Statute, no American President could again order the use of military force without first considering whether he, or his subordinates, might later be investigated and prosecuted by individuals with no allegiance to the United States, and very possibly hostile to its interests.

Not surprisingly, ratification of the Rome Statute also would violate the Constitution. Becoming a State party would vest the ICC with jurisdiction over Americans both at home and abroad. If, in the ICC’s unreviewable opinion, offenses within its jurisdiction occurred in the United States, it could prosecute and pun-

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2. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on International Operations of the Comm. on Foreign Relations*, 105th Cong. 21, 2d Sess. (1998) (statement of Sen. Joseph Biden, Member, Senate Comm. on Foreign Relations).

3. Statement on the Rome Treaty on the International Criminal Court on December 31, 2000, 37 WEEKLY COMP. PRES. DOC. 1 (Jan. 8, 2001).

ish Americans who have never strayed from home, and whose actions affected only other American citizens. Such offenses, however, are within the judicial power of the United States, which cannot be exercised by any court or institution not recognized by the Constitution itself, or established by Congress pursuant to authority granted in that document. This was the Supreme Court's ruling in the landmark, post-Civil War case of *Ex parte Milligan*,<sup>4</sup> and this remains the law today.

The limited exceptions the Supreme Court has recognized to this rule—permitting the military trial of “unlawful” combatants during time of war—cannot and do not justify or support U.S. participation in the ICC regime.<sup>5</sup> That court would make no distinction between civilians, lawful combatants, and unlawful combatants, and would offer all a series of limited due process guarantees that do not approximate, let alone vindicate, the requirements of the Bill of Rights. In this regard, and among other things, the ICC would not guarantee the right to a speedy and public trial by jury, the right to confront all hostile witnesses, or protections against “double jeopardy,” as these rights are known in the United States. Thus, even if the ICC could meet the Constitution's structural requirements, including a prosecutor and judges appointed by the President, by and with the advice and consent of the Senate, the United States could not participate in its operations and activities.

Indeed, these procedural issues highlight a flaw in the ICC project not merely from the point of view of the United States, but from the perspective of the international system at large. However good the intentions of the ICC's proponents, that project is grounded in a tragically misguided conceit. It assumes that there are universally recognized and accepted notions of law, justice, and procedural fairness. In fact, there are a number of competing (and often openly hostile) views on each of these points, and this is especially true in the procedural context. Even the most closely related of the world's legal systems, the Common Law and the Civil Law, begin from fundamentally different assumptions about the role of a criminal trial in the pursuit of justice. This is to say nothing of non-Western systems, such as the Sharia. The Rome Statute, like the United Nations'

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4. 71 U.S. 2 (1866).

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

*ad hoc* tribunals, has attempted to create an "international" procedural standard by drawing elements from both the Civil Law and Common Law traditions. The result is a jerry-rigged system, internally inconsistent, that lacks the legitimizing force of the approval and acceptance that these separate systems have earned over centuries.

I. *RATIFICATION OF THE ROME TREATY WOULD BE INCONSISTENT WITH AMERICAN DEMOCRACY*

The ICC will be an unprecedented and, indeed, revolutionary institution. Its power will be different in character and kind from that of other international organizations, such as the United Nations ("U.N.") and the World Trade Organization ("WTO") that the United States has joined. Unlike the U.N. or WTO, the ICC would have the legal authority to act directly upon individual American citizens, rather than merely to interact with the government of the United States as an independent sovereign, affecting individuals, if at all, only through national enforcement mechanisms.<sup>6</sup> In fact, the legal right to investigate, prosecute, and punish individuals is the kind of authority exercised by sovereign States over their citizens and, arguably, it is the most important such power. As Alexis de Tocqueville wrote: "[h]e who punishes the criminal is . . . the real master of society."<sup>7</sup>

The practical effect of vesting this power in an institution that can investigate and prosecute government officials, regardless of their official status, would be to transfer the ultimate authority to judge the policies adopted and implemented by the

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6. As noted by Antonio Cassese:

Since international law regulates the conduct, not of individuals but of States, it is not a self-sufficient system. States have no soul, no capacity to form and express an autonomous will; they are 'abstract' structures acting through individuals. Human beings alone can give flesh and blood to State activity. Consequently, if they are to be translated into reality, thus becoming effective standards of behavior, international rules must be applied by natural persons. Human beings, however, are still subject to national legal systems, which decide of their own accord upon the procedures for choosing or selecting State officials, and establish their field of competence and powers autonomously. International law must bow to municipal authority in this area.

ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 14 (1986).

7. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282-83 (Reeve trans. 1948 ed.), quoted in *Reid v. Covert*, 354 U.S. 1, 10 n.13 (1957).

elected officials of the United States—the core attribute of sovereignty and the *sine qua non* of democratic self-government—away from the American people and to the ICC’s prosecutor and judicial bench. This would violate the first principle of American democracy—that the American people have an inherent right to choose, directly or indirectly, the men and women who will exercise power over them, and to hold those individuals accountable for the exercise of that power. As James Madison noted in *The Federalist*: “The genius of Republican liberty seems to demand on one side not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people . . . .”<sup>8</sup> The ICC would neither derive its power from the people nor would it be dependent upon them.

In fact, the ICC would exercise governmental power without the sanction of popular election, or democratic accountability, of any kind. Its prosecutor and judges would be selected by the ICC’s Assembly of States Parties, a body composed of one representative from each country that has ratified the Rome Statute, and designed to represent the interests of States, not individuals. That body would, in no way, be representative of the people of the United States or their interests. If the United States ratified the Rome Statute, it would have but a single vote in the Assembly—the exact same representation enjoyed by His Serene Highness, the Prince of Liechtenstein, the Grand Duke of Luxembourg, the Republic of San Marino, Andorra, Antigua & Barbuda, and the Pacific atoll of Nauru.<sup>9</sup> Such arrangements, whereby the American people would be subjected to the authority of a super-national institution, in which they had no controlling voice, were rejected even before the Revolution—at that time, in the shape of suggestions that the Thirteen Colonies might elect individuals to “represent” them in the British Parliament.<sup>10</sup> Similarly, when the United States joined the United Nations in 1945, only the creation of an absolute “veto” for it in the Security Council, where all of the U.N.’s “coercive” power was vested, was deemed sufficient to protect American interests.

If anything, the “international community” has become far

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8. THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961).

9. Nauru’s population numbers some 10,000 souls.

10. See generally GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 177 (1969).

more diverse than it was in 1945. It does not, in any form, constitute a unified polity, sharing the same political culture, values, expectations, and sense of justice. Such shared values and aspirations are, however, critical to the legitimacy of any governing institution, especially a judicial one like the ICC. The founders of the American Republic understood the importance of this shared political culture, and incorporated into the Constitution a requirement that each of the several states be guaranteed a "republican form of government."<sup>11</sup> As Madison explained:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a Union may be, the greater interest have the members in the political institutions of each other . . . .<sup>12</sup>

The fact that many Western democracies have ratified the Rome Statute, and have loudly called upon the United States to follow them for the sake of "fellowship," changes nothing. The Rome Statute is open to all States, regardless of their form of government, and a number of profoundly un-democratic countries have already signed on. This includes Algeria, Cambodia, Haiti, Iran, Nigeria, Sudan, Syria, and Yemen. All of these States have been implicated in torture, or extra-judicial killings, or both.<sup>13</sup> Nevertheless, each of these States will have an equal voice in the ICC regime once they have ratified the Rome Statute.

Given these facts, the claims made by ICC supporters that the ICC will embody "American values," or that democratic accountability will be preserved through U.S. representation in Assembly of States Parties, are nothing short of fantastic. The obvious lack of any requirement that the States parties subscribe—and practice—fundamental democratic norms compels the con-

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11. U.S. CONST. art. IV, § 4.

12. THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961). See also THE FEDERALIST NO. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Who can predict what effect a despotism established in Massachusetts would have upon the liberties of New-Hampshire or Rhode-Island, of Connecticut or New York?").

13. See Country Reports on Human Rights Practices for 1999, 106th Cong., 2d Sess. (2000), available at <http://www.usis.usemb.se/human/human1999.html>. Indeed, since the ICC's jurisdiction is prospective only, Saddam Hussein could, in complete safety, sign and ratify the treaty on Iraq's behalf. See Rome Statute, *supra* note 1, art. 11.



clusion that the Assembly could not even claim to “virtually” represent the peoples over whom the ICC would exercise power. For such “virtual” representation to exist, there must be a common “interest” among all those represented. Edmund Burke explained the point with regard to the British Parliament (which, he believed, virtually represented the whole country, and not just the parliamentary electors), as follows:

Parliament was not “a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.”<sup>14</sup>

The ICC Assembly of States Parties would be precisely and exactly that “congress of ambassadors from different and hostile interests” Burke spoke of, and could claim no democratic legitimacy even on a theory of virtual representation.

The “judicial” character of the ICC in no way compensates for the court’s lack of democratic accountability. Although the United States has an “independent” judiciary, in that the courts are co-equal with, rather than subordinated to, the other branches of government, both prosecutors and judges *are* accountable for their substantive acts. On the state level, for example, prosecutors are often directly elected by the local communities they serve, and can be disciplined through normal electoral processes. On the federal level, U.S. attorneys, who oversee federal prosecutions, are appointed by the President by and with the advice and consent of the Senate. Similarly, many states elect judges directly for a specific term of office. Federal judges serve at good behavior, but, like U.S. attorneys, are appointed by the President, with the Senate’s advice and consent. Judicial appointments, and prosecutorial policies, regularly figure as major issues in national political campaigns.

Moreover, any rule of law adopted by a court in the United States, and inconsistent with the views of the electorate, can be changed through democratic processes, including legislation, or, if necessary, constitutional amendment. The results in indi-

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14. See Edmund Burke, Speech to his Bristol Constituents, 1774, *quoted in* Wood, *supra* note 10, at 175.

vidual cases also are subject to review and change, either through legislation, the President's pardon power, or through the elaborate appeals processes available on both the state and federal levels. These appeals are to distinct courts, differing in their jurisdiction, authority, and personnel, sometimes representing different sovereignties (state and federal) when issues of national significance are involved. All appeals in the ICC will be heard by an "appeals division," which will have institutional interests identical to those of the other ICC organs.<sup>15</sup>

There is, in fact, no provision in the Rome Statute permitting review or reversal of the ICC's decisions by an independent body, and it is unclear whether even the unrepresentative Assembly of States Parties would be able to affect the substantive policies pursued by the court in any meaningful sense. Although the ICC's prosecutor and judges could be removed for "serious misconduct," or a "serious breach" of duty, by a majority (two-thirds in the case of a judge) of the States Parties,<sup>16</sup> personal speculation or misconduct is not the issue. Unlike the national judicial system in the United States, and in other modern democracies, the ICC simply will not be part of an integrated governing structure, supported by institutions that enjoy democratic legitimacy, and subject to institutional "checks and balances."

In fact, the only real limitation on the ICC's power will be its own conscience. Ironically, from the viewpoint of many ICC supporters, this is entirely appropriate. For example, the former Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), Canadian Justice Louise Arbour, has argued that "there is more to fear from an impotent than from an overreaching Prosecutor . . . an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes."<sup>17</sup> This, of course, is precisely the assumption upon which American de-

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15. This lack of any real "separation of powers" is one of the most important flaws in the ICC framework. The ICC's partition into judicial bench, prosecutor's office, and registrar, represents merely a bureaucratic division of authority—unlike the separate branches of the United States government, each with different powers, interests, and constituencies. The ICC's judges and prosecutors will have the same institutional interests. Their performance will be assessed by the very same standards. Thus, the fact that prosecutions may only go forward upon the approval of a judge provides little solace.

16. Rome Statute, *supra* note 1, art. 46.

17. See Justice Louise Arbour, Statement to the Preparatory Committee on the Establishment of an International Criminal Court (Dec. 8, 1997).

mocracy is grounded. If there is, in fact, one particular American contribution to the art of statecraft, it is the principle—incorporated into the Constitution's very architecture—that the security of our rights cannot be trusted to the integrity of our leaders. By its nature, power is capable of abuse and people are, by nature, flawed. As Madison wrote in support of strong separation of powers:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*.<sup>18</sup>

The ICC would not be obliged to control itself.

## II. *RATIFICATION OF THE ROME TREATY WOULD BE INCONSISTENT WITH THE NATIONAL SECURITY AND FOREIGN POLICY INTERESTS OF THE UNITED STATES*

Participation in such an uncontrolled, and uncontrollable, institution would not be in the national interests of the United States. Once vested with the power to review and judge American foreign and defense policies, there is no doubt that the ICC will use this authority. Suggestions—often voiced in the period leading up to the Rome Conference in 1998—that the ICC would not target American officials may safely be dismissed as fanciful. Indeed, this pleasant myth was exploded in 1999, by none other than Justice Arbour, who launched a politically inspired investigation of President Clinton, Prime Minister Blair, and other NATO officials, on account of the Alliance's campaign over Kosovo. Largely based upon the civilian casualties resulting from that campaign, China, Russia, and a group of international human rights activists and lawyers—including a number of the ICC's most vocal proponents—demanded action against the NATO leadership, and Prosecutor Arbour accommodated. She opened an investigation, modestly described as a "review," which

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18. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

resulted in a Final Report to the Prosecutor by the Committee Established to Review NATO Bombing Campaign Against the Federal Republic of Yugoslavia (released June 13, 2000). No indictments were brought. However, this was not because the Prosecutor concluded that no offenses had been committed. Rather, she did not go forward because, “[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses.”<sup>19</sup> A court that is less dependent upon the United States and NATO to support its authority is likely to be far less circumspect.

And, the power vested in the ICC would provide plenty of scope for mischief. The offenses listed in the Rome Treaty are all defined broadly, and could be applied on an even wider basis by the court in practice. This is particularly true with respect to the allegation that is most likely to be brought against U.S. forces—causing “disproportionate” civilian casualties and property damage. Under Article 8 of the Rome Treaty, officials may be prosecuted for

[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>20</sup>

This provision, which attempts to embody traditional rules requiring the avoidance of “disproportionate” civilian casualties, can be interpreted to fit virtually any situation in which civilians are killed or injured, or in which property damage results. What is, and is not “clearly excessive,” is very much a matter of opinion, and opinions on this point can be expected to differ. As Justice Arbour’s Report explained, with admirable candor, in discussing “the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the

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19. See Final Report to the Prosecutor by the Committee Established to Review NATO Bombing Campaign Against the Federal Republic of Yugoslavia, U.N. Doc. PR/P.I.S./510-E (2000), para. 90, (released June 13, 2000), available at <http://www.un.org/icty/pressreal/nato061300.htm>.

20. Rome Statute, *supra* note 1, art. 8(2)(b)(iv).

damage to civilian objects," whether such offenses have been committed is based on a very subjective assessment:

[t]he answers to these questions [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision-maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.<sup>21</sup>

Permitting individuals with no stake in the American polity, who owe no allegiance to the United States, and who may, in fact, owe their allegiance to its most determined adversaries, to make such determinations with respect to American officials or forces would be folly. The application of this standard would put the ICC prosecutor and judges in the position of reviewing and judging any American military action which resulted in civilian casualties, and determining for themselves whether it was justified—without consideration of the operation's importance to U.S. national interests, and accountability to the American people. While ratification of the Rome Treaty would make a "multilateral" foreign policy (such as the Kosovo operation) difficult for the United States, it would make a "national interest" driven foreign policy impossible.

### III. U.S. RATIFICATION OF THE ROME TREATY WOULD BE UNCONSTITUTIONAL

#### A. *The Federal Judicial Power Cannot be Subordinated to an Extra-Constitutional Institution, Allowing that Institution to Prosecute American Nationals for Crimes Committed in the United States*

United States ratification of the Rome Statute also would be unconstitutional. Each of the offenses defined in that instrument are otherwise within the judicial power of the United States<sup>22</sup> and, when those offenses are committed on U.S. terri-

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21. Final Report to the Prosecutor by the Committee Established to Review NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *supra* note 19, para. 50.

22. Each of the offenses defined in the Rome Treaty: (1) genocide; (2) crimes

tory, involving only American nationals, that jurisdiction is exclusive.<sup>23</sup> This point has been conceded even by strong ICC proponents, such as former State Department Legal Adviser (under President Gerald R. Ford) Monroe Leigh. Speaking on behalf of the American Bar Association, Mr. Leigh explained territoriality as follows before the House of Representatives Committee on International Relations:

This principle is firmly established in international law and no less firmly established in U.S. constitutional law. In 1812 in the famous Schooner Exchange case, Chief Justice Marshall wrote:

(The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible to no limitation not imposed by itself) (7 Cranch 116, 135).<sup>24</sup>

In 1957 when the NATO Status of Forces Agreement was subjected to a rigorous constitutional reexamination, the Supreme Court unanimously came to the same conclusion. It stated, "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction."<sup>25</sup>

Although Mr. Leigh cited the territoriality principle as a means of showing that, under accepted rules of international and U.S. law, ICC States parties would have authority over U.S.

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against humanity; (3) war crimes; and (4) aggression, are fully within the judicial power of the United States. They all constitute violations "against the laws of nations," and the Constitution grants Congress the authority to "define and punish . . . Offenses against the Law of Nations." See U.S. CONST. art. I, § 8, cl. 9; art. III, § 2 ("The Congress shall have Power . . . To define and punish Piracies and Felonies Committed on the high Seas, and Offenses against the Law of Nations."). Cf. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (civil suit alleging various violations of international humanitarian norms may be brought in court of the United States, so long as defendant is properly served within the court's jurisdiction). Congress has, in fact, specifically exercised this power with respect to "war crimes" and "genocide." See 18 U.S.C. § 2441; 18 U.S.C. §§ 1091-1093. At the same time, the federal judicial power extends "to all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and that power is vested exclusively "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

23. This is true notwithstanding the increasingly exaggerated claims made for "universal" jurisdiction. See *infra* notes 37-39 and accompanying text.

24. See Monroe Leigh, Statement on behalf of the American Bar Association before the Committee on International Relations United States House of Representatives on the subject of The International Criminal Court (July 25, 2000), 92-102.

25. *Girard v. Wilson*, 354 U.S. 524, 529 (1957).

troops overseas *regardless* of whether the U.S. ratifies the Rome Statute, this principle is equally applicable to the constitutional question of whether that institution could exercise jurisdiction over Americans for acts in the United States. Under Supreme Court jurisprudence, the accepted rules of international law, and the Rome Statute itself, the ICC cannot exercise this jurisdiction unless and until the United States becomes a State party, affirmatively vesting that power in the court.<sup>26</sup> At the same time, no part of the judicial authority of the United States can be vested in the ICC. That court is not provided for under the Constitution, and, consequently, could not try Americans for crimes committed on U.S. soil.

This conclusion is compelled by the Supreme Court's ruling in *Ex parte Milligan*.<sup>27</sup> Generally recognized as one of the Court's "landmark" decisions, *Milligan* involved a civilian's challenge to his conviction and condemnation in a military tribunal (a non-Article III court where the Bill of Rights was not applied), at the close of the Civil War. A resident of Indiana, but a Confederate sympathizer, Lamdin P. Milligan, was tried and convicted for seditious activities and, particularly, "for violations of the Laws of War." The Supreme Court granted his *habeas corpus* petition and ordered his release. In doing so, it ruled that "[e]very trial involves the exercise of judicial power," and that the tribunal in question could exercise "no part of the judicial power of the country." That power, it noted, was vested by the Constitution "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."<sup>28</sup>

The rule and reasoning of *Ex parte Milligan* are equally and emphatically applicable to the ICC. Like the military tribunal in *Milligan*, the ICC would not be a court ordained or established by Congress, either under Article III, or under that body's limited ability to created "legislative" courts under Article I.<sup>29</sup> The

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26. Rome Statute, *supra* note 1, art. 4.

27. 71 U.S. 2 (1866).

28. *Id.* at 121 (quoting U.S. Constitution).

29. Under Article I, § 8, cl. 9, Congress has the power to "constitute Tribunals inferior to the Supreme Court," and, under Article I, § 8, cl. 14, "[t]o make rules for the Government and Regulation of the land and naval forces." These grants of authority have supported the creation of a number of "courts," such as the United States Court of Federal Claims and the United States Tax Courts, not subject to the requirements of Article III, as well as the military courts of justice. This authority does not, however, permit United States participation in the ICC. Under the Supreme Court decision in

ICC's judges would not be appointed by the President, by and with the advice and consent of the Senate, as required by the Constitution's "Appointments Clause." Additionally, the judges would not serve for life at good behavior, as required by Article III, § 1. Moreover, the ICC would not preserve the right to trial by jury, as required both by Article III, § 2, cl. 3, and by the Sixth Amendment. Indeed, the ICC would not be bound to comply with the Bill of Rights, especially those guarantees afforded to criminal defendants.<sup>30</sup> For all of these reasons, it could not be authorized or permitted by the U.S. Government, through ratification of the Rome Statute, to conduct criminal prosecutions of offenses taking place within the territory of the United States.

In response to this point, ICC proponents often cite the Supreme Court's decision in *Ex parte Quirin*.<sup>31</sup> Some claim that *Quirin* overruled *Milligan*. The better informed merely assert that *Quirin* limited *Milligan* to its facts. Both are wrong. In *Quirin* the Court ruled that a group of men, recruited in Nazi Germany as saboteurs, could be tried and condemned by military commission. Such commissions are not "Article III" courts, and they are not bound by the Bill of Rights. They are also incapable of lawfully trying civilians—a rule required by *Milligan* and fully accepted by the Court in *Quirin*. In fact, the *Quirin* Court carefully distinguished *Milligan*, explaining that the accused in that case "was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents."<sup>32</sup> The defendants in *Quirin*, however,

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*Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), there are only three types of Article I courts permissible: (1) territorial courts, whose authority is limited to U.S. possessions outside of the territory of the states of the Federal Union; (2) military courts; and (3) courts overseeing "public rights," such as licensing decisions by federal agencies. Article I courts cannot, and do not, exercise criminal jurisdiction within the territory of the several states, as the ICC would were the United States a State Party to the Rome Statute. Moreover, the ICC would not, in any case, be an institution constituted by Congress under its Article I power.

30. The "due process" guarantees it would provide are significantly different, and far less protective of the individual than permitted under the U.S. Constitution. See *infra* Part III.C.

31. 317 U.S. 1 (1942).

32. Claims that *Quirin* limited *Milligan* to its facts are clearly based on language in the opinion stating that, when the *Milligan* Court concluded the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed," this had particular reference to the facts before it. *Ex parte Milligan*, 71 U.S. at 121. That is, civilians, like *Milligan*, cannot be subjected to criminal prosecution in military (or other non-Article



were not civilians, but “[u]nlawful combatants . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>33</sup> Such individuals, ruled the Supreme Court, are neither entitled to trial in the Article III courts, nor to the protections of the Bill of Rights.<sup>34</sup> The ICC, of course, would have jurisdiction over civilians, lawful combatants, and unlawful combatants alike.<sup>35</sup>

The only argument that might be advanced to support an exercise, by non-Article III courts, of criminal jurisdiction over American civilians for crimes within the judicial power of the United States, is one of universality. All of the offenses within the ICC’s jurisdiction have been, at one time or another, claimed to be the subject of “universal jurisdiction.” As such, the argument runs, they are subject to trial and punishment under international law regardless of where they take place, or the nationality of the perpetrators or victims. Consequently, prosecutions and trials of these offenses by the ICC need not be consid-

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III courts) when the regular courts are open and unobstructed. This is a rule that covers upwards of 95% of the population of the United States, including the President, all civilians in the chain of command of the U.S. armed forces, and all private citizens who are civilians.

33. *Ex parte Quirin*, 317 U.S. at 31.

34. The Supreme Court has never considered exactly what procedural rights unlawful combatants must be afforded. Under the traditional laws of war, they could be killed without trial. See EMMERICH DE Vattel, *THE LAW OF NATIONS* 481 (Luke White ed., 1792). However, under the Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 30 (1907), spies can no longer be shot out of hand, and Protocol I Additional to the Geneva Conventions of 1949, provides that unlawful combatants are entitled to certain basic due process guarantees. See Protocol I Additional to the Geneva Conventions of 1949, art. 75(1)(4). The United States has not ratified this treaty, but at least some of its provisions embody norms of customary international law.

35. *Hirota v. MacArthur*, 338 U.S. 197 (1948), also is frequently cited to support the proposition that U.S. participation in the ICC regime would not violate the Constitution. However, it too is inapposite. *Hirota* involved the trial of Japanese officers and officials by the International Military Tribunal for the Far East (“MTFE”). The Supreme Court refused to review the case. It reasoned, in a generous eight sentence opinion, that the MTFE was “not a tribunal of the United States.” Rather, that court was a tribunal established in Japan, by her conquerors: “The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.” *Hirota*, 338 U.S. at 198. Thus, the “judicial authority” exercised by the MTFE was not that of the United States, but of the defeated Japanese State. In fact, the International Military Tribunal convened in Nuremberg to try the Nazi leadership based its authority on the very same reasoning. See *infra* note 41 and accompanying text.

ered an exercise of the judicial power of the United States, but of any of the ICC States parties (who would have jurisdiction themselves under this theory), or of the "international community" at large.<sup>36</sup> This, however, would require the application of a universality principle that is inconsistent with, and superior to, the territorial principle. There is no support in international law for such a rule.

In fact, despite the inflated claims regularly made on behalf of "universal jurisdiction," territorial jurisdiction remains the primary basis of international legal authority, recognized by all States and supported by centuries of consistent practice.<sup>37</sup> "Universality" has a far more checkered pedigree. In theory, it permits any State to proscribe certain conduct damaging to all States. In practice, the only universal offenses that have a long history of general acceptance are piracy and the slave trade, both activities taking place on the high seas, beyond the territorial jurisdiction of any single State. Since the Second World War, claims have also been made that "genocide," "war crimes," and "crimes against humanity" are subject to the universality principle. Even assuming that this is the case,<sup>38</sup> recognizing the authority of States to proscribe certain conduct does not resolve the issue of whether they would, in any particular circumstance, also have the authority to prosecute and punish the offense. As Professor Alfred Rubin has explained:

The analogy between war atrocities and "universal offenses"

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36. See, e.g., Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 105 (1995) ("The international court operates under its own authority and applies its own law; the judicial power it exercises is that of the international community rather than that of any one state."). Power, however, must have some source. Despite the efforts of international activists, and the fondest dreams of many in the professoriate, the "international community" has no authority that is separate and apart from the world's independent nation-States. If there is "international" authority to vest in the ICC, it must be found in the authority reposed in the States making up the international system.

37. See generally IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300 (4th ed. 1990) ("[t]he principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has.").

38. Even supporters of this theory have admitted that there is little actual State practice supporting its application to such offenses in specific cases. See Christopher C. Joyner, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Arresting Impunity—The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROB. 153, 166 (1996).

such as "piracy" or the slave trade does not relate to jurisdiction to enforce or to adjudicate, but only to the applicability of national criminal legislation: the reach of so-called "jurisdiction to prescribe." And, even there, the extension of a national jurisdiction to make criminal acts of some foreigners outside the territory of the prescribing state has been much exaggerated by scholars unfamiliar with the actual cases and equally unaware of the dismal record of failed attempts to codify the supposed international criminal law relating to "piracy" or the international slave trade.<sup>39</sup>

It is, in fact, difficult to find a single instance in which a State exercised "universal" jurisdiction over offenses taking place within the territory of another State, where none of its nationals were involved. Most recently, the effort by a Spanish judge to extradite former Chilean dictator Augusto Pinochet from Britain, does not present such an example. Although the universality principle was invoked, the victims of Pinochet's alleged offenses included a number of Spanish nationals. Similarly, although Israel invoked universal jurisdiction as a basis for the trial and condemnation of Adolph Eichmann, the Israeli Supreme Court was careful to note, in its opinion upholding the Eichmann trial and verdict, that both the "protective" and "passive personality" principles also supported its jurisdiction over the case.<sup>40</sup> The International Military Tribunal ("IMT"), convened at Nuremberg in 1946, certainly would not support such a rule. In fact, that court never claimed to exercise universal jurisdiction of any sort, resting its authority instead on the rights of the defeated German State:

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

*The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as*

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39. Alfred P. Rubin, *Dayton, Bosnia and the Limits of Law*, NAT'L INT., Dec. 22, 1996.

40. See *Israel v. Eichmann*, 36 I.L.R. 1, 304 (1968).

will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.<sup>41</sup>

Whatever the developments in the law of "universal jurisdiction" over the past fifty years, the universality principle has not reached a level of acceptance that would permit its application in clear contravention of the predominant territorial principle.<sup>42</sup>

In any case, the question whether universality could support ICC jurisdiction over offenses committed in the United States is academic. Under the Rome Statute, the ICC would have this power *only* if the United States were to deposit an instrument of ratification. Whether this action can be taken is governed by the Constitution and laws of the United States, which prevail over any inconsistent international law rule.<sup>43</sup> Vesting this power in the ICC would directly contravene the Constitution's requirements, as articulated in *Ex parte Milligan*, and neither the President nor the Senate may take such action.<sup>44</sup>

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41. The Nurnberg Trial, 6 F.R.D. 69, 107 (1946) (emphasis added). The United Nations' *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda also do not present instances of the universality principle in action. As noted above, both of these bodies were established pursuant to the U.N. Security Council's authority under Chapter VII of the U.N. Charter to adopt "measures . . . to maintain or restore international peace and security." U.N. CHARTER art. 39. They remain political, rather than legal, institutions, despite their judicial form.

42. Moreover, although application of the universality principle under the Rome Statute is an interesting question, it is also entirely academic. Under the treaty itself, the ICC cannot exercise authority over U.S. territory unless the United States vests that authority in the court through the deposit of an instrument of ratification.

43. See, e.g., *In re Yamashita*, 327 U.S. 1, 16 (1946) ("[w]e do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution."). The fact that a treaty is involved does not change this analysis or conclusion. As the Supreme Court wrote more than a century ago: "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 . . ." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

44. *Missouri v. Holland*, 252 U.S. 416 (1920) is not to the contrary. In that case, the Supreme Court upheld a treaty with Britain regulating migratory birds against a constitutional attack claiming that the treaty infringed the sovereign rights of the states under the Tenth Amendment. Justice Holmes reasoned that the power to enter such a treaty, even if not specifically provided for among Congress' enumerated powers in the Constitution, could be inferred from the residual authority of the United States under the treaty-making power. He acknowledged, however, that there were some things the Federal Government could not do in a treaty, because such action might violate some other provision of the Constitution, noting that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it

Finally, the fact that offenses within the ICC's jurisdiction are unlikely to occur within the territory of the United States does not change this analysis, or make ratification of the Rome Statute any less unconstitutional. The treaty's constitutionality must be assessed based on the nature and extent of the power that it would vest in the ICC, not on the likelihood of any particular exercise of that power. However unthinkable, "violations of the laws and customs of war," "genocide," and "crimes against humanity" may occur anywhere. Each of the Rome Statute's definitions of these offenses are subject to interpretation and application by the court itself. The "unthinkable" happens, even in America.

*B. If the United States Were to Join the ICC Treaty Regime, ICC Prosecutions of Americans for Crimes Allegedly Committed Overseas Also Would be Unconstitutional*

In addition to the constitutional impediments to ratification of the Rome Statute outlined above, the United States also cannot become an ICC State Party because this would require it to cooperate with the court in the apprehension *and* prosecution of civilians whose acts may have taken place overseas without the full and undiluted guarantees of the Bill of Rights. In this regard, if the United States were to become a "State Party" under the Rome Treaty, it would be more than a neutral bystander with respect to the ICC's actions. In addition to vesting a portion of its own judicial power in the court, it would undertake obligations to "cooperate fully with the Court in its investigation and prosecution of crimes," including—among many other things—the arrest and extradition of individuals wanted by the ICC, the "execution of searches and seizures," and the "provision of records and documents, including official records and docu-

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is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Holland*, 252 U.S. at 433-34.

The guarantees provided to criminal defendants in the Bill of Rights are far more precise, and in mandatory language. This point is made clear in Mr. Justice Black's plurality decision in *Reid v. Covert*, 354 U.S. 1 (1957), a case in which the Supreme Court ruled that an American civilian could not be subject to trial in a military court overseas, even though an international agreement between Britain and the United States appeared to allow such a trial. On that occasion, Black wrote that "[a]t the beginning we reject the idea that when the United States acts against its citizens overseas, it can do so free of the Bill of Rights." *Reid*, 354 U.S. at 5-6.

ments.”<sup>45</sup> Moreover, as explained above, the United States would be a member of the Assembly of States Parties, the body responsible for selecting the ICC’s judges and prosecutor, overseeing the administrative operation of the court, setting its budget, and adopting the court’s rules of procedure and evidence.<sup>46</sup> This level of involvement with the court would be sufficient to trigger the requirements of the Bill of Rights—guarantees that the ICC simply does not provide.<sup>47</sup>

This analysis and result was suggested by the Supreme Court in *United States v. Balsys*.<sup>48</sup> This case involved the investigation of an individual, Balsys, accused of committing war crimes in Lithuania. Balsys argued that he could not constitutionally be required to submit to interrogation, by the United States Department of Justice, asserting the Fifth Amendment right against self-incrimination. The Supreme Court rejected this argument, noting that the Fifth Amendment did not apply to Balsys’ case because he would be prosecuted, if at all, in a non-U.S. court. However, the Court recognized that the situation might be very different if his prosecution was undertaken in a non-U.S. court in concert with the United States. In this respect, the Court explained that:

If the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution *simply because that prosecution was not fairly characterized as distinctly “foreign.” The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation . . .*<sup>49</sup>

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45. Rome Statute, *supra* note 1, arts. 86, 91, 93.

46. *Id.* arts. 51, 112.

47. Claims by ICC proponents that the Rome Statute provides guarantees “equivalent” to those found in the Bill of Rights are incorrect. See *infra* Part III.C. In addition, even if the rights provided to the accused in accordance with the Rome Statute were comparable to those required under the Constitution, it would be irrelevant to the ICC’s legality. The Constitution makes no provision for “equivalent” guarantees. Where it applies, only the full and undiluted requirements of Article III and the Bill of Rights suffice.

48. 524 U.S. 666 (1998).

49. *Id.* at 698 (emphasis added).

This would, of course, be exactly the case with the ICC. If the United States became an ICC State Party, the prosecutions 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 State Party. Since the guarantees of the Bill of Rights would not be available under the ICC, the United States could not participate in, or facilitate, any such court.

Critics of this analysis are quick to point out that the language quoted above, from Justice Souter’s opinion in *Balsys*, was dicta; and so it was. However, ICC supporters have yet to produce authority of even equal weight suggesting that the United States may, through the device of a treaty or other international agreement, shed its responsibilities under the Bill of Rights in these circumstances. The Constitution obviously does not hold the U.S. Government responsible for the actions of other nation-states, or of international institutions. The United States, however, is limited in its authority and actions by the Constitution, and constitutional imperatives cannot be avoided by laundering otherwise unconstitutional actions through an international institution.

The implications of the opposite conclusion, so eagerly embraced by ICC supporters, should give pause even to those Americans intoxicated by the prospects of a truly “international” justice. If the federal government could slip its constitutional collar by simply associating one or more other countries in a particular project, then there is no constitutional invocation, prohibition, or mandate that cannot be avoided. This is particularly the case with the trial and punishment of criminal offenses. If the United States can join the ICC regime, then it also could create any number of “international” courts, by agreement with one or more non-U.S. States, for the trial of other offenses within the judicial power of the United States. The entire federal court system could, in principle, be transferred “off-shore,” avoiding the guarantees of the Bill of Rights, and permitting summary trials and punishments.

For example, the Bush Administration’s decision to establish, under the authority of *Quirin*, military commissions to try *al Qaeda* operatives and others involved in terrorist attacks against the United States has been severely criticized because the courts do not provide the guarantees of the Bill of Rights. Their reach,

however, is highly limited. Under *Quirin's* teaching, military commissions may only try unlawful combatants during time of war. If the United States is free to join the ICC, it would also be free to enter an international agreement with other States establishing a new international court to try, without the protections of the Bill of Rights, all offenses the agreement defines as "terrorism." That definition could be as expansive as the parties chose, including any word or deed considered critical of the Government or in opposition to its policies. The First Amendment, under this interpretation of the Constitution, would be no bar. ICC supporters should consider whether they really wish that this was the law.

### C. *Bill of Rights—Lite*

In considering that question, it is important to note that neither international criminal courts in general, nor the ICC in particular, provide protections to the accused equivalent to those guaranteed by the Bill of Rights. First, and foremost, the Rome Statute makes no provision for trial by jury. This, however, is among the most important rights guaranteed by the Constitution. It is the only "due process" right that was incorporated into the Constitution's original six articles (Article III, § 2), and again restated in the first ten articles of the amendment.<sup>50</sup> This was no drafting error. For the Constitution's Framers, the right to trial by jury was both a means of determining facts in a judicial proceeding and a fundamental and necessary check on the use and abuse of governmental power. As Justice Joseph Story explained: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people."<sup>51</sup> It is "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power."<sup>52</sup>

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50. U.S. CONST. art. III, § 2 ("[t]he trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."); U.S. CONST. amend. VI ("[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.").

51. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 656-58 (1833) (1987).

52. *Id.*



Moreover, the Constitution guarantees more than just a jury trial. It also requires that trials be held in "in the State where the said Crimes shall have been committed."<sup>53</sup> This requirement was in direct response to events before the War for Independence, when Americans faced the real possibility of transportation overseas for trial without a jury. In this regard, the British Government had claimed the right to prosecute Americans in British courts overseas, and instituted a practice of arraigning Americans before "vice-admiralty" courts for criminal violations of the navigation and trade laws. These courts were not English Common Law courts. Like the ICC, they followed the Civil Law "inquisitorial," system, where guilt or innocence was determined by judges alone and rights of confrontation and counsel were highly restricted.<sup>54</sup> In addition, Parliament also had claimed the right to transport Americans to England on treason charges—a claim denied by the colonial legislatures.<sup>55</sup> These practices were considered serious abuses by the founding generation, and were included in the catalog of outrages, justifying separation from Britain, set forth in the Declaration of Independence. That document accused King and Parliament of:

- "subjecting us to a jurisdiction foreign to our constitution and unacknowledged by our laws;"
- "depriving us, in many Cases, of the Benefits of Trial by Jury;" and of
- "transporting us beyond the Seas to be tried for pretended Offences."<sup>56</sup>

When the Constitution was adopted, the Framers guarded against the recurrence of such practices by requiring that trials be conducted in the state and district where the crime was committed. As Justice Story explained,

The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus subjected

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53. U.S. CONST. art. III, § 2, cl. 3. Similarly, the Sixth Amendment provides 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." U.S. CONST. amend. VI.

54. See generally THOMAS C. BARROW, *TRADE AND EMPIRE: THE BRITISH CUSTOMS SERVICE IN COLONIAL AMERICA 1660-1775*, at 256 (1967); DON COOK, *THE LONG FUSE: HOW ENGLAND LOST THE AMERICAN COLONIES 1760-1785*, at 59 (1995).

55. See *United States v. Cabrales*, 524 U.S. 1, 4 & n.1 (1998).

56. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him.<sup>57</sup>

If the United States were to join the ICC Treaty, Americans again would face transportation beyond the seas for judgment, without the benefits of trial by jury, in a court that would not guarantee the other rights we all take so much for granted—and where the judges may well “cherish animosities, or prejudices against” them.

Trial by jury is not, of course, the only right enjoyed by Americans that would not be guaranteed in the ICC. For example, Americans brought before that court would not enjoy the right to a speedy and public trial, or to confront and cross-examine witnesses, in any form recognizable in the United States. Although the Rome Statute provides that “the accused shall be entitled to a public hearing,” without “undue delay,” and to “examine, or have examined, the witnesses against him,” the interpretation and application of these protections on the international level fall far short of constitutionally mandated practice in the United States. Under the Sixth Amendment, for instance, the accused’s right to confront “the witnesses against him” includes the right to know the identity of hostile witnesses, and to exclude “hearsay” evidence that does not fall within a recognized exception to the general rule. On the international level, however, this is not the case. In the ICTY, a court widely viewed as the ICC’s model, both anonymous witnesses have been permitted, as has virtually unlimited hearsay evidence.<sup>58</sup>

Similarly, the ICC would not preserve the right to a speedy trial. In the United States, a defendant has a right to be brought to trial within seventy days from the filing date of the indictment.<sup>59</sup> There would be no such limit in the ICC. Again, international practice here falls far short of American requirements. For example, the Yugoslav Tribunal Prosecutor actually has argued that up to five years would not be too long to wait in prison

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57. STORY, *supra* note 51, at 658.

58. See generally MICHAEL P. SCHARF, BALKAN JUSTICE 7, 67, 108-09 (1997). In the 1996 trial of Dusko Tadic before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), hearsay evidence was permitted, and several witnesses were allowed to give evidence on an anonymous basis. *Id.* at 108-09.

59. 18 U.S.C.S. § 3161(c)(1) (2001).

for a trial.<sup>60</sup> More disturbing still, there is case law in the European Court of Human Rights arguably supporting such a rule.<sup>61</sup> In addition, the Rome Statute would permit the ICC prosecutor to appeal any verdict of acquittal. Such appeals have been forbidden in Anglo-American law since the 17th century, and would violate the protections against "double jeopardy" contained in the Fifth Amendment. Whatever the protections provided in the Rome Statute, they are not the "equivalent" of the constitutional guarantees provided in the United States.

#### D. *The Extradition Cases*

Although the ICC would not preserve the guarantees of the Bill of Rights, another argument often advanced in support of U.S. ratification of the Rome Statute is that the Constitution does not prevent the extradition of Americans to face trial in non-U.S. courts that also do not afford those rights. In fact, the Supreme Court has ruled that American citizens can be extradited for trial overseas in court systems that do not meet minimum U.S. constitutional standards.<sup>62</sup> These cases, however, involve instances where Americans have committed crimes abroad, or where their actions in the United States are intended to achieve a criminal effect in another country.<sup>63</sup> As the *Neely* Court reasoned:

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 for by treaty stipulations between that country and the United States.<sup>64</sup>

By contrast, as noted above, the Rome Statute would not merely require the United States to surrender citizens charged with of-

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60. See *The Prosecutor v. Aleksouski*, Prosecution Response to the Defence Motion for Provisional Release, ICTY Case No. IT-95-14/1-PT, Jan. 14, 1998, ¶ 3.2.5.

61. The Case of *W. v. Switzerland*, 254 Eur. Ct. H.R. (ser. A) (1993) (holding four years of pretrial detention accepted); "Neumeister" Case, 8 Eur. Ct. H.R. (ser. A) (1968) (holding three year pre-trial detention acceptable, and up to seven years not too long to try a criminal case).

62. See, e.g., *Neely v. Henkel*, 180 U.S. 109 (1901).

63. See *Melia v. United States*, 667 F.2d 300 (2d Cir. 1981) (holding that an individual, whose actions took place in the United States, was subject to extradition where acts were intended to produce criminal effect in another country).

64. *Neely*, 180 U.S. at 123.

fenses committed abroad. Were the United States to ratify that treaty, it would be required to surrender to the ICC American nationals charged with offenses committed in the United States, involving only other American citizens. There is no precedent permitting such a practice.

E. “Complementarity”: *The Last Redoubt*

Failing all else, ICC proponents often claim that the principle of “complementarity” would protect Americans from prosecution and trial by the ICC, and so also would resolve the constitutional impediments to U.S. accession to the ICC Treaty. This too is incorrect. Whatever solace “complementarity” may provide to other States parties, it can give no comfort, either practically or constitutionally, to the United States.

The principle of “complementarity” is stated in Article 1 of the Rome Statute, which provides that the ICC’s jurisdiction is to be “complementary to national criminal jurisdictions.”<sup>65</sup> Accordingly, under Article 17 of the Statute, the ICC must determine that a particular case is “inadmissible” where (1) “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it;” or (2) “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.”<sup>66</sup> However, these limitations do not apply where a State “is unwilling or unable genuinely to carry out the investigation or prosecution,” or where a decision not to prosecute “resulted from the unwillingness or inability of the State genuinely to prosecute.”<sup>67</sup> In “order to determine unwillingness in a particular case,” the ICC will consider whether the national proceedings “were not or are not being conducted independently or impartially and [whether] they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”<sup>68</sup> This is a test the United States can never meet.

Under the Constitution, decisions on whether to prosecute both military and civilian personnel are a matter solely for the

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65. Rome Statute, *supra* note 1, art. 1.

66. *Id.* art. 17(1).

67. *Id.*

68. *Id.* art. 17(2).

Executive Branch, and ultimately for the President.<sup>69</sup> At the same time, the military and civilian individuals most likely to be accused of offenses within the ICC's authority also are Executive Branch personnel, directly accountable to the President as Chief Executive and Commander-in-Chief of the Armed Forces. In such cases, the President is, in fact, always himself a potential defendant under a "command responsibility" theory. Therefore, it could be argued that the United States' decision not to pursue a case involving such an individual can never be "independent" or "impartial." Upon this pretext, the ICC would be in a position to examine each and every use of American military power to determine whether, in its view, offenses within its authority have been committed. Thus, if the United States were to join the ICC Treaty regime, the principle of "complementarity" would be no bar to the arraignment of Americans before the ICC.

#### IV. *WHOSE JUSTICE?*

In addition to the aspects of the ICC that militate against U.S. participation, including the court's lack of American-style democratic accountability, and the constitutional impediments to U.S. ratification, there are fundamental problems with the ICC project that should concern the entire "international community." Although there is support, both in customary international and treaty law, for the criminal punishment of the four offenses subject to the ICC's jurisdiction, there is little practice or precedent that supports the prosecution of individuals before international institutions. Both the International Military Tribunal ("IMT") and Military Tribunal for the Far East ("MTFE") were created by the victorious allies after World War II based on their authority as the conquerors of Nazi Germany and Imperial Japan, rather than as representations of the international community.<sup>70</sup> Similarly, the *ad hoc* tribunals created during the 1990s by the U.N. Security Council were not based on any judicial power inherent in the "international community," but as measures "to maintain or restore international peace and secur-

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69. See *Morrison v. Olsen*, 487 U.S. 654, 691 (1988) ("There is no real dispute that the [investigative and prosecutorial] functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

70. The Nurnberg Trial, 6 F.R.D. 69, 107 (1946).

ity," under Chapter VII of the U.N. Charter.<sup>71</sup> That body possesses no legal or judicial authority with which to vest a court (the International Court of Justice being the "judicial organ" of the United Nations). Consequently, and despite elaborate judicial trappings, including the *ancien regime* scarlet and ermine worn by the judges (mere lawyers are clothed in the modest black of the Third Estate), these institutions exercise political—rather than judicial—authority.<sup>72</sup> Appropriately, those institutions were strictly limited to the application of "existing international humanitarian law."<sup>73</sup> Whether States, acting as States, have the authority to create independent judicial bodies with the power to prosecute and punish individuals remains an open question, with little international custom to support such action.

This lack of international precedent is, however, hardly surprising. Notions of justice and fairness, which must support any judicial system, vary dramatically from society to society, and there is no internationally recognized standard. Even the world's most closely related legal systems, the Common Law and the Civil Law, take dramatically different approaches to "due process," and particularly the conduct of criminal trials. In Common Law countries, trials are conducted in accordance with the "accusatorial" or "adversarial" system. The judge acts as a neutral arbiter, ruling on points of law, but taking no active part in the investigation of the matter, or in the presentation of the case for or against the accused. That case unfolds during a public trial, in which the prosecution acts as a zealous advocate against the accused, and defense counsel advocates equally strongly on the accused behalf. (As a result, the Common Law lawyer tends to behave far more aggressively in both the presentation of the case, and cross-examination of witnesses, than the Civilian.) For any serious offense, like those covered under the Rome Statute, the accused is entitled to trial by a jury, which ultimately determines whether he is convicted or acquitted.

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71. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 808 (1993)*, U.N. Doc. S/25704 (1993), ¶¶ 22-30, at 7-8 [hereinafter Secretary General's Report].

72. Although the ICTY itself has concluded that the Security Council had this authority in *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 18-22 (Oct. 2, 1995), the Tribunal's legality has not been tested in an independent forum.

73. Secretary General's Report, *supra* note 71, at ¶ 29, at 8.

Among other things, the accused has the right to confront, and cross-examine, all of the witnesses (and other evidence) against him in open court, and the "rules of evidence" are crafted to vindicate this right. If the jury's verdict results in an acquittal, it cannot be challenged or appealed. Juries can, and do, exercise the ultimate power of the sovereign, by permitting individuals who may be guilty in fact, to go free.

By contrast, the Civil Law criminal trial is conducted through an "inquisitorial" process. The judiciary is a full participant in the investigation of the case against the accused. Before the trial begins, an "examining" or "investigative" judge reviews the material compiled by the prosecutor, and conducts his own additional inquiries. This "examining" phase takes place in secret, and is mostly conducted in writing. The accused is entitled to counsel, who may both advise the accused during this stage, and bring matters to the judge's attention on the accused's behalf. The accused may be questioned by the judge, and any refusal to answer may be taken into account in determining his guilt or innocence—a practice clearly forbidden in the United States by the Fifth Amendment right against self-incrimination. By the time the "trial" phase begins, the "record" is already completed, and includes all of the evidence considered relevant by the investigating judge. During the trial the prosecution and defense counsel argue their interpretation of the record to the trial judge (a different individual than the investigating judge) and, often, to "lay assessors." Verdicts of acquittal are often subject to appeal, and this feature has been carried over into the Rome Statute.<sup>74</sup>

Although each of these systems works well enough in its own context, and on its own terms, they do not mix well together. For example, in the United States' legal system "hearsay" evidence—statements, related in court, but made by an individual who is not present, and who cannot be cross-examined—is generally excluded from criminal trials. Hearsay is excluded, in

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74. See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 124-32 (2d ed. 1969). Obviously, this is a highly generalized description of Civil Law procedure. These procedures differ, sometimes substantially, from country to country. (Germany, for instance, has evidently eliminated the "examining phase"). *Id.* at 129. In France, only certain acquittals are subject to appeal. See CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 218-19 (1996).

part, because it may be unreliable. However, hearsay is often entirely accurate and highly probative. It is nevertheless excluded because the accused will have no opportunity to confront and test, through vigorous cross-examination, the veracity of the individual actually making the statement. In the ICTY, hearsay evidence is admitted virtually without limitation, on the theory that the Tribunal's professional judges will, unlike a lay jury, be able to adequately assess and discount the evidence. Neither the critical importance of vindicating the accused's right to confront the witnesses against him, nor the basic human fallibility even of professional judges is acknowledged. Other aspects of this attempt to mix Civil Law and Common Law assumptions and practices, such as the role of precedent and *stare decisis*, continue to bedevil ICTY proceedings.

The problem here is not merely one of "growing pains." The Civil Law and Common Law systems, in fact, represent the different approaches to law, justice, and government that have divided Anglo-American from Continental societies since the Middle Ages, and especially in the United States since Independence. The fundamental premise underlying the Civil Law system is that justice is most likely to be achieved through the good offices of highly professional, well intentioned individuals guided by the application of reason. The fundamental premise underlying the Common Law system is that justice is most likely to be done if each party is vigorously represented, and that the system itself must be structured to operate regardless of the good will or intentions of the individuals involved.

This very basic difference in approach explains many of the disagreements between the United States and other States at the 1998 Rome Conference, and is most obvious in the debate over the power and independence of the ICC prosecutor. The United States sought institutional checks on the prosecutor's power, which it was unable to achieve. Representatives of many European States, however, were far more interested in creating a powerful prosecutor, taking for granted that the job would be filled by a responsible, professional individual, who could be trusted not to abuse his or her authority.

In any case, the tension between these two systems is likely to cause individual injustices, and it will certainly be perceived as such. Ironically, in the ICTY's case, the unfairness is not that Civil Law aspects have been incorporated into the system, but



that so many Common Law elements are involved. *All* of the defendants before the ICTY have come from Civil Law jurisdictions. This, however, will not be the case with the ICC, particularly if the United States were to become a State Party to the Rome Statute. The fundamental difference between criminal procedure in the United States, and that adopted in the Rome Statute, including such elements as *in camera* trial proceedings, the limited nature of the right of confrontation, the lack of a jury, and the prosecutor's right to appeal acquittals, suggest that no American could receive a fair trial, as that term is understood and accepted in the United States, before the ICC. The same can be said for many of the other countries, whether Civil Law or Common Law, that already have signed and ratified the treaty.

*"IT IS NOT MY APPREHENSION, NOR YOURS NEITHER,  
THAT OUGHT TO DECIDE IT"*

ICC proponents, and particularly the drafters of the Rome Statute, would doubtless respond that agreement has, in fact, been reached on a proper standard of justice and procedural fairness. The Rome Statute was, after all, signed by an overwhelming number of States. But that, of course, is the point. It was signed by States, yet it will have power over individuals. Those individuals must recognize and accept its authority if the court is to be legitimate. Like all courts of law, the ICC must be prepared to answer the question first put by Britain's King Charles I, at the opening of his trial in January 1649: "I would know by what power I am called hither . . . I would know by what authority—I mean lawful—there are many unlawful authorities in the world—thieves and robbers by the highways . . ."<sup>75</sup> The parliamentarians arraigning the King before their "High Court of Justice," had no answer. The court's president, John Bradshaw, did no more than assert that "[w]e are satisfied with our authority . . ."<sup>76</sup> To which the King responded, "[b]ut that you have said satisfies no reasonable man."<sup>77</sup> "That's in your apprehension," said Bradshaw, "[w]e think it reasonable that are your judges."<sup>78</sup> The king then had the last word, "[t]is not my appre-

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75. DAVID LAGOMARSINO & CHARLES T. WOOD, *THE TRIAL OF CHARLES I: A DOCUMENTARY HISTORY* 64 (1989).

76. *Id.* at 66.

77. *Id.*

78. *Id.*

hension—nor yours either—that ought to decide it.”<sup>79</sup> Hopelessly bested, Bradshaw’s only response was to order Charles removed from the court.

This scene was replayed recently, at the ICTY, when Slobodan Milosevic was brought to the bar. Like King Charles, he challenged the court’s legitimacy and, like John Bradshaw 350 years before, the presiding judge had no better answer than to silence the prisoner—by turning off his microphone in this instance. A permanent ICC will have to do better.

Legitimacy must be based on acceptance, and this cannot be decreed by States, even by those with elected governments. The ICTY, again, is a case in point. All of the States subject to that court’s jurisdiction, including Croatia, the Federal Republic of Yugoslavia, and Bosnia and Herzegovina, have accepted the authority of the Security Council to create the ICTY, and the court’s authority to investigate and prosecute their citizens. Yet, the citizens of those States remain deeply divided over the ICTY’s legality and the appropriateness of its operations. Many Serbs, in both Yugoslavia and Bosnia, remain convinced that the court has unfairly singled out Serb leaders, including Milosevic, for prosecution when other groups were equally as guilty, if not more so. Similarly, it is an article of faith in many parts of Croatia that the ICTY has unfairly targeted Croats for prosecution, thus punishing the victims rather than the aggressors. There is little doubt that, as the prosecutor begins to consider and bring indictments against Bosnian Muslim leaders, similar sentiments will be expressed in that community.

Even if the public expression of such views can be suppressed, the beliefs they represent cannot be. The judgments of a court that is not genuinely accepted as *legitimate* by the people over whom it exercises authority will never be considered anything but arbitrary acts of power. The proponents of the ICC in general, and the drafters of the Rome Statute in particular, have yet to adequately address this issue of fundamental legitimacy. They have failed to articulate, in a satisfactory way, the legitimate source of power whereby an institution, based upon an international agreement, drafted by the representatives of States, may prosecute and punish individual human beings. To date, their response has been no better than John Bradshaw’s response to

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79. *Id.*

his King: “we are satisfied with our authority.”<sup>80</sup> As King Charles responded, “[t]his is not my apprehension—nor yours either—that ought to decide it.”<sup>81</sup>

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80. *Id.*

81. *Id.* at 64.