Florida State University Journal of Transnational Law & Policy

Volume 17 | Issue 1 Article 2

2007

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Cover Page Footnote

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UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT: TOWARD THE FEDERALISM OF FREE NATIONS

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The political winds are changing, and a more liberal United States government may very well be receptive to ratification of the Rome Statute of the International Criminal Court (Rome Statute). The nature and scope of international law are also changing. Indi-

viduals are sharing responsibility with states for grave breaches of international law, and globalization has resulted in a marked increase in international tribunals deciding disputes affecting individual interests. Despite these trends, Americans have been wary of the International Criminal Court (ICC). The roots of this fear run deep. One can see shadows of this distrust at the 1787-1788 Constitutional Convention, where "fiercely independent states were being enjoined to surrender part of their precious sovereignty to an as yet inchoate united entity and were doing so at best grudgingly."[1] Out of that gathering, the U.S. Constitution was born and federalism principles set in place that slowly evolved and soothed these fears. These same principles can and should be implemented to govern relations between the ICC and domestic courts, for there is much to be gained from an international criminal court with the power to deter and punish those who commit the most severe crimes. In addition, a positive interaction between the ICC and the United States will contribute to what philosopher Emmanuel Kant named "the federalism of free nations," which is a "decentralized system of cooperative relations among nations that, where possible, advances goals of democracy and respect for individual rights."[2]

This article provides a brief introduction to the background and workings of the ICC in Part I. Part II engages the primary U.S. objections to the ICC. Part III considers whether acceding to the Rome Statute is constitutional by comparing surrender to extradition. Part IV argues that federalism principles, specifically the Legal Process approach and institutional settlement, can be used to interpret the ICC in a less threatening way, and introduces the idea that these principles can be used to build a healthy framework of cooperation between the United States and the ICC. In doing so, this Part proposes rules and policies that the ICC should implement to encourage U.S. participation and strengthen institutional settlement. Finally, Part V identifies areas that will need to be included in legislation to implement the Rome Statute in U.S. law.

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1. Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 85, 88 (Sarah B. Sewall & Carl Kaysen eds., 2000).

2. *See* Jenny S. Martinez, *Towards An International Judicial System*, 56 STAN. L. REV. 429, 461 (2003) (discussing Kantian philosophy in relation to international law).

I. BACKGROUND: THE UNITED STATES AND THE ICC

The United States has long believed in the concept of an international criminal court to provide a forum for trying those accused of committing the most abhorred crimes. The idea of an international criminal court was first conceived after World War I, but did not materialize.[3] The concept resurfaced after World War II and resulted in the International Military Tribunal in Nuremberg. Although an ad hoc instead of permanent tribunal, Nuremburg proved hugely important in the journey to the ICC, for the tribunal ushered in the concept of individual responsibility for the most serious crimes.[4] World War II was followed by decades of the Cold War, which paralyzed international agreement on an international criminal court.[5] In 1989, Trinidad and Tobago, concerned about international drug activity, initiated a push for a permanent court.[6] Other nations, again including the United States, began to have a renewed interest in a permanent tribunal to punish international crimes. The U.N. General Assembly mandated that the International Law Commission (ILC) prepare a draft convention establishing the court.[7] While this process was taking place, conflicts involving major humanitarian crises broke out in the Balkans and Rwanda,[8] so two ad hoc criminal tribunals were created by the U.N. Security Council to prosecute atrocities in different areas of the world. They were the International Tribunal for the Former Yugoslavia (ICTY)[9] and the International Criminal Tribu-

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3. Joanna Harrington, et al., *Introduction, in* BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 3, 3-4 (Joanna Harrington et al. eds., 2006). A post-war compromise resulted in German war criminals being tried in Germany. *Id.*

4. International law had long recognized war crimes, but had held states responsible for breaches. *See* ANTONIO CASSESE, INTERNATIONAL LAW 435-36 (2d ed. 2005). An International Military Tribunal was established in Tokyo in the aftermath of World War II as well, but it is not given as much historical weight as Nuremberg because it is widely believed that the some of the defendants were not treated fairly. Leila N. Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 31, 34 (Sarah B. Sewall & Carl Kaysen eds., 2000).

5. Anne-Marie Slaughter, *Memorandum to the President, in* TOWARD AN INTERNATIONAL CRIMINAL COURT? 1, 7 (Alton Frye ed., 1999).

6. Harrington, *supra* note 3, at 5.

7. *Id.*

8. *See* S.C. Res. 827, U.N. SCOR, 48th Year, 1993 S.C. Res. & Dec. at 29, U.N. Doc. S/INF/49 (1993) (establishing The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991).

9. *See* 1994 S.C. Res. 955, U.N. SCOR, 49th Year, 1994 S. C. Res. & Dec. at 15, U.N. Doc. S/INF/50 (1994) (establishing The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda).

nal for Rwanda (ICTR), for which the U.S. provided much support.[10] These tribunals, though they experienced difficulties, rekindled interest in a permanent court.[11] The United States remained supportive of efforts to form an international criminal court, and envisioned referrals for prosecution to come from the U.N. Security Council as they had under the ICTY and ICTR.[12] This system would effectively insulate the U.S. from prosecution because of its veto power in the Council. The United States took early leadership in the Rome Conference establishing the ICC, and was successful in its push to incorporate rights-protecting provisions into the Rome Statute.[13] The United States became disenchanted with the process when it became clear that they would be unsuccessful in the push for complete U.N. Security Council control over prosecutions.[14] The United States was also bothered by the broad scope of the war crimes provisions and the future inclusion of the crime of aggression. Ultimately, the United States voted against the Rome Statute, as did China, Iraq, Israel, Libya, Qatar and Yemen.[15] President Clinton, although displeased with the final draft, signed the treaty on the last day it was open for signature, but it was never ratified, and President Bush withdrew the signature in 2002.[16]

Despite the lack of U.S. support for the ICC, the treaty was adopted on July 17, 1998, and entered into force on July 1, 2002.[17] As of November 2, 2007, the treaty has 105 parties.[18] The Rome Statute provides a forum for prosecuting individuals accused of the most egregious international law crimes, namely genocide, crimes against humanity and war crimes.[19] The crime of aggression is also

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10. *See* Slaughter, *supra* note 5, at 6. The U.S. provided money, attorneys, investigators and staff. *Id.*

11. The most severe difficulties included financing the tribunals and recruiting qualified personnel, as well as corruption in the ICTR. *See* Sadat, *supra* note 4, at 38.

12. In 1997, a presidential address to the U.N. actually called for the court's creation. Slaughter, *supra* note 5, at 7.

13. *See id.* at 7.

14. *Id.*

15. *Id.*

16. The primary objections of the United States to the ICC are discussed in Part II, *infra*. They can be summarized as follows: uncertainty over the definition of the crime of aggression; the possible future inclusion of crimes against international drug trafficking and terrorism; the referral system; the independence of the Prosecutor; the fact that an opt out period for war crimes jurisdiction applies only to states parties; the unique position of the United States as "world policeman," which puts U.S. officials and military leaders in a risky position with the ICC; and due process concerns.

17. PHILIPP MEISSNER, THE INTERNATIONAL CRIMINAL COURT CONTROVERSY: A SCRUTINY OF THE UNITED STATES' MAJOR OBJECTIONS AGAINST THE ROME STATUTE 11 (2005).

18. International Criminal Court, *The States Parties to the Rome Statute*, http://www.icc-cpi.int/statesparties.html (last visited Nov. 2, 2007).

19. International Criminal Court, *About the Court*, http://www.icc-cpi.int/about.html

included in the subject matter jurisdiction of the court, but is left undefined by the statute. The Assembly of States Parties must reach a definition of aggression by supermajority agreement before the ICC may exercise jurisdiction over this crime.[20] Investigations and prosecutions may be initiated by the U.N. Security Council, a state party or the court's Prosecutor (with authorization from two of three pre-trial chamber judges).[21] The ICC is built around a system of complementarity, which means that the court is a court of last resort.[22] It will not prosecute a case unless a domestic judicial system with jurisdiction is unwilling or unable to effectively prosecute the case.[23]

Although the concerns of the United States are valid, and will be discussed in depth later in this paper, there is much to be gained from U.S. support of the ICC. The interaction of the ICC and the United States can serve multiple functions, such as promoting an institutional framework for cooperation, promoting compliance with international law and reinforcing rights-respecting democracy at the local level.[24] The ICC promotes the values of justice, due process and the rule of law, all of which are values of central importance to Americans.[25] In addition, the ICC with its extensive scheme of rights protections may prove to be a safer place for American service members who have fallen into enemy hands to be tried than the foreign country where they are being held if that country refuses extradition to the United States.[26] In deciding to ratify the Rome Statute, the United States must accept that these advantages outweigh U.S. concerns, and should look for ways to minimize the conflict between the two systems.

(last visited Nov. 2, 2007). See Rome Statute of the International Criminal Court, arts. 6-8, July 17, 1998, 2187 U.N.T.S. 90, [hereinafter Rome Statute]. for definitions of each of these crimes.

20. *See* MEISSNER, *supra* note, 17 at 24. It is unlikely that the court will be able to prosecute the crime of aggression in the near future. *Id.*

21. *See id.* at 25-26.

22. *See About the Court, supra* note 19.

23. *Id. See* Part IV.B.2., *infra* for further discussion of complementarity. As of June 7, 2007, there were four situations where the Prosecutor had opened investigations: those of the Democratic Republic of Congo, Uganda, the Central African Republic, and Darfur in the Sudan. *See* International Criminal Court, *Situations and Cases,* http://www.icc-cpi.int/cases.html (last visited Nov. 2, 2007). The U.N. Security Council referred the Darfur situation to the ICC, while Uganda, Congo and the Central African Republic referred their own cases. *Id.*

24. *See* Martinez, *supra* note 2, at 516.

25. David J. Scheffer, *The U.S. Perspective on the ICC, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 115, 115-16 (Sarah B. Sewall & Carl Kaysen eds., 2000).

26. Robinson O. Everett, *American Servicemembers and the ICC, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 137, 141 (Sarah B. Sewall & Carl Kaysen eds., 2000).

This is where tools from the U.S. federal system are invaluable.

II. PRINCIPLE UNITED STATES OBJECTIONS TO THE INTERNATIONAL CRIMINAL COURT

The United States has articulated many concerns about the ICC. The objections fall into several categories, some having merit and some being purely political. Those having merit can roughly be divided into constitutional objections and infringement-of-sovereignty objections. These grievances should be divided in this way because, as this paper will show in Parts III and IV, the majority of the constitutional concerns are largely pretextual, while the objections relating to the court's capacity to trump national sovereignty are really what is driving the United States' opposition to the ICC.

A. Constitutional Concerns

1. Constitutional Due Process Concerns in General

One of the most proclaimed criticisms of the ICC is that the Rome Statute "does not adequately embody the type of due process rights that American nationals would be entitled to receive under U.S. law and the U.S. Constitution."[27] Under the Rome Statute, the possibility exists for a U.S. citizen to be tried by the ICC for a crime that is an offense in the United States without the "full and undiluted guarantees of the Bill of Rights."[28] Despite the fact that there are procedural protections for accused criminals in the Rome Statute, the ICC's detractors point out that the protections in the Bill of Rights and the Rome Statute do not mirror each other.[29]

2. No Right to Trial by Jury

In the opinion of the United States, the ICC's largest incompatibility with the Constitution is its failure to provide a trial by jury, using a three judge panel instead.[30] This objection cannot be dismissed lightly, because the right to trial by jury "is among the

27. Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1605 (2003).

28. Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 858 (2002).

29. *See* Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. § 2(5) (1999).

30. *See* Cuéllar, *supra* note 27, at 1610.

most important rights guaranteed by the Constitution."[31] In fact, it is the only due process right that was incorporated into the original six articles of the United States Constitution.[32] Its importance in the American criminal justice system goes far beyond an information gathering mechanism; indeed, it is believed to be a "fundamental and necessary check on the use and abuse of governmental power."[33]

3. Other Due Process Concerns

There are several other due process protections that are missing or inadequate in the Rome Statute. In addition to having the right to trial by jury, the U.S. Constitution mandates that a defendant have a speedy, public trial.[34] This trial must be held in the state where the crime was committed.[35] Although the Rome Statute provides for the accused to be entitled to a public hearing without inexcusable delay,[36] there is no firm definition of what constitutes inexcusable delay.[37] The ICTY, which served as a model for the ICC, has given some indication that five years in custody awaiting trial might not be undue delay.[38] In contrast, the United States law makes plain what is unacceptable delay. In the U.S., the defendant has the right to be brought to trial within seventy days of indictment.[39]

Further, the Rome Statute, while providing a watered down version of the exclusionary rule, does not protect accused persons against unreasonable searches and seizures.[40] Also of concern is the fact that the Rome Statute lacks a provision giving accused persons the right to confront and cross-examine witnesses, the

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31. Casey, *supra* note 28, at 861.

32. *See id.* (citing U.S. CONST. art. III, § 2).

33. Casey, *supra* note 28, at 861. Casey claims that a trial by jury's nature is so fundamental that it should be respected by an international court. *Id.* at 862. However, "few would suggest that the nations of Western Europe following the civil law tradition are fundamentally unjust." Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 147 (1995).

34. *See* U.S. CONST. amend. VI.

35. *See id.* at art. III, § 2, cl. 3.

36. Rome Statute, *supra* note 19, at art. 60(4).

37. *See* Casey, *supra* note 28, at 863 (citing Rome Statute, *supra* note 19).

38. *See id.* at 863-864 (citing The Prosecutor v. Aleksovski, Prosecution Response to the Defense Motion for Provisional Release, ICTY Case No. IT-95-14/1-PT, Jan. 14, 1998, p 3.2.5). This position has been echoed by the European Court of Human Rights, which has approved provisional custody stays of three and four years awaiting trial. *See* Casey, *supra* note 28, at 864.

39. *Id.* at 863 (citing 18 U.S.C.S. § 3161 (c)(1) (2001)).

40. *See* Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States and the International Criminal Court*, 29 B.C. INT'L & COMP. L. REV. 1, 8 (2006) (citing Rome Statute, *supra* note 19, at art. 69 (7)).

right to know the identity of hostile witnesses and the right to exclude hearsay evidence.[41] Finally, convicted persons under the ICC are not protected against double jeopardy--a Fifth Amendment protection--since the Prosecutor can appeal an acquittal verdict.[42]

B. Sovereignty Concerns

1. The ICC May Restrict Military Action That Is in the National Security Interest of the United States or Its International Peacekeeping Missions

The central sovereignty argument of the United States is that no entity other than its own government should influence how or when it will undertake its interests or defend itself.[43] The United States is the biggest peacekeeper in the world, safeguarding its national security and defending its allies and friends.[44] There is no other state that consistently deploys hundreds of thousands of soldiers around the world.[45] Indeed, "America is expected to intervene in humanitarian crises."[46] This places the United States in a uniquely precarious position with respect to the ICC. Marcella David conducted a study in which she examined how recent American peacekeeping missions would have been impacted had the Rome Statute been in force at the time they were conducted.[47] She studied American interventions in Iraq, Bosnia and Sudan and noted that the United States could have been exposed to charges of war crimes and/or crimes of aggression in all three situations.[48] This problem is exacerbated by the treaty framework

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41. *See* Casey, *supra* note 28, at 863. These are all areas that the ICTY was weak on due process protections. *See* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 7, 67, 108-09 (1997).

42. Casey, *supra* note 28, at 864.

43. Edlin, *supra* note 40, at 15. According to U.S. Senator Rod Grams, "the United States will not cede its sovereignty to an institution which claims to have the power to override the U.S. legal system and pass judgment on our foreign policy actions." *Id.* at 7.

44. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18-19 (1999).

45. *See* William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 126 (2001).

46. *See* John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 96 (2000) (citing David J. Scheffer, *Status of Negotiations on the Establishment of an International Criminal Court*, p.1, (July 15, 1998) *available at* http://www.state.gov/www/policy_remarks/1998/980715_scheffer_icc.html).

47. *See* Edlin, *supra* note 40, at 15 (citing Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 374-84 (1999)).

48. David, *supra* note 47, at 374-84 (stating that the Iraq intervention would be the most legitimate area of complaint, the Bosnia situation of weaker concern, and the Sudan action might have led to unsubstantiated political claims).

which enables internal conflicts—often the type of conflict with the worst humanitarian crises—to escape the jurisdiction of the court, while subjecting peacekeepers to the court's jurisdiction.[49] Therefore,

> it might be argued that the Rome Treaty combines the worst of both worlds. Reaching the most egregious violations of fundamental human rights—those occurring in internal armed conflicts—still requires Security Council involvement . . . but it does not require Security Council involvement to put even non-party peacekeepers at risk . . . whereby U.S. armed forces operating overseas could conceivably be prosecuted by the ICC even if the United States has not agreed to be bound by the treaty.[50]

The arguments of the United States center on military actions, specifically war crimes and the crime of aggression.[51] The crime of aggression is especially problematic in the eyes of the United States since it is a politically controversial crime.[52] It is a crime that remains undefined despite vigorous attempts to come to a definition at the Rome Conference.[53] Over the robust protests of the U.S. delegation, the crime was added to the Statute as a prospective crime despite its undefined status.[54] The United States fears that use of the crime of aggression as a prosecutorial tool "could be without limit and call into question any use of military force or even economic sanctions" and could call into question the credibility of the court.[55]

Complementarity as it is now understood is inadequate to ease U.S. fears over this issue.[56] The recent trials of U.S. soldiers accused of torturing Iraqi prisoners illustrates this problem.[57] While

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49. *See* Lietzau, *supra* note 45, at 129 (stating that "[m]ost atrocities—and certainly such is the case in recent years—are committed internally").

50. *Id.* at 129-30.

51. *See* Gerhard Hafner, *An Attempt to Explain the Position of the USA Towards the ICC*, 3 J. INT'L CRIM. JUST. 323, 327 (2005) (stating that the United States does not feel that there is any danger of allegations of genocide or crimes against humanity).

52. *See* Leitzau, *supra* note 45, at 122. This is in contrast to war crimes and crimes against humanity, which have elements that are well established under international law and are substantially the same under customary international law. *Id.* at 124.

53. *See* Scheffer, *supra* note 44, at 21.

54. *Id.* The crime is prospective, meaning that it will only be prosecuted after it is defined. The U.S. position is that the U.N. Security Council should determine that a crime of aggression has occurred before the ICC could prosecute. *See id.*

55. *Id.*

56. *See* Hafner, *supra* note 51, at 327.

57. *See id.*

the U.S. military tried the individuals accused of perpetrating the abuses, this would not have shielded high ranking military personnel from prosecution under the ICC:

> [I]t is not only the individual soldier who would be likely to become the subject of investigations by the ICC. It is rather the person higher in the chain of command, and ultimately the highest state actors who would be affected. It is unlikely that the United States would take judicial action on the national level against such persons.[58]

This raises symbolic sovereignty issues. Americans cannot accept the possibility of the "spectacle of an American President or high-ranking military or political official standing trial before a non-American tribunal."[59]

2. The ICC May Undermine the U.N. Security Council

The Charter of the United Nations assigns primary responsibility for maintenance of international peace and security to the U.N. Security Council.[60] Because the ICC also deals in matters that affect international peace and security, and the U.N. Charter's obligations were designed to prevail over other international agreements,[61] the United States believes that the ICC displaces the role of the Security Council.[62] According to this position, the role of the Security Council may be usurped by withholding from individual

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58. *Id.* (stating that this threat will only increase as more states sign on to the Rome Statute).

59. Edlin, *supra* note 40, at 18 (stating that this situation would have "symbolic and practical effects on American position, prestige, and power [which would be] intolerable to the sensibilities of many Americans").

60. *See id.* at 7 (citing U.N. Charter arts. 24(1) & 39 which provide that "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf," and "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.")

61. *See* Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 386 (2002) (citing U.N. Charter art. 103 which provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"). This presumably includes the ICC.

62. *Id.* at 386-87. Note, however, that the other Nuremburg members of the Security Council—Britain, France and Russia—have accepted the ICC. *See* Edlin, *supra* note 40, at 6.

permanent members of the Security Council the right to veto a prosecution by the ICC.[63] This may have been the intention of some states parties to the Rome Statute.[64] The danger as seen through the lens of the United States is that this undermining of the role of the Security Council has the potential to "transform fundamental international relations" in a way that is detrimental to international peace and security.[65]

3. The Referral System and the Robust Office of the Prosecutor

The United States hoped for a referral system by which the Security Council refers cases to the ICC, however the U.S. delegation was not successful on this point.[66] The Prosecutor, with the approval of a three judge pretrial panel, can initiate an investigation.[67] According to the United States, the office of the ICC Prosecutor should not have this power because the office is lacking nec-

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63. *See* Edlin, *supra* note 40, at 7.

64. *See* Lietzau, *supra* note 45, at 134 (stating that the great deal of authority vested in ICC judges was a direct attempt to undermine the role of the Security Council, due in part to disdain for the Security Council by some states).

65. *Id.* at 135.

66. Rome Statute, *supra* note 19, at art 15.

67. *Id.* (stating that:

> 1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
>
> 2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
>
> 3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
>
> 4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
>
> 5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
>
> 6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.)

essary checks and balances.[68] For example, the office answers to no executive authority.[69]

The reason for making the Prosecutor so independent was to avoid a politicized court.[70] However, the U.S. position is that the independent Prosecutor makes the court more politicized. The U.S. fears that the Prosecutor can manipulate the court to achieve political agendas.[71] This political manipulation is possible because the office has great power over the agenda of the court.[72] The United States fears that there is the potential for "nondemocratic governments [to] control the personnel and activities of the ICC."[73] A related fear is that U.S. military personnel will not be able to act without fearing political agendas.[74]

4. The Inadequacy of the Appeals Process and the Possibility of Double Jeopardy

The Rome Statute provides an appeals process.[75] The United States has two major issues with the way the appeals process works. First, the appeal is to an appeals division of the court, which has "institutional interests identical to those of the other ICC organs."[76] No review by an independent body is available.[77] In addition, the Rome Statute permits appeals of acquittals.[78] This

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68. *See* Casey, *supra* note 28, at n.15 (stating that the judicial bench, Prosecutor's office and registrar are "merely a bureaucratic division of authority").

69. *See* Lietzau, *supra* note 45, at 137.

70. *See* Matthew A. Barrett, Comment, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83, 95 (1999). Some states participating at the Rome Conference believed an independent Prosecutor essential to the court. *See* Alexander A.K. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 591-592 (2007).

71. *See* David M. Baranoff, Comment, *Unbalance of Powers: The International Criminal Court's Potential to Upset the Founders' Checks and Balances*, 4 U. PA. J. CONST. L. 800, 802 (2002). The U.S. fears this especially in the context of the crime of aggression. *See* Amann & Sellers, *supra* note 61, at 389.

72. *See* Greenawalt, *supra* note 70, at 585-86.

73. Amann & Sellers, *supra* note 61, at 388 (explaining that "[e]ach state party to the ICC is to have one vote in the Assembly of State Parties, the body empowered to chose and remove the prosecutor and judges" (citing Rome Statute, *supra* note 19, at art. 112)). This is problematic because the states voting for the Prosecutor and judges do not always adhere to the rule of law. *Id.* at 388. This is especially troubling to the United States in light of an "emerging multi-polar, post-Cold War negotiating dynamic." Lietzau, *supra* note 45, at 120.

74. *See* Edlin, *supra* note 40, at 16 (citing Lietzau, *supra* note 45, at 125-126).

75. Rome Statute, *supra* note 19, at art. 81(1)(b) (providing that the convicted person may make an appeal based on procedural error, error in fact, error of law or "[a]ny other ground that affects the fairness or reliability of the proceedings or decision").

76. Casey, *supra* note 28, at 847.

77. *Id.*

78. Rome Statute, *supra* note 19, at art. 81(1)(a) (providing that the Prosecutor may make an appeal based on procedural error, error of fact or error of law).

raises serious double jeopardy concerns for the United States [79]

III. THRESHOLD CONSTITUTIONAL ISSUES: QUESTIONS OF "ULTIMATE POWER"[80]

Because the United States cannot enter into treaties that violate the Constitution,[81] it is necessary as a threshold matter to consider whether jurisdiction in criminal cases can be delegated from the U.S. government to the ICC.[82] These constitutional issues can be understood by comparing surrender under the ICC to the current extradition regime in place in the United States, then examining whether Article III of the Constitution allows Congress to delegate criminal jurisdiction to the ICC.

A. Comparing Surrender and Extradition: An Argument for the Constitutionality of the ICC

1. Surrender Under the Rome Statute of the International Criminal Court

a) Background and Procedure

Article 89 of the Rome Statute requires the surrender of suspects to the jurisdiction of the court.[83] The Rome Statute uses the term "surrender" as opposed to "extradition," stating that suspects are "surrendered" to the jurisdiction of the ICC and "extradited" to the jurisdiction of another state.[84] The drafters of the Rome Stat-

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79. *See* Casey, *supra* note 28, at 864. The Fifth Amendment of the U.S. Constitution protects criminal defendants against double jeopardy. U.S. Constit. amend. IV cl. 2. The prohibition against double jeopardy is firmly established in Anglo-American law, having been in place since the seventeenth century. *See* Casey, *supra* note 28, at 864.

80. Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1161 (2005).

81. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137 (1972).

82. *See* Young, *supra* note 28, at 1161.

83. Rome Statute, *supra* note 19, at art. 89(1).

> 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 of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

Id.

84. Roy S. Lee, *States' Responses: Issues and Solutions, in* STATES' RESPONSES TO ISSUES ARISING FORM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 1, 18-19 (Roy S. Lee ed., 2005). The purpose of distinguishing surrender from extradition was to "express the special relationship between the ICC and states parties," and to try to avoid constitutional problems with extradition in various

ute were purposeful in making this distinction so that states party to the statute whose understanding of extradition excluded extradition of its own nationals would not have a loophole through which to escape the surrender requirements of the ICC.[85] The Rome Statute leaves states parties discretion in designing surrender legislation, yet mandates that states adopt a straightforward procedure.[86] The surrender request must be accompanied by evidence that will give the judicial officer of the sending state cause to believe the person in question committed the crime.[87] The Rome Statute calls for a determination of whether the person before the court is the person named in the warrant, whether the person has been arrested in accordance with the proper process, and that the person arrested had his or her rights protected.[88] The Statute calls on a domestic court to immediately consult with the ICC if there are any problems meeting the requirements of surrender.[89] Like the relaxed standards for extraditing suspects in conjunction with the ICTY and ICTR, prejudices are "presumed to be absent in this

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states. *Id.* at 19.

85. *See* Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 21 (2001). For a discussion of extradition of nationals and the U.S. stance on this issue, *see infra* Part III. A.3.

86. *See* Lee, *supra* note 44, at 37. *See also*, Rome Statute, *supra* note 19, at art. 91(2)(c) (providing that "those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court").

87. Rome Statute, *supra* note 19, at art. 91(2) & (3) provides the following procedural instructions:

> § 2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:
> (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
> (b) A copy of the warrant of arrest; and
> (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.
> §3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:
> (a) A copy of any warrant of arrest for that person;
> (b) A copy of the judgement of conviction;
> (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
> (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

88. *Id.* at art. 59(2).

89. *Id.* at art. 97.

type of international tribunal."[90] Finally, the Rome Statute requires that a "State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9."[91] A state must cooperate fully with a request for surrender, since there are no exceptions to a state's obligation to cooperate with the ICC in the arrest and surrender of the accused.[92]

b) Post-Surrender Protections

Once the defendant is surrendered to the ICC, he or she is entitled to a broad scheme of protections much like those criminal defendants in the United States can expect to receive. In fact, the U.S. delegation to the drafting of the Rome Statute was instrumental in the inclusion of many of these provisions giving those accused before the ICC due process-like protections. The American negotiators at Rome worked diligently to have the Rome Statute incorporate U.S. constitutional protections into the Statute.[93] The result is a system that closely mirrors the U.S. Bill of Rights.[94] In fact, one past State Department and Defense Department legal adviser, in addressing Congress, invited them "to not regard it . . . with suspicion, (but) rather with pride . . . since . . . it cannot be denied that the Treaty of Rome contains the most comprehensive list of due process requirements which has so far been promulgated."[95] For example, ICC defendants have the following enumerated rights:

> [T]he presumption of innocence (Art. 66); assistance of counsel (Arts. 67(1)(b), (d)); the right to remain silent (Art. 67(1)(g)); the privilege against self-

90. Kenneth J. Harris & Robert Kushen, *Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations With the U.S. Constitution*, 7 CRIM. L.F. 561, 594. This same presumption against prejudice is inherent in the U.S. federal system.

91. Rome Statute, *supra* note 36, at art. 59(1).

92. *See* Duffy, *supra* note 45, at 20.

93. *See* Ruth Wedgwood, *The Constitution and the ICC, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 119, 123 (Sarah B. Sewall & Carl Kaysen eds., 2000).

94. *See* MEISSNER, *supra* note 17, at 70-71 for an excellent chart that shows how ICC protections compare to U.S. constitutional protections. The only major departure is the absence of the right to a jury trial.

95. *Id.* at 71, *quoting* Monroe Leigh, U.S. Government Printing Office 2000b*, p.96 (prepared statement of Monroe Leigh). Elsewhere, Leigh claims that in some ways the ICC protections are broader than the Bill of Rights. Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 1, 124, 131 (2001).

> incrimination (Art. 67(1)(g)); the right to a written statement of charges (Art. 61(3)); the right to examine adverse witnesses (Art. 67(1)(e)); the right to have compulsory process to obtain witnesses (Art. 67(1)(e)); the prohibition of *ex post facto* crimes (Art. 22); protection against double jeopardy (Art. 20); freedom from warrantless arrest and search (Arts. 57 *bis* (3), 58); the right to be present at the trial (Art. 63); speedy and public trials (Art. 67(1)(a), (c)); the exclusion of illegally obtained evidence (Art. 69(7)); and the prohibition of trials *in absentia* (Arts. 63, 67(1)(d)).[96]

Precisely because of the similarities to the U.S. Bill of Rights, it might be advantageous for U.S. citizens to be tried by the ICC as opposed to a foreign state that would likely have inferior protections.[97]

2. United States Extradition Law

a) Background

(1) History

The U.S. Supreme Court has defined extradition as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."[98] The offense must be one that is criminal in both jurisdictions.[99] The United States has a long history of extradition. The first extradition treaty that the United States entered into was the Jay Treaty with Great Britain conducted in 1794.[100] Then, in a famous speech to the House of Representatives, Congressman John Marshall (who later became

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96. Leigh, *The United States and the Statute of Rome*, *supra* note 95, at 131. *But see* Part II.A.1., *supra* for a discussion of how ICC protections, while similar, might not be as comprehensive as U.S. constitutional protections. For example, the ICC protects against double jeopardy but some scholars feel that the ICC's rule that judgments of acquittal may be appealed is inconsistent with the U.S. notion of the prohibition against double jeopardy.

97. *See* MEISSNER, *supra* note 17, at 73.

98. Terlinden v. Ames, 184 U.S. 270, 289 (1902).

99. *See* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1998). This is the dual criminality requirement—one of the few barriers to international extradition. *See* Part III.A.3., *infra*.

100. Benjamin N. Bedrick, Comment, *United States Extradition Process: Changes in Law to Address Constitutional Infirmity*, 15 DICK. J. INT'L L. 385, 387 (1997).

Chief Justice of the Supreme Court) announced that the authority to extradite under a treaty is vested in the executive branch as part of its power to carry out foreign affairs.[101] Since that time, the United States Supreme Court has echoed Marshall's view.[102] This particular area of U.S. law has been surprisingly static with no major changes since 1848.[103]

(2) Procedure

Extradition is a "highly formalized diplomatic process."[104] Under 18 U.S.C. § 3184, foreign states requesting extradition of a person in the United States must first issue a formal extradition request to the State Department.[105] The request is accompanied by documentation, such as an explanation of foreign criminal statutes allegedly violated, a certificate of conviction (if available), or an arrest warrant and evidence that the person in question probably committed the crime.[106] The State Department then screens the request to ensure that it fits within the parameters of applicable federal and treaty law.[107] If the Secretary of State determines that extradition is appropriate under the relevant laws, the Justice Department forwards the request to a U.S. Attorney who files a com-

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101. *See* Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1206 (1991) (citing 10 ANNALS OF CONG., 6th Cong., 1st Sess. 596-618 (Mar. 7, 1800), *reprinted in* U.S. v. Furlong, 18 U.S. (5 Wheat.) 184, 198-202 (1800)). *See also*, Kathleen F. Elliott, *No Due Process Right to a Speedy Extradition*, 18 SUFFOLK TRANSNAT'L L. REV. 347, 350 (1995) (stating that the power to extradite derives from the President's authority to "conduct foreign affairs and make treaties").

102. *See* Semmelman, *supra* note 101 (explaining that "in the absence of voluntary delegation by the executive, judicial involvement in the extradition process, and the resulting encroachment on executive authority, must be premised upon treaty, statute, or the Constitution").

103. *See* Bedrick, *supra* note 100, at 390. In 1848, the first federal extradition statute was enacted which:

> provided for an extradition magistrate to examine the evidence against a person sought by a foreign government. The extradition magistrate, if he found the evidence to be sufficient, was required to certify that determination to the Secretary of State. Upon certification, the Secretary of State was given authority to make a final determination whether to extradite.

Id. (citing Act of Aug. 12, 1848, ch. 167, 9 Stat. 302). Bedrick notes that "[t]he extradition law enacted in 1848 has been changed since then only in minor respects, for example, to substitute 'magistrate' for the original 'commissioner.' None of the changes have altered the basic statutory scheme." *Id.*

104. Devin C. McNulty, *The Changing Face of Extraditions Between Mexico and the United States*, CHAMPION, Apr. 2007, at 34.

105. *See* Matthew Murchison, *Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry*, 43 STAN. J. INT'L L. 295, 297 (2007).

106. Bedrick, *supra* note 100, at 391.

107. Murchison, *supra* note 105, at 298.

plaint in the proper judicial district.[108] The magistrate makes a cursory review of the matter to determine whether an arrest warrant is appropriate.[109] After the arrest warrant is issued and the defendant is arrested, he or she faces a hearing to determine whether he or she should be extradited.[110] The hearing considers the following:

> whether there is Probable cause to believe that there has been a violation of one or more criminal laws of the [requesting] country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation . . ."[111]

In addition, the defendant may raise any affirmative defenses that might be available under the applicable treaty.[112] Upon finding sufficient evidence to extradite, the magistrate certifies the case to the Secretary of State.[113] The Secretary of State then makes the final determination of whether to extradite the defendant.[114] In making this determination, the Secretary has broad powers of discretion.[115]

(3) U.S. Acceptance of Extradition

The United States strongly supports extradition, both to and from the United States,[116] and extradition numbers are on the rise.[117] While the United States could choose to follow the path of a

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108. *Id.* The case is filed in the district in which the defendant is located. *See* Semmelman, *supra* note 101, at 1202.

109. Murchison, *supra* note 105, at 298. Circuits are split over scope of the government's probable cause obligation in granting a provisional arrest warrant. *See* Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 787 (1998).

110. Murchison, *supra* note 105, at 298.

111. Bedrick, *supra* note 100, at 391 (quoting Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976)).

112. *See* Semmelman, *supra* note 101, at 1202. The most frequently raised affirmative defense is that the crime charged is a political offense. *Id.*

113. Bedrick, *supra* note 100, at 392. The magistrate sends a transcript of the case and a copy of all evidence to the Secretary of State along with the certification. *Id.*

114. *Id.*

115. *Id.*

116. *See* Kester, *supra* note 99, at 1442 (stating that the United States has extradition treaties with approximately one hundred states). *Id.*

117. *Id.* at 1443. This is due to a world economy that is increasingly interdependent, a world population that finds it easier and faster to travel internationally, and an increasing

number of states that enter into extradition treaties but exclude their own nationals, it continues to decide not to do so.[118] Between ten and twenty percent of all persons extradited from the United States are U.S. nationals.[119] In addition to having no major qualms about extraditing its nationals, the United States also seems to have few reservations about the states with which it enters into extradition treaties.[120] In fact, the United States has treaties with most states, including those with questionable human rights records.[121]

b) How Extradition Falls Short of Usual Constitutional Protections

(1) Lack of Constitutional Protection in the Process of Extradition

In many ways, extradition is without many constitutional protections one usually associates with the U.S. criminal justice system. This is because an extradition hearing is really more like a preliminary hearing than a trial on the merits.[122] Like a preliminary hearing, the guilt or innocence of a person is not determined.[123] Preliminary hearings and extradition hearings share a low standard of proof—probable cause.[124] A magistrate deciding an extradition hearing must find "probable cause to believe that a crime had been committed and that the petitioner committed it."[125]

Because an extradition hearing is not considered a criminal prosecution, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence do not apply.[126] As a result, hearsay evi-

willingness of prosecutors worldwide to prosecute complex economic crimes. *Id.*

118. *See id.* at 1474 (citing Belgium as an example). *Id.* at n.190. Kester points out that some extradition treaties do not exclude the possibility of extraditing their nationals, but specify that they are under no duty to do so. *Id.* at 1475.

119. *Id.* However, extradition of U.S. nationals can only occur where authorized by treaty or statute. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936). All U.S. extradition treaties provide for this. *See* Kester, *supra* note 99, at 1474.

120. *See* Paul Coltoff, *Extradition and Detainers*, CJS §41 (2007).

121. *See* Kester, *supra* note 99, at n.223 (naming in particular Yugoslavia, Albania, South Africa, Romania, Bulgaria, Congo, Ghana, Iraq, Paraguay, Poland, Zambia and Haiti).

122. *See* Robert Iraola, *Foreign Extradition, Provision Arrest Warrants, and Probable Cause*, 43 SAN DIEGO L. REV. 347, 357 (2006) (citing Benson v. McMahon, 127 U.S. 457, 463 (1888) and David v. Attorney General, 699 F.2d 411, 415 (7th Cir. 1983)).

123. *See* Bedrick, *supra* note 100, at 393.

124. *See* Iraola, *supra* note 122, at 373. While the exact language under § 3184 is "evidence of criminality," this has been interpreted by the courts to mean probable cause. *Id.*

125. *Id.* at 374 (citing Parretti v. United States, 122 F.3d 758, 776 (9th Cir. 1997), *appeal denied, rev'd en banc*, 143 F.3d 508 (9th Cir. 1998)).

126. *See* Kester, *supra* note 99, at 1443-44 (citing Fed. R. Crim. P. 54(b)(5) (stating that "[t]hese rules [of criminal procedure] are not applicable to extradition and rendition of fugitives")); Fed. R. Evid. 111(d)(3); *see also*, Messina v. United States, 728 F. 2d 77, 80 (2d

dence is not prohibited, and is in fact often used in extradition hearings.[127] A magistrate "has wide latitude admitting evidence."[128] Because of this, documents of "questionable authenticity" frequently are admitted into evidence.[129] For example, both unsworn summaries of witness statements[130] and documents containing inconsistencies have been admitted into evidence in U.S. extradition proceedings. [131] Affidavits or depositions may be used in place of witness testimony.[132] This practice denies the accused the opportunity to confront witnesses, a protection that a defendant has no right to under an extradition proceeding.[133] The primary reason that the United States has consistently accepted these relaxed standards in the extradition context is that incorporating constitutional due process requirements into the extradition process would place an enormous burden on the requesting state, therefore contravening the object and purpose of the underlying extradition treaty.[134]

Admission of evidence and documents are not the only areas where the extradition process falls short of constitutional protections. In addition to lacking the right to confront witnesses, most other Sixth Amendment protections are not present in extradition hearings.[135] The defendant in an extradition proceeding has no right to a jury and no right to a speedy trial.[136] Further, the Fourth Amendment exclusionary rule does not apply to extradition hear-

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Cir. 1984).

127. Kester, *supra* note 99, at 1444 (citing Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986)); O'Brien v. Rozman, 554 F.2d 780, 783 (6th Cir. 1977); United States *ex. rel.* Klein v. Mulligan, 50 F.2d 687, 688 (2d Cir.), *cert. denied*, 284 U.S. 665 (1931).

128. Iraola, *supra* note 122, at 358 (quoting In re Mainero, 990 F. Supp. 1208, 1219 (S.D. Cal. 1997)).

129. Kester, *supra* note 99, at 1444.

130. *Id.* at n.18 (quoting Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984)).

131. *See id.* (citing United States *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726, 728 (9th Cir. 1975)).

132. *See* Kester, *supra* note 99, at 1444. In some instances, magistrates have admitted unsworn statements. *Id.*

133. *See* 9B Fed. Proc., L. Ed. § 22:2368 (citing Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988); Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996), *aff'd*, 121 F.3d 1322 (9th Cir. 1997); Matter of Extradition of Cheung, 968 F. Supp. 791 (D. Conn. 1997)). In addition, live testimony is not permitted. *See* 9B Fed. Proc., L. Ed. § 22:2368 (citing Surrender of Ntakirutimana, 988 F. Supp. 1038 (S.D. Tex. 1997)); Powell, Matter of Extradition of, 4 F. Supp. 2d 945 (S.D. Cal. 1998)).

134. *See* Kester, *supra* note 99, at 1445.

135. *See id.* at 1446. The only sixth amendment protection present in extradition hearings is the right to counsel. *Id.* at 1444-45.

136. *See id.* (citing Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d Cir.) (Sixth Amendment speedy trial guarantee not applicable to extradition proceedings), *cert. denied*, 429 U.S. 833 (1976). *See also*, Sabatier v. Dambrowsk, 453 F. Supp. 1250, 1255 (D.R.I. 1978) *aff'd* 586 F.2d 866 (1st Cir. 1978)).

ings in all circuits.[137] The government does not have to disclose exculpatory evidence to the defendant,[138] and neither res judicata nor double jeopardy apply.[139] Bail, while theoretically available to a defendant, is infrequently granted.[140] One federal circuit has even ruled that the defendant does not have to be sane at the time of his or her extradition hearing.[141]

Another protection that is usually present in U.S. criminal law that is absent in the extradition process is the rule of lenity, the presumption that where a statute is ambiguous it is to be construed in favor of the defendant.[142] In fact, the opposite rule applies in extradition hearings. Extradition treaties are to be liberally construed in favor of extraditing.[143] This rule exists because extradition treaties "are in the interest of justice and friendly international relationships,"[144] which seem to trump individual rights in the extradition context.

(2) The Rule of Non-Inquiry

The Rule of Non-Inquiry is to be applied in extradition hearings and instructs that the judicial officer deciding the case should not inquire into the judicial system of the requesting state.[145] All federal circuits that have considered the issue of whether to inquire into the judicial system of the requesting state have adopted the rule of non-inquiry.[146] The use of the rule has resulted in harsh results for extradited individuals.[147] For example:

> situations have included those in which the defen-

137. *See* Kester, *supra* note 99, at 1445.

138. *See* Iraola, *supra* note 122, at 358-59 (citing Montemayor Seguy v. United States, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004)).

139. *See* Kester, *supra* note 99, at 1445. Again, the rationale is that extradition hearings are not full and final judgments on the merits. *Id.*

140. *See id.* at 1447-49. The Department of Justice position is that persons awaiting an extradition hearing should "almost always" be imprisoned. *Id.* at 1448. The practice of granting bail varies by circuit. *See id.* at 1448-49.

141. *See id.* (citing Romeo v. Roache, 820 F.2d 540, 544 (1st Cir. 1987)).

142. *See* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1978 (2007).

143. *See* Coltoff, *supra* note 120, § 41. *See also*, Factor v. Laubenheimer, 290 U.S. 276, 293 (1933).

144. Coltoff, *supra* note 120, § 41 (citing Matter of Extradition of Cheung, 968 F. Supp. 791 (D. Conn. 1997)).

145. *See* Elliott, *supra* note 101, at 351 (citing Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990); Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980); Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976)). This rule echoes "the broader separation of powers argument [the government] has often made in other cases where its foreign policy interests are involved." Wiehl, *supra* note 109, at 772.

146. *See* Semmelman, *supra* note 101, at 1205.

147. *See id.* at 1204.

> dant anticipates abuse, torture, or even murder at the hands of the requesting country's authorities; inadequate protection from lawless elements in the requesting country; prosecution for crimes not covered by the extradition request; or a fundamentally unfair trial, due to bias, restrictions on presenting a defense, or the use of illegally obtained evidence. The rule of non-inquiry has also governed when a defendant has claimed the protection of the statute of limitations; double jeopardy; breach of a plea agreement by the requesting country; or that the requesting country lacks jurisdiction. For those already convicted, the rule of non-inquiry has precluded claims that extradition should be barred because the conviction was secured unfairly or in absentia.[148]

A recent example highlights the serious consequences of the rule of non-inquiry. In *Prasoprat v. Benov*, the United States refused to deny the extradition of a U.S. citizen who was charged in Thailand with a non-violent drug offense.[149] What makes this particular case so compelling is that the defendant was facing the death penalty in Thailand for his crime.[150] If convicted of the same crime in the United States, the defendant would have faced imprisonment of as little as eight years.[151] However, he may face

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148. *Id.* at 1205-06 (*citing* Linnas v. I.N.S., 790 F.2d 1024, 1031-32 (2d Cir.) (deportation case), *cert. denied,* 479 U.S. 995 (1986); *In re* Manzi, 888 F.2d 204, 206 (1st Cir. 1989), *cert. denied,* 110 S. Ct. 1321 (1990); Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); Kamrin v. United States, 725 F.2d 1225 (9th Cir.), *cert. denied,* 469 U.S. 817 (1984); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983); Sindona v. Grant, 619 F.2d 167, 174-75 (2d Cir. 1980), *cert. denied,* 451 U.S. 912 (1981); Escobedo v. United States, 623 F.2d 1098 (5th Cir.), *cert. denied,* 449 U.S. 1036 (1980); Geisser v. United States, 627 F.2d 745, 749-53 (5th Cir. 1980), *cert. denied,* 450 U.S. 1031 (1981); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); Magisano v. Locke, 545 F.2d 1228, 1230 (9th Cir. 1976); Holmes v. Laird, 459 F.2d 1211, 1214 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972); Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972); Gallina v. Fraser, 278 F.2d 77, 78-79 (2d Cir.), *cert. denied,* 364 U.S. 851 (1960); Argento v. Horn, 241 F.2d 258, 263-64 (6th Cir.), *cert. denied,* 355 U.S. 818 (1957); *In re* Singh, 123 F.R.D. 127, 128-29 (D.N.J. 1987); United States v. Clark, 470 F. Supp. 976, 979-80 (D. Vt. 1979); *In re* Ryan, 360 F. Supp. 270, 274 (E.D.N.Y.), *aff'd,* 478 F.2d 1397 (2d Cir. 1973); *cf. In re* Mylonas, 187 F. Supp. 716, 721 (N.D. Ala. 1960) (although "[t]he fact that the accused was convicted in absentia would not preclude his extradition," the court denied extradition on other grounds)).

149. *See* Andrew J. Parmenter, *Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug Offense,* 45 WASHBURN L.J. 657, 657 (2006) (citing Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005)).

150. *See id.*

151. *See id.* at 658.

death in Thailand for the same offense, a punishment which would violate the Eighth Amendment prohibition against cruel and unusual punishment if imposed in the United States for the same offense.[152]

The Supreme Court case *Neely v. Henkel* provides a rationale for the rule of non-inquiry:

> 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. [153]

There are several other justifications for the rule of non-inquiry. One rationale is that the existence of an extradition treaty compels the assumption that the trial in the requesting jurisdiction will be fair.[154] Another argument for the rule of non-inquiry is that it would be an enormous undertaking for domestic courts to examine the procedures of foreign courts.[155] Even if an inquiry were feasible, it might interfere with the executive's foreign policy activities and infringe on the requesting state's sovereignty.[156]

Regardless of the reasons for the rule of non-inquiry's utility, it is a rule that severely constrains individual rights. Some commentators suggest that the rule should be abolished as it is inconsistent with modern human rights norms.[157] For example, the United Nations Convention Against Torture prohibits the extradition of a defendant where there are reasonable grounds to believe that he or she may be tortured in the requesting state.[158] However, the rule of non-inquiry would prevent the magistrate from making that de-

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152. *Id.* at 672-73.

153. Semmelman, *supra* note 101, at 1212 (quoting Neely v. Henkel, 180 U.S. 109, 123 (1901)).

154. Semmelman, *supra* note 101, at 1213. Despite this assumption, the State Department has on occasion demanded that extradited defendants that had been convicted in absentia be retried after they are extradited. *Id.* at 1233-34.

155. *See* Parmenter, *supra* note 149, at 674.

156. *See id.* at 674-75.

157. *See* Murchison, *supra* note 105, at 311 (explaining that "beginning in the late 1980s, influential international courts began to recognize and explore the intersection of the duty to extradite and the duty to respect human rights."). Indeed, there is some evidence that the rule may have limits. One case suggests that courts may make a more searching inquiry "where . . . procedures or punishment [are] so antipathetic to a federal court's sense of decency as to require reexamination of the principle." Galina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960).

158. *See* Murchison, *supra* note 105, at 311.

termination in an extradition hearing.

(3) Sparse Review

Very little review of extradition decisions is available. There are only two options available for review of the extradition hearing—State Department review and habeas corpus. Review by the State Department may be worth very little.[159] One study revealed that during a period of twenty-one years, only two extradition requests by foreign states were denied.[160] The difficulty with entrusting the State Department with the protection of extradition defendants is that there are so many political factors exerting pressure on the Department.[161] For example, the State Department is also the requesting party in situations where the United States is seeking the extradition of accused criminals from other states.[162] In fact, the U.S. Department of State sends out more requests than it receives. It benefits the State Department to cooperate with the extradition requests of other States.[163] Further, the State Department deals with a host of foreign relations issues and the refusal of an extradition request has the potential to create problems in any one of them. This creates tension between a defendant's individual rights and the executive branch's authority to conduct foreign relations. For example, "the Secretary [of State] may decide whether to extradite based on foreign policy or domestic political considerations, even though consideration of the individual rights of the defendant might call for a different result."[164]

Review of an extradition hearing is also available through a writ of habeas corpus.[165] However, the scope of habeas review is extremely narrow.[166] The district judge upon habeas review "is not to retry the magistrate's case."[167] So what can be challenged through habeas review? The answer is brief:

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159. *See* Kester, *supra* note 99, at 1484-89.

160. *Id.* at 1486. However, there is no evidence that the State Department has been deficient in protecting the rights of defendants in extradition proceedings. *See* Semmelman, *supra* note 101, at 1232.

161. *See* Kester, *supra* note 99, at 1486.

162. *See id.*

163. In fact, "[n]othing in the extradition statute prevents the Secretary of State from acting for policy reasons in a manner that does not protect the defendant's rights." Bedrick, *supra* note 100, at 394 (citing 18 U.S.C. § 3186 (1994)).

164. Bedrick, *supra* note 100, at 395.

165. *See* 28 U.S.C. § 2241. *See also*, Lindstrom v. Graber, 203 F.3d 470, 473 (7th Cir. 2000).

166. *See* Kester, *supra* note 99, at 1472.

167. Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

> [w]hether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.[168]

3. Analysis

An extradited defendant faces a very uncertain future. The rule of non-inquiry prevents U.S. courts from inquiring into the judicial process the defendant will face upon extradition. In many ways, there are fewer dangers with surrendering a person to the ICC than extraditing him or her to a foreign state under an extradition treaty. This is due in part to the fact that the ICC is a creature of state consent.[169] States were involved in the formation of the protections in the ICC and continue to be involved with ensuring that fundamental rights are protected.[170] The Rome Statute was created to have procedural safeguards and human rights guarantees.[171]

The only areas where extradition seems to offer some advantage over surrender to the ICC are the political offense exception and the requirement of dual criminality. There no analogous bars in the ICC.[172] The dual criminality requirement, which prevents

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168. Iraola, *supra* note 122, at n.15 (quoting Fernandez v. Phillips, 268 U.S. 311, 312 (1925)). *See also In re* Luis Oteiza y Cortes, 136 U.S. 330, 334 (1890).

> A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on *habeas corpus*, either originally or by appeal.

Id.

169. *See* Duffy, *supra* note 85, at 22.

170. *See id.* Some commentators go so far as to suggest that "the ICC can properly be considered an extension of a [S]tate's own domestic jurisdiction." *Id.* at 23 (citing Cherif Bassiouni, *Observations on the Structure of the (Zutphen) Consolidated Text, in* OBSERVATIONS ON THE CONSOLIDATED ICC TEXT 12 (Leila Sadat Wexler ed., 1998)). However, this would trigger structural constitutional concerns, because the U.S. Constitution protections are triggered when "a foreign government acts as an agent of, or joint venturer with, the United States in violating a defendant's rights." Semmelman, *supra* note 101, at 1227. The academic consensus seems to be that the ICC, while being influenced by individual states, is not an extension of them. *See* Marquardt, *supra* note 33, at 104-05 ("[I]t is clear that an international criminal court would be more like a foreign jurisdiction than an instrumentality of the United States.").

171. *See* Duffy, *supra* note 85, at 23-24. *See also supra* Part III.A.1.b.

172. *See* Semmelman, *supra* note 101, at 1235.

extradition where the offense claimed in the extradition request is not a crime in the receiving State, is not a requirement under the ICC, leaving a certain group of defendants vulnerable under a surrender regime that would be protected from extradition. This problem could be avoided by carefully drafted implementing legislation that criminalized all activities that are crimes under the Rome Statute.[173] Most importantly, these bars to extradition are protections that have arisen from state practice and are probably not constitutional protections.[174]

A comparison of surrender and extradition makes plain that the purpose and function of the two practices are substantially similar.[175] The few places of difference, most notably the lack of trial by jury, are "not absolutely essential to the administration of justice," making claims of unconstitutionality difficult to justify.[176] This is especially true in light of the United States' overwhelming support of and participation in international extradition and even surrender to other international criminal tribunals.[177]

Since "many constitutional protections afforded to defendants in domestic cases have never been extended to international fugitives arrested and detained in the United States on warrants in aid of extradition requests,"[178] it seems logical that the lack of a very few constitutional protections should not bar U.S. participation in the International Criminal Court. For constitutional purposes, extradition and surrender should be considered sufficiently close.[179] Therefore, "the procedural due process critique underexplains U.S. rejection of the ICC."[180] Focusing on illegitimate objections diverts focus from a very real objection that remains—infringement on the sovereignty of the United States—and hinders inquiry into ways to resolve sovereignty concerns.

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173. *See* Amann & Sellers, *supra* note 61, at 400-02 (noting that the dual criminality requirement is already met with regards to genocide, war crimes and torture but not for crimes against humanity). If the United States were to criminalize crimes against humanity, the complementarity scheme of the ICC would offer the U.S. protection. *Id. See also infra* Part V.A.

174. *See* Amann & Sellers, *supra* note 61, at 400 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. d. (1986)). *But see* Jordan v. DeGeorge, 341 U.S. 223, 230 (1951) (implying that the dual criminality requirement may be constitutionally required because of the due process idea of fair warning).

175. *See* Marquardt, *supra* note 33, at 147.

176. *Id.* at 132 ("[T]he variations from standard United States domestic practice in the proposed international criminal court would not be significant enough to render the entire project unconstitutional . . .").

177. A U.S. court held that transfer of a fugitive to the ICTR was constitutional. *See* Amann & Sellers, *supra* note 61, at 403 (citing Ntakirutimana v. Reno, 184 F.3d 419, 421 (5th Cir. 1999)).

178. *See* Wiehl, *supra* note 109, at 732.

179. *See* Barrett, *supra* note 70, at 107.

180. Cuéllar, *supra* note 27, at 1612.

B. Structural Concerns

1. Does Article III of the Constitution Allow Congress to Delegate Criminal Jurisdiction to the ICC?

Delegation of adjudicatory authority raises serious constitutional questions.[181] Article III of the U.S. Constitution does not allow Congress to delegate "essential attributes of judicial power" to a tribunal other than the federal courts, since federal courts have the power under the U.S. Constitution to decide cases and controversies.[182] Adjuncts to Article III courts are permissible so long as they are not delegated these essential attributes.[183] This raises a question about what comprises the essential attributes of judicial power reserved to the federal courts. *Commodity Futures Trading Commission v. Schor* used a balancing test to determine the permissibility of using an adjunct.[184] This two-part test balances the utility of using an adjunct against the two essential attributes of federal judicial power, which are promoting fairness through an independent judiciary and maintaining separation of powers through the structural role of the judiciary.[185] To determine the constitutionality of delegation of Article III power to decide criminal cases, it is necessary to apply this balancing test to the ICC situation. The first prong ensures that the judiciary is independent of the other political branches. The ICC passes this test. The second prong asks whether the ICC impermissibly threatens the institutional integrity of the federal judicial branch. Justice O'Connor in the majority opinion of *Schor* outlined four factors that can be used to determine whether separation of powers may be threatened.[186] They are

> the extent to which the 'essential attributes of judicial power' are reserved to article III courts, and conversely, the extent to which the non-article III forum exercises the range of jurisdiction and powers normally vested only in article III courts, the origins

181. *See* Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 42 (1996).

182. *Id.* (quoting from Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986)).

183. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982); United States v. Raddatz, 447 U.S. 667 (1980) (approving the use of an adjunct in a criminal proceeding); Cromwell v. Benson, 285 U.S. 22 (1932).

184. *Schor*, 478 U.S. at 849. *See also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 251-254 (4th ed. 2003).

185. *Schor*, 478 U.S. at 849-50.

186. *See* CHEMERINSKY, *supra* note 184, at 254-55 (citing *Schor*, 478 U.S. at 851).

> and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of article III.[187]

The essential attributes of judicial power are encroached on very little by the ICC since it is empowered to hear a narrow range of crimes, and the ICC does have a thin range of jurisdiction. The concern that led Congress to authorize adjunct power to the ICC is very important—the effective deterrence and punishment of persons committing the gravest crimes. However, the origins and importance of the right to be adjudicated is more problematic, since criminal prosecutions and protections granted accused persons are of central importance to the U.S. judicial system. On balance, it seems that this deferral of power to an adjunct does not conflict with separation of powers. Nonetheless, Erwin Chemerinsky points out that it is hard to have a definitive idea on how the Supreme Court would rule on any given situation, since there is no clear guidance as to how much weight the court gives to each of the factors.[188]

In addition, the United States has ratified other treaties authorizing tribunals that have decision-making authority over the lives and property of U.S. citizens.[189] The arbitration provisions of the World Trade Organization and the North American Free Trade Agreement are good examples. The Algiers Accord, which established the Iran-United States Claims Tribunal, is another.[190]

Most offenses covered by the ICC to which an accused American would be subject would be handled domestically by a non-Article III court, such as a military court-martial, or extradition to a foreign court.[191] *Ex Parte Quirin* is illustrative.[192] *Quirin* held that the use of military (non-Article III) courts for German spies apprehended in the United states were constitutional. One of the spies claimed to be a U.S. citizen. That notwithstanding, the Supreme Court held that

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187. *Id.* at 245-55 (quoting *Schor*, 478 U.S. at 851).

188. *Id.* at 255.

189. Ruth Wedgwood, *The Constitution and the ICC, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 119, 121 (Sarah B. Sewall & Carl Kaysen eds., 2000).

190. *See id.* at 122 (citing Algiers Accords, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 223).

191. *See id.* at 121. The Supreme Court has authorized the use of military tribunals whose judges do not have salary protections and life tenure. This has been held to be permissible even in the instance of capital punishment. *See also* Dynes v. Hoover, 61 U.S. 65 (1858) (holding that military tribunals are not prohibited by Art. III); CHEMERINSKY, *supra* note 184, at 224.

192. Ex Parte Quirin v. Cox, 317 U.S. 1 (1942).

> §2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.[193]

While delegation to the ICC of jurisdiction over military personnel seems plausible, ICC jurisdiction over civilians is less clear. Two cases seem especially problematic. *Ex Parte Milligan* reversed the conviction and death sentence of a civilian convicted by a military tribunal during the Civil War, stating that "no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service."[194] A later case, *Reid v. Covert*, held that separation of powers prevented spouses of service personnel from being tried for capital crimes in military courts.[195] *Kinsella v. United States ex. rel. Singleton* extended this holding to non-capital cases.[196] Yet, Henry Hart has theorized that "these cases are equally as instructive in what they imply the government can do in allowing defendants to be tried by non-Article III courts as they are in establishing what the government cannot do."[197] *Milligan* implies that the government can convict soldiers with a bench trial, limiting the reach of the Sixth Amendment.[198] Audrey Benison comments that "[i]f Congress may constitutionally abrogate the jury trial right from this class of defendants, then it is possible that there are other instances in which withholding the right may be appropriate."[199] *Reid* held that the defendant military spouses could not be tried by military tribunals because their crimes were ordinary crimes (as opposed to law-of-war crimes which could be tried by military tribunals).[200] Benison argues that this focus on status of the crime rather than status of the accused in determining the permissibility of non-Article III review is consistent with the ICC approach.[201]

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193. CHEMERINSKY, *supra* note 184, at 229 (quoting *Quirin*, 317 U.S. at 30-31).

194. Ex Parte Milligan, 71 U.S. 2 (1866).

195. Reid v. Covert, 354 U.S. 1 (1957). *See also* CHEMERINSKY, *supra* note 184, at 225.

196. Kinsella v. United States, 361 U.S. 234 (1960). *See also* CHEMERINSKY, *supra* note 184, at 226.

197. Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J. INT'L L. 75, 99 (2001) (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374-75 (1953)).

198. Benison, *supra* note 197, at 99-100.

199. *Id.* at 100.

200. *Id.*

201. *See id.*

2. Does the ICC's Jurisdiction Over U.S. Nationals for Crimes Committed on U.S. Soil Violate the Constitution?

Commentators arguing that the United States should exercise jurisdiction over all acts committed in its territory rely on antiquated ideas about territoriality. With increasing globalization, overlapping jurisdiction is common. The United States has embraced theories of jurisdiction other than territoriality when extraditing defendants accused of committing crimes in the United States as well as when exercising jurisdiction over acts committed outside the United States.[202] There is a body of cases validating the extradition of persons to foreign jurisdictions for crimes committed in the United States. Many are in conspiracy cases where some, but not all, elements of the conspiracy occurred in the United States [203] The United States has departed from the territoriality principle when exercising jurisdiction over acts committed outside the United States in *United States v. Alvarez-Machain*, which upheld U.S. jurisdiction to try a Mexican national accused of murdering a DEA agent in Mexico.[204]

Another important case demonstrating a federal court's willingness to depart from the territoriality principle is *United States v. Yunis*, which applied universal jurisdiction over the crime of air piracy, where a hijacking occurred on a Jordanian airliner.[205] The court stated that the assertion of such jurisdiction is fully consistent with "norms of customary international law."[206] The line of reasoning in the *Yunis* case is particularly important because it embraces an expanded conception of jurisdiction for a crime that is considered to be a universal crime (piracy). The crimes covered by

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202. Marquardt, *supra* note 33, at 115-16. There are four primary legal grounds of jurisdiction. Antonio Cassese defines them in his international law treatise:

> Traditionally, States bring to trial before their courts alleged perpetrators of international crimes on the strength of one of three principles: *territoriality* (the offense has been perpetrated on the State territory), *passive nationality* (the victim is a national of the prosecuting State), or *active nationality* (the perpetrator is a national of the prosecuting State) . . . In more recent years, the so-called principle of *universality* has also been upheld, whereby any State is empowered to bring to trial persons accused of international crimes regardless of the place of commission of the crime, or the nationality of the author or of the victim.

CASSESE, *supra* note 4, at 451.

203. *See, e.g.*, Austin v. Healey, 5 F.3d 598 (2d Cir. 1993); Melia v. United States, 667 F.2d. 300 (2d Cir. 1981); Valencia v. Scott, 1992 U.S. Dist. LEXIS 3886 (E.D.N.Y. Mar. 19, 1992).

204. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (*cited in* Marquardt, *supra* note 33, at n.177).

205. United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (*cited in* Marquardt, *supra* note 33, at n.177). The airliner was carrying U.S. citizens.

206. *Id.* at 1091.

the ICC are arguably even more universally accepted than piracy. The ICC crimes are crimes that have been defined in a way that all countries can prosecute notwithstanding the ICC.[207] For example, the four Geneva Conventions of 1949 not only allow a state to prosecute grave breaches of war crimes, they actually impose an obligation on all signatory states to do so.[208]

3. The Jury Issue Revisited

The key to the determination of whether the absence of a jury violates the Constitution is in the basis of comparison.[209] There is no dispute that jury trials are called for in criminal cases before federal and state courts.[210] Notwithstanding this requirement, there are numerous instances of the United States dispensing with the jury requirement in situations that fall outside of federal and state courts. The military court martial system is one example;[211] extradition of U.S. citizens to foreign jurisdictions or tribunals is another.[212] In the Supreme Court case *Wilson v. Girard*, a U.S. soldier stationed in Japan was accused of murdering a Japanese woman. [213] The United States held that Japan had jurisdiction over this case even though there was a treaty in place granting Japan and the United States concurrent jurisdiction.[214] This bolsters the argument that "the United States is not constitutionally required to exercise jurisdiction over its nationals whenever possible."[215] Therefore, the point of comparison should be what a U.S. citizen

207. *See* MEISSNER, *supra* note 17, at 68.

208. *See* JEFFEREY L. DUNOFF, ET. AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 537 (2d ed. 2006) (stating that the "four conventions, now almost universally ratified, are designed to protect wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilian non-combatants."). In November 2006, attorneys representing nine Iraqi and Afghan citizens who were held at Abu Ghraib prison or Guantánamo filed suit in Germany against former Secretary of Defense Donald Rumsfeld, requesting that the German Federal Prosecutor open a criminal prosecution as required by the Geneva Convention looking into the responsibility of high-ranking U.S. officials for authorizing war crimes. Germany was chosen as a potential forum because it subscribes to the universal jurisdiction principle. Paul von Zielbauer, *Former Detainees Argue for Right to Sue Rumsfeld Over Torture*, N.Y. Times, Dec. 9, 2006, *available at* http://www.nytimes.com/2006/12/09/washington/09torture.html.

209. *See* MEISSNER, *supra* note 17, at 72.

210. *See id.*

211. In fact, because the ICC has jurisdiction over a very narrow range of crimes, it is hard to imagine how an American citizen would violate them outside the context of the military (which would subject the defendant to court martial jurisdiction—and no jury). *See id.*

212. *See supra* Part III. A. for a further discussion of extradition.

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

214. *Id.*

215. MEISSNER, *supra* note 17, at 67.

would face in a foreign jurisdictions.[216] As Paul Marquardt explains:

> any case referred to an international criminal court would . . . contain other transnational elements sufficient to sustain foreign jurisdiction over the case. The nationality of the victim (passive personality), the nationality of the offender (active personality), the commission of elements of a crime in the territory of another state (territoriality), or the intended effects on another state (effects principle) could all be sufficient to sustain the jurisdiction of another state.[217]

IV. USING A FEDERALIST "LEGAL PROCESS" APPROACH TO MEDIATE REMAINING TENSIONS BETWEEN THE UNITED STATES AND THE ICC

While the constitutional concerns held by the U.S. may be resolved by a look to case law and the practice of extradition, other objections, which primarily address sovereignty issues, are more difficult to resolve. It is this second group of concerns that need to viewed through the Legal Process lens of institutional settlement.

The ratification of the Rome Statute requires a system to govern interaction between overlapping judicial systems. A "federalist ideal of healthy dialogue and mutual trust" can be "adapted to describe the proper relationship between domestic courts" and the ICC.[218] Supreme Court Justice Sandra Day O'Connor has described this relationship as "the federalism of free nations."[219] Ernest Young proposes that "interjurisdictional rules relating supranational courts to domestic courts should likewise reflect . . . [a] Legal Process approach."[220] He is referring to a U.S. federal courts jurisprudential school developed in the 1950s by Henry Hart, Herbert Wechsler and Albert Sacks.[221] The main focus of the Legal Process school is the allocation of decision making authority.[222] Decision making is divided primarily by using an approach called "institutional settlement," which means that the "law should allocate

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216. *See id.* at 72.

217. Marquardt, *supra* note 33, at 115-16.

218. O'Connor, *supra* note 181, at 41.

219. *Id.*

220. Young, *supra* note 80, at 1149.

221. *Id.* (citing RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320 (5th ed. 2003) [hereinafter HART & WECHSLER]).

222. Young, *supra* note 80, at 1159.

decisionmaking [sic] to the institutions best suited to decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion."[223] There must be a powerful reason for an institution's settled decision to be challenged.[224] The Legal Process approach is useful in the context of the United States and the ICC in two distinct ways. First, it facilitates U.S. acceptance of the ICC. In addition, the Legal Process approach will contribute to an evolving framework of procedures governing the relationship between the ICC and the U.S. judicial system. Using the principle of institutional settlement from the Legal Process approach can maintain the integrity of domestic structures, enhancing and protecting state sovereignty.[225]

A. A Legal Process Approach Will Make the United States More Comfortable With the ICC

The idea of conceding state sovereignty to the ICC is a hard pill for some Americans to swallow. However, the principle of institutional settlement can mediate this tension. In the U.S. system, federalism and separation of powers are manifestations of institutional settlement,[226] and with time the same principle will create a framework of checks and balances in the international system. The problem of the independent ICC Prosecutor illustrates this principle at work.

One of the major issues Americans have with the ICC is the Prosecutor, who operates in a much more independent capacity than most American prosecutors. This raises questions that there are no "adequate guarantees of transparency and accountability."[227] However, this is balanced by both complementarity and the lack of an enforcement arm. We see institutional settlement at work here in on two levels. First, the independent Prosecutor's involvement will be minimal if the United States is willing and able

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223. *Id.* at 1149-50. The author is thankful to Professor Young for sharing the following analogy: if his wife and he decide that he will be responsible for dressing his kids for school, the principle of institutional settlement should preclude his wife from redressing his kids if she doesn't like what he picked for them to wear.

224. *See id.* at 1160. In the forgoing example, if Professor Young dressed his kids for school in their swimsuits, his decision might be subject to question. Therefore, a settled decision is not necessarily a conclusive decision. *Id.*

225. *See id.* at 1178. Indeed, some scholars have suggested that involvement in international institutions is part of sovereignty, not a restriction on it. *Id.* at 1225 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995)).

226. *See* Young, *supra* note 80, at 1160.

227. *Id.* at 1246.

to handle situations domestically. Second, the extra power that the ICC wields is balanced by the absence of enforcement power. This enforcement power promotes state sovereignty in a ways both obvious and not obvious. Since implementation of ICC judgments is not automatic, states hold final authority for their actions, thus strengthening their commitment to international values with each implementation.[228]

It would be difficult to find a clearer example of institutional settlement than the ICC system of complementarity, which establishes a regime of concurrent jurisdiction with domestic courts having the first bite at the apple to prosecute its nationals accused of committing genocide, crimes against humanity or war crimes. Complementarity mandates that the ICC defer to state sovereignty.[229] The court must defer to the domestic judicial system unless the state system is unable or unwilling to investigate or prosecute a case.[230] In addition, a state party or the accused may challenge the ICC's jurisdiction over a case or the case's admissibility.[231] This deference is clearly in line with the institutional settlement idea that once the best forum is chosen for a type of case, the individual court decisions should be respected unless there is a compelling reason not to. The most powerful part of institutional settlement is the fact that decisions must be respected even if the result is wrong, and even if other actors do not agree with the decision.[232]

The two examples discussed above, that of the Prosecutor and

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228. Martinez, *supra* note 2, at 467. Martinez goes on to say that "[f]acilitating the orderly interaction between our legal system and the rest of the world is not about giving up sovereignty or surrendering the national interest but about figuring out how to protect and preserve the things our nation values in our inevitable interactions with the rest of the world." *Id.* at 474-75.

229. *See* Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 1, 3 (Sarah B. Sewall & Carl Kaysen eds., 2000).

230. *See id.* Because the United States legal system functions well, the ICC would arguably have jurisdiction in cases where the United States is unwilling to investigate or prosecute a case. *Id.*

231. *See* Roy S. Lee, *States' Responses: Issues and Solutions, in* STATES' RESPONSES TO ISSUES ARISING FORM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 1, 13 (Roy S. Lee ed. 2005) (citing Rome Statute, *supra* note 19, at arts. 17 -19; ICC Rules of Procedure and Evidence, Preparatory Comm'n for the Int'l Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc PCNICC/2000/1/Add.1.(2000)).

232. *See* Young, *supra* note 80, at 1150. The United States was able to experience complementarity in action during the drafting of the Rome Statute. In 1998, a Marine jet flying too low in the Italian Alps caused a gondola to fall from its wire, killing twenty people. Because a Status of Force Agreement between the United States and Italy embodied the complementarity principle, the Italian prosecutor dropped all charges against the U.S. pilots upon the United Staes instigating court-martial proceedings. *See* Weschsler, *supra* note 1, at 96.

the system of complementarity, while good examples of institutional settlement systems already in place in the ICC, are also examples of how institutional settlement as it now exists, falls short of resolving the U.S. difficulty with the court. For example, the U.S. delegation authored portions of the Rome Statute delineating the Prosecutor's powers, yet as discussed in Part II.B.3. *supra*, the United States continues to have concerns over the potential for abuse inherent in such a robust office.[233] In addition, complementarity as it now stands, while an example of institutional settlement, is viewed with suspicion by the United States. While institutional settlement exists within the current mechanisms in place in the ICC, more tools are needed. The ICC and the Prosecutor should build in additional rules and policies to strengthen the court's system of institutional settlement.

B. Proposed Rules and Policies for the ICC to Adopt to Promote Institutional Settlement and Resolve U.S. Objections

1. High Threshold for Opening Cases Should Be Rigidly Enforced

In the specific instance of war crimes, a high threshold for prosecutions should be an established guideline that the Prosecutor must follow. It could be determined that a case is not admissible unless it reaches some predetermined level of seriousness, eliminating prosecution in cases involving "disputed exercises of military judgment."[234] This follows logically from the high degree of deference called for by Article 17(1)(d) of the Rome Statute.[235] As Ambassador Scheffer has pointed out, "individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC."[236] He goes on to admonish that "an appropriately structured ICC should prosecute significant criminal activity during wartime but should leave to national jurisdictions the job of disciplining the isolated war crimes committed by errant soldiers."[237]

The United States often cites the scenario where, while engaged in a peacekeeping mission, its military force hits a civilian

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233. *See supra* Part II.B.3.

234. Greenawalt, *supra* note 70, at 637.

235. *See* Rome Statute, *supra* note 19, at art. 17(1)(d).

236. Scheffer, *supra* note 44, at 16.

237. *Id.* The definition of war crimes under the Rome Statute of the ICC does define the crimes in a way that limits them to situations where the crimes are "committed as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute, *supra* note 19, at art. 8(1).

target in error. There is the fear that the ICC may launch an investigation and prosecution based on these facts. However, if there is a policy in place by which a prosecution is commenced only where the crimes are committed "as part of a plan or policy or as part of a large-scale commission of such crimes," then the United States would be protected.[238]

An additional potential guideline would require that crimes charged are of concern to the international community as a whole. There is some scholarship that insists that this is already a requirement of the Rome Statute.[239] Proponents of this view claim that Article 5 of the Rome Statute, which defines crimes within the jurisdiction of the court, proclaims that "[t]he jurisdiction [of the Court] shall be limited to the 'most serious crimes of concern to the international community as a whole.'"[240] This proclamation is in addition to the enumerated crimes, leading some to believe that the clause is a further limitation on the court's jurisdiction.[241] The language as it now stands is ambiguous, so a firm guideline should be established to clarify this issue.

A further guideline that the ICC may consider adopting is one that would exclude individual responsibility in two cases: where the suspect had acted in performance of his or her official duties, and where the state of which the suspect was an agent acknowledged the criminal act as its own.[242] This limitation on individual responsibility could be limited to situations where the United Nations or a regional organization, such as NATO, authorized the action.[243]

The legal basis for these and other guidelines that might limit the reach of the ICC comes from the court's implied powers and Article 53, which constrains the activities of the Prosecutor that are restricted by the interests of justice.[244] The Rome Statute states that "the Prosecutor, when deciding on further investigations, has to consider whether there are substantial reasons to believe that an investigation 'would not serve the interests of jus-

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238. *See* Greenawalt, *supra* note 70, at 638 (citing Rome Statute at art. 8(1)).

239. *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 38 (2001).

240. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 7 (2002) (citing Rome Statute, *supra* note 19, at art. 5).

241. *Id.* at 167 (citing Newton, *supra* note 239, at 38).

242. Hafner, *supra* note 51, at 329.

243. *See id.* at 330. Hafner points out that this is in line with the U.N.'s practice of authorizing military actions instead of establishing its own forces. *Id.* at n.37.

244. *See id.* at 330.

tice.'"[245]

2. The Complementarity Regime Should Be Strengthened

Complementarity is a system that seeks to infringe very little on state sovereignty, while exerting pressure on states to investigate and punish international crimes. National courts are encouraged to act when they know that the ICC will step in if they do not.[246] At the same time, national courts get the "political cover" they need, which helps them prosecute and avoid impunity.[247] An indictment by the ICC sends the signal that "a state is not doing what it should."[248]

Despite complementarity's positive institutional settlement qualities, order is needed in ICC investigation and prosecution decisions.[249] Tighter guidelines for accepting cases for prosecution should be established.[250] This would limit the Prosecutor's discretion, soothing U.S. fears over the energetic office.[251] The guidelines could be developed by the Prosecutor and approved by the Assembly of States Parties.[252] Utilizing these guidelines in decisions to prosecute would "enhance legitimacy by rooting the Prosecutor's decisionmaking [sic] in neutral ex ante criteria that 'provide for a transparent standard that the Prosecutor will consistently apply.'"[253]

3. "Unwilling" and "Unable" Should Be Clearly Defined

There is a great deal of discretion in determining what it

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245. *See id.* at n.38 (quoting Rome Statute, *supra* note 19, at art. 53).

246. Burke-White, *supra* note 240, at 92 (stating that otherwise, states might allow impunity to avoid political costs).

247. *Id.*

248. Greenawalt, *supra* note 70, at 629.

249. *See* Burke-White, *supra* note 240, at 101.

250. Greenawalt, *supra* note 70, at 650.

251. *See id.* at 651.

252. *Id.* at 652.

253. *Id.* (quoting Allison Marston Danner, *Enhancing the Legitimacy and Accountability of the Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 552 (2003)). Admittedly, it is difficult to come up with such rules. One set of rules proposed is a non-exclusive list of criteria for the Prosecutor to consult, including: the level of public outrage, popular support for a particular investigation, security issues (whether the conflict is ongoing . . .), threats to the security of a fragile transitional state by prosecuting key individuals, and political issues, including the existence of a peace treaty amnesties (distinguish between democratic and non-democratic societies/popular will and conditional and unconditional). Greenawalt, *supra* note 70, at 654-55 (quoting Avril McDonald & Roelof Haveman, *Prosecutorial Discretion — Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Apr. 15, 2003, ICC-OPT, at 9, http://www.icc-cpi.int/opt/consultations.php).

means to be "unwilling" or "unable".[254] It rests with the ICC to decide what these terms mean.[255] There are broad guidelines in the Rome Statute and in the Rules of Procedure and Evidence.[256] The term "unwilling", which is the term that could benefit the most from a stronger definition, means that a state has not prosecuted, has unjustifiably delayed investigation or prosecution, has initiated a prosecution for the purpose of shielding the accused from the ICC or has not conducted the prosecution in a manner that is impartial or independent.[257] The court must develop guidelines stating precisely what these terms mean, so that the Prosecutor's discretion will be appropriately limited. In developing guidelines over what it means to be "unwilling," the ICC should adopt the position that substantial compliance with a state's obligations is sufficient.[258] Substantial compliance should allow a "broad 'zone within which behavior is accepted as adequately conforming.'"[259] If there has been substantial compliance, the Prosecutor must find that the state has been willing to prosecute and allow complementarity to keep the case out of the ICC. This is institutional settlement at its most elemental.

4. Allow Questions of Law From National Courts

Trust, respect and interdependence between national and supranational courts can be enhanced by allowing states to submit questions of law to the ICC.[260] Allowing this process has the potential to keep cases out of the ICC and keep prosecution local.[261] The interaction between national courts of the European Union and the European Court of Justice provides a model for how this interaction might work, as does the interaction between federal and state

254. Burke-White, *supra* note 240, at 92 (citing Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement Int'l Criminal Law*, 23 MICH. J. INT'L L. 869, 904 (2002)).

255. *See* Burke-White, *supra* note 240, at 9.

256. *See* Rome Statute, *supra* note 19, at art. 17 (2) & (3); Preparatory Comm'n for the Int'l Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, ch. 3, U.N. Doc PCNICC/2000/1/Add.1.(2000).

257. *See id.*

258. *See* Burke-White, *supra* note 240, at 80. A state's obligations must also be clearly set out in guidelines. In broad terms, these obligations are to: (1) criminalize the behavior by passing legislation; (2) have the necessary domestic institutions available to investigate and prosecute, such as establishing special courts or giving existing domestic courts jurisdiction over international claims; and (3) exercise the jurisdiction where appropriate. *Id.* at 80.

259. *Id.* at 80 (citing ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY 1 (1993)).

260. *See id.* at 94.

261. *See id.*

courts in the United States.[262] This is a step that has great practical significance because the great majority of international crimes are prosecuted at the national level.[263]

5. Disallow Appeal for Acquittals

The ICC should follow the example long established under Anglo-American law by which the acquittal of a defendant is a final judgment not subject to appeal.[264] This change will prove difficult for the court, since the mechanism for prosecutorial appeal is expressly stated in the Rome Statute.[265] Thus, an amendment to the statute will be necessary. Despite the difficulty of the process, this change would eliminate the one area where an accused's due process rights are truly under protected.

6. Independent Appellate Body Should Be Established

Competence questions, such as who has the power to determine the limits of the ICC's authority, are important to the relationship between individual states and the ICC.[266] States, including the United States, usually want states to have ultimate authority to decide these questions, while internationalists want this power vested in a transnational body.[267] Under the Rome Statute, the ICC makes these competence determinations.[268] A middle ground between these two approaches is a court made up of justices from member states' high courts empowered to rule on competence questions.[269] This would provide a check on the power of the ICC, making it less of an intrusion upon state sovereignty.

C. Proposed Policy for the United States to Adopt to Promote Institutional Settlement: Congress Should Establish a Panel of Judges to Render Decisions on Whether the ICC Has Exceeded Its Authority

The United States should establish a court to determine

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262. *See id* at 95.
263. *See* Burke-White, *supra* note 240, at 97.
264. *See* Casey, *supra* note 28, at 861.
265. *See* Rome Statute, *supra* note 19, at art. 81(1)(a).
266. *See* T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2012 (2004).
267. *See id.*
268. *Id.* These determinations are made by an in-house appellate body. *Id.*
269. *Id.*

whether the ICC has exceeded its authority.[270] This could be an Article I court, reporting to the President and Congress.[271] The court's mandate would be to issue warnings where the ICC has exceeded its authority.[272] The purpose of the court would be to influence the behavior of the ICC by keeping it within its prescribed boundaries.[273] The model for this new court would be the courts of the EU member states, which have "exerted gravitational force on the ECJ's approach to rights-based claims against EU regulations."[274]

D. Other Ways That a Legal Process Approach Will Foster a Workable, Peaceful Relationship Between U.S. Courts and the ICC

The ICC is a very new institution, therefore procedures governing the interactions of the ICC and domestic courts have yet to be worked out. Now is an opportune time to apply concepts from the Legal Process school to interactions between the ICC and the U.S. judicial system, thereby increasing the chances of a peaceful, successful relationship between the two.[275] The federal system in the United States provides a model of Legal Process doctrines that have the potential to mitigate conflict between courts with concurrent jurisdiction.[276] Professor Young in his article, *Institutional Settlement in a Globalizing Judicial System,*[277] outlines categories of U.S. statutory and judge-made rules that can be grafted onto the international legal system. Some of these are potentially useful in the context of the relationship between the United States and the ICC—rules of abstention;[278] standards of review and collateral at-

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270. *Id.* at 2013.

271. *Id.*

272. Aleinikoff, *supra* note 266, at 2013.

273. *See id.*

274. *Id.* (citing KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF THE EUROPEAN LAW 61 (2001)).

275. Jenny Martinez points out that a "[c]loser examination of a variety of existing judicial systems, however, shows that the practices of courts themselves in ordering their relationships over time are at least as important as formal legal documents are in making judicial systems function." Martinez, *supra* note 2, at 444.

276. Young, *supra* note 80, at 1177. We should not worry that these doctrines are not spelled out in the Rome Statute. Martinez reminds us that the Constitution says little about the requirements of federalism. The development of federalism has been a process. *See* Martinez, *supra* note 2, at 457. She continues by saying that "we need not wait for an international code of procedure before we start to consider issues related to the structure and functioning of the system." *Id.* at 460.

277. Young, *supra* note 80, at 1154-56.

278. Note that Professor Young includes exhaustion in his analysis of abstention. Exhaustion of local remedies is an extremely common feature of international law, however, there is no exhaustion of local remedies rule under the ICC. This is logical considering the grave nature of the covered crimes and the high likelihood that the state or its instrumentality is the perpetrator of the crime(s).

tacks; and choice of law.

1. Rules of Abstention

Abstention is a vital component of federalism in the United States. It is a policy of judicial restraint whereby federal courts will not interfere with pending state cases. Abstention takes several forms in the United States.[279] The *Younger* abstention doctrine is particularly relevant to a study of how federalism principles can be exported to the ICC framework of shared jurisdiction.[280] *Younger* prohibits federal courts from interfering in a pending criminal case, absent bad faith.[281] The parallels between the *Younger* abstention doctrine and the complementarity system are striking, as both exist to facilitate relationships between courts with concurrent jurisdictions.[282] Jenny Martinez points out that abstention doctrines "invite a conversation among courts," and this ongoing conversation promotes stability and peace between them.[283]

2. Standards of Review and Collateral Attacks

Federal courts have the power to review final state court judgments on appeal and, more rarely, collaterally through a writ of habeas corpus.[284] Because they are collateral, habeas standards of deference are similar to what can be expected under a system of complementarity. Federal habeas relief is a mechanism for a detained person to challenge the legality of his state court conviction in federal court. According to Hart & Wechsler, habeas corpus is unique among other methods of collateral attack because it is not subject to res judicata.[285] Habeas is admittedly opposite of complementarity in that habeas corpus is a mechanism used to free convicted persons, while complementarity has the potential to convict persons whose domestic legal systems have proved unwilling or unable to do so. However, the similarity is in the standard of deference used in an adequacy determination by the reviewing

279. *See generally,* HART AND WECHSLER, *supra* note 221, at 1186-1258. Abstention doctrines bear the name of the cases that gave birth to them.

280. Younger v. Harris, 401 U.S. 37 (1971).

281. *Id.* at 53-54.

282. The U.S. Supreme Court in another abstention case enunciated one of the purposes of abstention is to avoid needless friction with state policies. *See* HART & WECHSLER, *supra* note 221, at 1188 (*quoting* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941)).

283. Martinez, *supra* note 2, at 450.

284. *See* Young, *supra* note 80, at 1155.

285. HART & WECHSLER, *supra* note 221, at 1296.

court. The federal habeas statute and Supreme Court cases plainly show that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[286] This deferential standard is clearly an example of institutional settlement, and should be applied under the ICC complementarity system.

3. Choice of Law

A federal system such as the United States is no stranger to the situation of choosing which law should apply in a given situation. U.S. courts have grappled with overlapping state laws as well as state and federal law. As a result, various doctrines have developed to govern which law should be applied. One of the most important of these doctrines is preemption.[287] Preemption provides a clear indication of which law should have precedence. In the United States, there are some areas where federal law preempts state law, so that the state law cannot stand in the event of a conflict. Because of the interstitial nature of federal law, however, federal preemption is the exception, not the rule. As applied to the ICC, Rome Statute crimes and defenses would preempt conflicting domestic laws covering genocide, crimes against humanity and war crimes.[288] Preemption is helpful, as all Legal Process doctrines are, in minimizing confusion and conflict.

V. IMPLEMENTING LEGISLATION THAT TAKES INTO CONSIDERATION CONSTITUTIONAL ISSUES AND THE LEGAL PROCESS METHOD

Treaties in the United States are not automatically self-executing, therefore Congress will need to pass legislation to implement the requirements of the Rome Statute of the International Criminal Court.[289] This implementation legislation needs to be specific in order to comply with the treaty as well as to protect U.S. interests. Implementing legislation can be drafted in such a way as to minimize constitutional issues and take into account Legal Process methods. In addition to expressly accepting the Rome Convention of the International Criminal Court, implementing legislation must add to or change the law in the following areas:

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286. Young, *supra* note 80, at 1179 (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)); *see also*, 28 U.S.C. § 2254(d)(1)(2000).

287. *See* Young, *supra* note 80, at 1156-57.

288. This is why, in conjunction with the system of complementarity, the United States should incorporate ICC definitions and elements into domestic implementing legislation. *See infra* Part V.A..

289. *See* Lee, *supra* note 84, at 5.

A. Crimes

Because of the system of complementarity, arguably the most important piece of legislation needed to protect U.S. interests is to ensure that the crimes covered under the Rome Statute of the International Criminal Court are fully criminalized under U.S. law.[290] While this purpose could be served by individual state court criminal codes and the military court-martial system, the federal government should codify the crimes covered by the ICC to ensure uniformity and full coverage, ensuring an independent and impartial forum as required by the Rome Statute.[291] Although the Rome Statute does not require that a state party include the covered crimes in domestic legislation, it is advantageous for the United States to do so, in order to provide a jurisdictional base for U.S. courts to preempt ICC jurisdiction.[292] This would create a safety net for the United States, allowing domestic jurisdiction over any case brought against one of its citizens by the ICC under the complementarity principle. There are several other good reasons for the United States to criminalize Rome Statute crimes, such as preventing the chance that the United States could become a safe haven for perpetrators of covered crimes and to contribute to the international strengthening of criminal justice in the area of the most serious crimes.[293]

The most effective way for the United States to accomplish this goal of criminalizing Rome Statute offenses is to implement legislation that codifies the crimes and their elements in a way that mirrors their treatment in the Rome Statute.[294] Defenses and penalties should also track the Rome Statute to provide the broadest possible protection for U.S. citizens.[295]

Implementation legislation must also codify crimes against the administration of justice. Article 70 of the Rome Statute requires states parties to enact laws prohibiting the following: giving false testimony; presenting false evidence; corrupting or retaliating against a witness; impeding, retaliating or bribing a court official; retaliating against a member of the court; and soliciting or accept-

290. It is important to note that the United States should take this step even if it ultimately decides not to ratify the convention, since the International Criminal Court has jurisdiction over persons who commit covered crimes in the territory of a state party, even if the defendants are citizens of non-state parties. *Id.* at 24.

291. U.S. military courts are at the most risk of being considered not effectively independent and/or impartial.

292. *See* Lee, *supra* note 84, at 44.

293. *See id.* at 22.

294. *See generally* Rome Statute, *supra* note 19, at arts. 6-8 for elements of these crimes.

295. Rome Statute, *supra* note 19, at arts. 31-33, 77.

ing a bribe as a member of the court.[296]

These crimes are the responsibility of states parties to criminalize and prosecute under domestic law as part of the obligation to cooperate with the court.[297] The United States should have no problem implementing these prohibitions and should look to federal laws already on the books dealing with the same issues in the domestic context.[298]

B. Cooperation and Judicial Assistance

For a system of shared power to work, with the power to enforce reserved to the states, states parties must cooperate with and lend assistance to the ICC. In fact, this is a requirement of the Rome Statute.[299] As a result, provisions for cooperation should be incorporated into U.S. implementing legislation. States are free to implement these requirements in a way that best suits each, provided that the cooperation mandated by the Rome Statute is possible.[300] At a minimum, provisions must be made in the following areas:[301] taking sworn testimony;[302] production of evidence;[303] questioning of suspects;[304] service of documents;[305] facilitating appearance of witnesses;[306] searches and seizures;[307] examination of sites, including exhumations;[308] provision of records and documents;[309] identification, freezing or seizure of assets;[310] provision for enforcement of fines, forfeitures and reparations;[311] provision for prisoners to serve their sentences in the U.S.[312]

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296. *Id.* at art. 70.

297. Lee, *supra* note 84, at 35.

298. *See generally,* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 303-06, 383-85 (2d ed. 2003) (discussing the elements of perjury and obstruction of justice).

299. Rome Statute, *supra* note 86, at arts. 86-102.

300. BRUCE BROOMHILL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 155 (2003).

301. Many of these provisions will have to be drafted carefully to comply with the Constitution.

302. *See* Elizabeth Wilmshurst, *Implementation of the ICC Statute in the United Kingdom, in* STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 147, 155 (Roy S. Lee ed. 2005).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 160.

307. Wilmshurst, *supra* note 302, at 160.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 162. Many of these areas will have to be drafted carefully to avoid constitutional violations.

312. *Id.* at 148 (explaining that Great Britain has made provision for its citizens convicted by the ICC to serve their sentences in the United Kingdom). While there is no obliga-

A referral of non-cooperation can be made to the Assembly of States Parties (or the U.N. Security Council if the Security Council referred the case to the ICC).[313] It remains to be seen what the consequences of non-cooperation will be, since the ICC is still in its early days.[314]

C. Surrender

Surrender of suspects is another area of fundamental importance in drafting implementing legislation for the Rome Statute Court, since it mandates the surrender of suspects to the jurisdiction of the court.[315] The Rome Statute leaves states parties discretion in designing surrender legislation, yet requires that surrender procedures should not be more burdensome than extradition procedures already on the books.[316] Because of the relaxed extradition procedures called for by the Rome Statute, a threshold issue in drafting surrender legislation is its constitutionality. As discussed in Part III.A.3., *supra*, legislation in the area of surrender is within the power of Congress.[317] The federal legislation providing for surrender in connection with the ICTY and ICTR is further proof that the necessary provisions of a new statute will be constitutional.[318]

Legislation should provide judicial review for the suspect, but a form of judicial review that is no more complex than that usually provided for under U.S. extradition law.[319] The judicial review should provide for a determination of whether the person before the court is the person named in the warrant and make an inquiry into whether the defendant's rights were protected.[320] Legislation must also instruct the judicial officer to immediately consult with the ICC about difficulties that arise in the surrender process.[321]

This relaxed standard presumes the trust relationship dis-

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tion on states parties to accept prisoners, it would further protect U.S. interests to agree to accept them. States have the power to accept or reject prisoners on a case-by-case basis, which is a viable way to protect U.S. citizens convicted under the ICC. States accepting prisoners must agree to certain conditions, including agreeing not to shorten a sentence without ICC permission. *See* generally, BROOMHILL, *supra* note 300, at 161-62.

313. *See* BROOMHILL, *supra* note 300, at 156.

314. *See id.*

315. *See* Rome Statute, *supra* note, at art. 89.

316. Lee, *supra* note 84, at 37; Rome Statute, *supra* note 19, at art. 91(2)(c).

317. *See* Harris & Kushen, *supra* note 90, at 10.

318. *See generally*, National Defense Authorization Act, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1986).

319. *See* Sheila O'Shea, *The Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. INT'L L. & POL. 367, 379-80.

320. *See* Lee, *supra* note 84, at 37.

321. Rome Statute, *supra* note 19, at art. 97.

cussed previously, calling for a presumption against prejudice in the ICC.[322] This same presumption against prejudice is inherent in the U.S. federal system and is an essential feature of institutional settlement.

D. Immunity

Immunity is an area that is related to extradition and surrender, and implementing legislation must make provision for the unique treatment of immunity under the Rome Statute. The ICC both ignores and protects immunity of diplomats and state officials.[323] While the Rome Statute recognizes that immunity is an area covered by numerous international agreements and customary international law, its drafters recognized that to achieve the purposes of the ICC, all persons, including heads of state, state officials and diplomats, must be held accountable for their criminal acts. The solution is a system where states must surrender their own officials regardless of immunity for officials, while pre-existing international obligations between the state and a second state may excuse the state from surrendering a foreign official.[324]

E. Bail

Bail is allowed under the Rome Statute, therefore implementing legislation should provide for bail to be granted pending determination of the proceedings.[325] Legislation should reference the Rome Statute requirements, which state that

> [i]n reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil [sic] its duty to surrender the person

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322. Harris & Kushen, *supra* note 90, at 8.

323. *See* Rome Statute, *supra* note 19, at arts. 27, 98(1).

324. *See* Wilmshurst, *supra* note 302, at 156. For an exacting study of the many issues of immunity under the ICC, *see generally* Dapo Akande, *The Application of International Law Immunities in Prosecutions for International Crimes, in* BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT (Joanna Harrington, et al., eds. 2006).

325. Rome Statute, *supra* note 19, at art. 59(4). *See also*, Wilmshurst, *supra* note 302, at 156.

to the Court.[326]

The federal statute should make clear that determination of bail must not include consideration of whether the arrest warrant was properly executed.[327]

F. Repeal of the American Servicemembers' Protection Act (ASPA)

Compliance with the Rome Treaty of the ICC will require legislation to repeal the American Servicemembers' Protection Act (ASPA). The ASPA was passed in 2002 in response to the entry into force of the ICC.[328] Its provisions are incompatible with the U.S. ratification of the Rome Statute. Major provisions of the ASPA include termination of military aid to countries that are party to the ICC, preclusion of U.S. military deployment to states party to the ICC, authorization for the U.S. president to employ "'all means necessary,' including military force, to rescue any United States national in ICC custody" and authorization to enter into immunity agreements with states party to the ICC.[329]

G. Status of Force Agreements (SOFAs)

Status of Force Agreements have been utilized by the United States since the 1950s to give the United States concurrent jurisdiction over their forces accused of illegal conduct while serving overseas.[330] Even though jurisdiction is concurrent, the agreements call for the host country to "give 'sympathetic consideration' to any U.S. request for waiver of the primary right to exercise jurisdiction if the United States claims such waiver 'to be of particular importance.'"[331] After the creation of the ICC, the United States utilized SOFAs in response to fear that U.S. military personnel would be subject to the jurisdiction of the ICC.[332] The United States should continue to use SOFAs to give the United States more areas of concurrent jurisdiction, providing the opportunity to

326. Rome Statute, *supra* note 19, at art. 59(4).

327. *Id.*

328. The American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2002).

329. Michael T. Wawrzycki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT'L & COMP. L. 579, 614 (2006) (commenting that "the United States has obtained separate bilateral immunity agreements from sixty countries, many of which are either smaller states or those with weak economies").

330. *See* Everett, *supra* note 26, at 138.

331. *Id.*

332. *See id.*

take advantage of complementarity.

VI. CONCLUSION

The International Criminal Court has the potential to reinforce principles of justice and the rule of law that the United States has long valued. The concurrent jurisdiction scheme established by the ICC represents a balanced distribution of power and does not overly threaten the U.S. Constitution or state sovereignty. U.S. involvement with the court would enhance the court's credibility and power, and increase its chance of success. If the United States becomes party to the treaty while the court is in its early days, it can graft federalism principles onto an emerging framework of transnational power. Doctrines in place in the U.S. federal system that have promoted order and functionality will serve the ICC well.[333] The ICC can increase the probability of U.S. involvement by adopting a vigorous set of rules and policies designed to promote institutional settlement. With lots of cooperation and a little luck, history will bear witness, just as it has in the case of the U.S. Constitution, to the creation of a "judicial comity borne of dialogue and trust."[334]

333. *See* Martinez, *supra* note 2, at 449.
334. O'Connor, *supra* note 181, at 40.