WHY THE UNITED STATES SHOULD BE WARY OF THE INTERNATIONAL CRIMINAL COURT: CONCERNS OVER SOVEREIGNTY AND CONSTITUTIONAL GUARANTEES

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I. INTRODUCTION

Halfway around the world, in a small country ravaged by civil war and ethnic strife, a small patrol of U.S. soldiers acting as part of an international peacekeeping force, moves down a winding road into a small town. They stop their vehicles in the town and chat briefly with some of the inhabitants. The residents seem friendly, but the soldiers are wary nonetheless. Recent weeks have seen peacekeepers attacked by snipers and small guerrilla bands that appear without warning, and disappear just as quickly, fading into the wilderness, and mingling with the civilian population. For the peacekeepers, it is difficult to tell one ethnic or religious group from another, and nearly impossible to tell friend from foe.

Within a few minutes, they resume their patrol and head out of the town. Suddenly, their patrol explodes into chaos when the lead vehicle strikes a hidden land mine at the edge of the town. Within seconds, a rocket propelled grenade disables the trail vehicle, and the patrol comes under small arms fire from attackers hidden in the town. With burning vehicles blocking the road ahead and behind, the soldiers deploy to their flanks, return fire, and look for a way out.

The situation is confusing. Their attackers are well hidden and move about quickly. Civilian homes and businesses, presumably with civilian occupants, surround them. The patrol commander radios for help, but additional ground forces will take time to get there. Casualties begin to mount and the patrol commander becomes desperate. He calls for, and

gets approval for artillery support. The supporting fire is limited, and ceases as soon as the patrol extricates itself from danger, but still there is damage to property and civilian lives are lost. Unfortunately, a historic and revered mosque is also damaged.

Following the incident there is some uproar that too much force was used, and an investigation is demanded. An official U.S. government investigation ensues. The investigation and a military court clear the patrol commander of any wrong-doing.

With the ordeal behind him, the patrol commander takes some much needed leave in a European resort area. Just as he settles in for some rest and relaxation, his peaceful interlude is abruptly interrupted by the local authorities who place him under arrest. He is informed that he is to be transported to the Hague and tried for war crimes before the International Criminal Court.

Shocked, the young American officer learns that a special prosecutor of the court (perhaps bowing to pressure from outraged Muslims around the world) has determined that the United States' investigation of the incident was not conducted impartially. Because, according to the prosecutor the United States is apparently unwilling to genuinely prosecute, the International Criminal Court has assumed jurisdiction. Now, rightly or wrongly, the American soldier finds himself seized and taken before a foreign court, to be tried not by a jury of his peers, but by a panel of foreign judges, for an offense of which he has already been acquitted, on charges which are very likely politically motivated.

Far-fetched? Maybe. Possible? Absolutely. With the advent of the International Criminal Court (ICC), created by the Treaty of Rome which was adopted by the majority of the international community on July 17, 1998,[1] the hypothetical situation described above could very well happen. At first it may sound far-fetched, but given recent U.S. involvement in places like Somalia and the Balkans, the possibility of U.S. soldiers finding themselves in such a situation is very real. And with the creation of the ICC, the possibility of U.S. servicemen being subjected to a trial before a foreign court, with foreign judges, and without the protection of the United States Constitution is also real. Perhaps more frightening is that under the Rome Treaty, the ICC can assert its jurisdiction over U.S. citizens even if the United States does not become a party to the treaty.[2]

1. *Rome Statute of the International Criminal Court*, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Treaty].

2. *See* Rome Treaty, *supra* note 1, art. 12. Under Article 12(2)(a), the ICC may exercise jurisdiction if the alleged conduct occurred in a state that is a party to the Treaty, regardless of whether or not the accused's state is a party to the Treaty. *See infra* note 39 for full text of Article 12. Thus, an American soldier deployed to a foreign country can be subjected to the ICC's jurisdiction even though the United States is not a party to the Treaty.

While it is true that U.S. citizens traveling and living abroad daily subject themselves to foreign laws and the jurisdiction of foreign courts, the ICC creates a completely different situation. The ICC is a supranational court with near-universal jurisdiction over a list of specified crimes that have not been fully defined, and which may be expanded.[3] This court has the authority to investigate alleged crimes on its own initiative, and the power to determine, on its own motion, whether it has jurisdiction over a particular case.[4] While supposed limitations do exist, the possibility of the court growing into a politically motivated, jurisdictional monstrosity is more real than some may imagine.

While many see the ICC as a great step forward for humanity and world peace, Americans should approach it with a wary, and realistic eye. The ICC is not the first international institution touted to be a revolutionary advancement for peace and justice in the world. So was the League of Nations. So was the United Nations (U.N.). The League failed utterly, and the U.N. hasn't fared much better.[5] In reality, the ICC will probably flounder about and won't amount to much. However, if it does get off the ground, Americans should be concerned. As foreign policy analyst Gary Dempsey notes, "the court threatens to diminish America's sovereignty, produce arbitrary and highly politicized 'justice,' and grow into a jurisdictional leviathan. . . . Moreover, it appears that many of the legal safeguards American citizens enjoy under the U.S. Constitution would be suspended if they were brought before the court."[6]

3. *See* Rome Treaty, *supra* note 1, art. 1-14 (detailing the establishment of the court and its jurisdiction).

4. *See* Rome Treaty, *supra* note 1, art. 15-19 (detailing the investigatory powers of the prosecutor and the admissibility of cases before the court).

5. Following World War I, the League of Nations was formed to insure international security and the peaceful resolution of disputes among states. For a great many reasons, it was a weak institution whose absolute failure was marked by the outbreak of World War II. *See* CHRIS BROWN, UNDERSTANDING INTERNATIONAL RELATIONS 23-31, 137-40 (1997); HENRY KISSINGER, DIPLOMACY 218-318 (1994); MICHAEL J. LYONS, WORLD WAR II: A SHORT HISTORY 14-71 (1989). Following World War II, the United Nations was formed for the same purposes as the League, with the hope that the institutional deficiencies that doomed the League would be corrected. THOMAS M. FRANCK, NATION AGAINST NATION 6-24 (1985). However, while the U.N. has proven to be somewhat more effective than the League, it has fallen far short of the dreams of its founders. *Id.* It has failed to prevent armed conflict and has not been particularly effective at resolving such conflicts once they've started. *See generally id.* at 25-272 (providing a general survey of the U. N., its successes and failures). During the Cold War, the U.N. was paralyzed by the veto authority of the opposing superpowers in the Security Council, and even following the end of the Cold War, it has failed as an institution of collective security. BROWN, *supra* at 137-40; KISSINGER, *supra* at 249-50. The war against Iraq in the early nineties, while receiving the approval of the Security Council, was actually conducted outside of the authority of the U.N., as were the recent attacks by NATO against Yugoslavia. BROWN *supra* at 137-40; KISSINGER *supra* at 249-50. Thus, the real authority and effectiveness of the U.N. is questionable.

6. Gary Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, 311 CATO POLICY ANALYSIS 1 (July 16, 1998) <http://www.cato.org/pubs/pas/pa-311.html>.

II. HISTORY AND CREATION OF THE INTERNATIONAL CRIMINAL COURT

"The concept of an international criminal court, having its own super-national criminal power goes back to the era of the League of Nations, a time of quite naïve faith in the omnipotence of the force of law and effusive enthusiasm regarding magnificent international projects."[7] In 1926, following the perceived failure to prosecute war criminals of World War I, a permanent international criminal court was proposed.[8] No such court was created, however, and at the end of World War II, ad hoc war crimes tribunals were organized at Nuremburg and Tokyo to handle the prosecutions against axis leaders and soldiers.[9] While these tribunals provided a possible framework for future development, they did not evolve into any permanent institutions. In 1948, the Genocide Convention called for a permanent tribunal to try those charged with genocide, but again, no such institution was created.[10]

During the Cold War, no real steps were taken toward the creation of a permanent institution. It wasn't until 1995, when the United Nations appointed a Preparatory Committee on the Establishment of a Criminal Court, that real work began.[11] Using the International Law Commission's Draft Statute of an International Court as a starting point,[12] the committee began the work that eventually resulted in the Rome Treaty.

On July 17, 1998, following a five week conference, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Treaty, creating the ICC.[13] Delegates from one-hundred twenty nations of the world voted to approve the Treaty, twenty-one abstained, and seven, including the United States, voted against it.[14]

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7. J. Holmes Armstead, Jr., *The International Criminal Court: History, Development, and Status*, 38 SANTA CLARA L. REV. 745 (1998) (citing Hans-Heinrich Jescheck, *International Criminal Law; Its Object and Recent Developments*, 1 INT'L CRIM. L. 49, 72 (1973)).

8. *Id.*

9. *See* MICHAEL J. LYONS, WORLD WAR II: A SHORT HISTORY 319-20 (1989) (summarizing the formation and conduct of the war crimes tribunals).

10. Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT'L L. REV. 27, 36 (1996) (citing Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan 12, 1951)).

11. *See* G.A. Res. 50/46, U.N. GAOR, 50th Sess., U.N. Doc. A/Res/50/46 (1995) (charging the committee with preparing an acceptable text for an international criminal court).

12. *See Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. 10, U.N. Doc. A/49/10 (1994).

13. *Final Act of the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court*, ¶¶ 1-2, 23-24, U.N. Doc. A/CONF 183/10 (1998).

14. The other countries voting against it were Israel, China, Libya, Qatar, Iraq, and Yemen. William F. Jasper, *Courting Global Tyranny*, 14 THE NEW AMERICAN No. 18 at 10 (August 1998). As of September 16, 1999, eighty-six countries had actually signed the treaty, and four (Italy, San

The United States voted against the Rome Treaty for several reasons. These were outlined before the Senate Foreign Relations Committee by David Scheffer, the head of the U.S. delegation to the Rome Conference.[15] First, the United States objected to the extension of the court's jurisdiction over non-party states.[16] Mr. Scheffer explained the United States' position:

> Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty . . . . Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone, everywhere in the world.[17]

The U.S. opposition to the jurisdictional design of the Treaty was deepened by the anomalous effect of the seven-year "opt out" provision.[18] While the United States favored a transition period of ten years to allow states "to assess the effectiveness and impartiality of the court," during which time states could opt out of the court's jurisdiction, the U.S. opposed the "opt out" provision that was finally adopted.[19] This provision allowed a seven year "opt out" period with respect to war crimes only.[20] The effect of this, when coupled with the court's apparent jurisdiction over non-party states, is that "a country willing to commit war crimes could join the treaty and 'opt out' of war crimes jurisdiction for seven years while a non-party state could deploy its soldiers abroad and be [immediately] vulnerable to assertions of jurisdiction."[21]

Second, the United States opposed the self-initiating prosecutor created by the Treaty.[22] The U.S. was concerned "that it will encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion."[23] The U.S. favored a prosecutor that could

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Marino, Senegal, and Trinidad and Tobago) had actually ratified it. Rome Statute of the International Criminal Court: Ratification Status (visited October 18, 1999) <http://www.un.org/law/icc/statute/status. html>. The Treaty will enter into force on the first day of the month after the sixtieth day following ratification by sixty countries. Rome Treaty, *supra* note 1, art. 126.

15. USIS Washington File, *23-07-98 Text: Scheffer On Why U.S. Opposed International Criminal Court*, at 1 (visited April 2, 1999) <http://www.usembassy.org.uk/forpol2.html>.

16. *Id.* at 3.

17. *Id.*

18. Rome Treaty, *supra* note 1, art. 124. Article 124 states:

> Notwithstanding article 12 paragraph 1, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [War Crimes] when a crime is alleged to have been committed by its nationals or on its territory.

Rome Treaty, *supra* note 1, art. 124.

19. USIS Washington File, *supra* note 15, at 3-4.

20. Rome Treaty, *supra* note 1, art. 124.

21. USIS Washington File, *supra* note 15, at 4.

22. *Id.*

23. *Id.*

only act on the referral of a party government or the U.N. Security Council.[24]

Third, the United States opposed the inclusion of the crime of aggression because aggression is not defined under customary international law, and the Treaty itself does not define it.[25] The U.S. also insisted that to assign individual criminal responsibility, there had to be "a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state."[26]

Fourth, the United States opposed the inclusion of terrorism and drug crimes within the jurisdiction of the ICC.[27] It was the United States' position that including these crimes in the court's jurisdiction would not assist in the fight against them, and may actually hinder such efforts.[28] As Mr. Scheffer explained:

> [C]onferring jurisdiction on the court could undermine essential national and transnational efforts and actually hamper the effective fight against these crimes. The problem . . . [is] not prosecution, but rather investigation. These crimes require an ongoing law enforcement effort against criminal organizations and patterns of crime, with police and intelligence resources. The court will not be equipped effectively to investigate and prosecute these types of crimes.[29]

Finally, the United States could not agree to the provision that the treaty be accepted with no reservations.[30] Mr. Scheffer explained, "[w]e believed that at a minimum there were certain provisions of the treaty, particularly in the field of state cooperation with the court, where domestic constitutional requirements and national judicial procedure might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty."[31]

All of the reasons given by Mr. Scheffer for the United States' refusal to support the Rome Treaty are valid and legitimate concerns. American citizens should find some comfort in the knowledge that their government is not willing to blindly stumble into such an ill-conceived international regime. However, Mr. Scheffer's explanations do not tell the whole story. His reasoning is very practical, but he does not truly address the more frightening aspects of the ICC—the threat it poses to U.S. sovereignty and to the rights guaranteed by the U.S. Constitution.

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24. *Id.*
25. *Id.*
26. *Id.*
27. USIS Washington File, *supra* note 15, at 4.
28. *Id.* at 4-5.
29. *Id.*
30. *Id.* at 5. Article 120 of the Rome Treaty states, "[n]o reservations may be made to this Statute." Rome Treaty, *supra* note 1, art. 120.
31. USIS Washington File, *supra* note 15, at 5.

III. DIMINUTION OF SOVEREIGNTY

In the summer of 1776, Thomas Jefferson penned the Declaration of Independence, declaring the United States of America sovereign and independent. He listed twenty-eight grievances against the King of Great Britain as reasons justifying American independence.[32] Among these were:

> He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation;
>
> . . . .
>
> For depriving us in many cases, of the benefits of Trial by Jury;
>
> For transporting us beyond Seas to be tried for pretended offences . . . .[33]

To the American colonists, these grievances were so serious that they felt it necessary to take up arms and throw off the yoke of the British King. The Rome Treaty threatens to once again place Americans in danger of the very treatment which the founding fathers found so abhorrent to necessitate independence. The Rome Treaty threatens to erode that very independence by subordinating national sovereignty to an international institution.

Justice Joseph Story declared that "[t]he first and most general maxim [of international jurisprudence] is . . . that every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[34] Sovereignty is the supreme and independent political authority of a state.[35] It is a state's "independence of outside authority, and in particular . . . its supreme jurisdiction over its subjects and territory."[36] Sovereignty is the cornerstone of every state's existence.[37] The ICC threatens the very core of national sovereignty by superimposing its jurisdiction over all territories and all people.[38]

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32. THE DECLARATION OF INDEPENDENCE para. 3-31 (U.S. 1776).

33. *Id.* at para. 15, 20-21.

34. JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18 (8th ed. 1883).

35. Black's Law Dictionary defines sovereignty as "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

36. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 17 (1977).

37. International relations scholar Hedley Bull notes that the chief hope of any particular state participating in the society of states is the recognition of its "independence of outside authority," i.e., its sovereignty. *Id.* The price to pay for this independence is the "recognition of like rights to independence and sovereignty on the part of other states." *Id.* The sovereign equality of states is a basic foundation of international society. The United Nations itself "is based on the principle of the sovereign equality of all its Members." U.N. CHARTER art. 2, para. 1.

38. In his *Commentaries on the Conflict of Laws*, Justice Story observed:

> Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural- born subjects or others. This is a natural consequence of the first proposition [*see supra* note 34]; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to a declara-

A. The ICC's Expansive Jurisdiction

The greatest danger of the ICC lies in its broad jurisdiction and the possible expansion and abuse of that jurisdiction. The ICC can exercise jurisdiction over any state that is a party to the Rome Treaty, as well as over any individuals, regardless of nationality, within the territory of a party state.[39] Its jurisdiction also extends over any citizen of a party state, even when in the territory of a non-party state.[40] The ICC has subject matter jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[41] Suggestions have already been made to expand its jurisdiction beyond this list.[42] Theoretically, the ICC "shall be complementary to national criminal jurisdictions."[43] The intent is that the ICC will complement, not replace na-

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> tion that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey. The absurd results of such a state of things need not be dwelt upon.

STORY, *supra* note 34, at § 20. Unfortunately, because of the Rome Treaty, the absurd results of extraterritorial legislation must now be dwelt upon. The Rome Treaty creates an international institution which is at liberty to regulate and enforce laws beyond territorial boundaries. *See infra* Part III.A-B. As Justice Story noted, this situation is "wholly incompatible with the equality and exclusiveness of the sovereignty of all nations," and is "equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations." STORY, *supra* note 34, at § 20.

39. Rome Treaty, *supra* note 1, art. 12. Article 12 reads:

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 [*see infra* note 41].
> 2. In the case of article 13, paragraph (a) or (c) [exercise of jurisdiction on referral by a party state or following a prosecutor initiated investigation], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crimes is a national.
> 3. If the acceptance of a State which is not a Party to this Statue is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Rome Treaty, *supra* note 1, art. 12.

40. *Id.*

41. Rome Treaty, *supra* note 1, art. 5. Article 5 reads:

> 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression.
> 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Rome Treaty, *supra* note 1, art. 5.

42. *See* discussion *infra* Part III.B.

43. Rome Treaty, *supra* note 1, preamble.

tional criminal justice systems.[44]

Under this theory of complimentary jurisdiction, however, the ICC can exercise jurisdiction if a state shows an unwillingness or inability to genuinely prosecute crimes.[45] Moreover, the ICC can assume jurisdiction over a person who has already been subjected to court proceedings in a domestic court if the ICC determines that the proceedings were undertaken "for the purpose of shielding the person concerned from criminal responsibility," or were otherwise not conducted "independently or impartially."[46] Of course, the determination as to whether a state is unwilling or unable to "genuinely prosecute," or whether prior domestic court proceedings were independent and impartial, lies solely with the ICC itself.[47] Therefore, "because it will set precedents regarding what it considers 'effective' and 'ineffective' domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court."[48] This constitutes "an unprecedented change in the sources of national lawmaking, one that diminishes the traditional notion of state sovereignty."[49]

Perhaps even more disconcerting is the fact that the Rome Treaty gives the ICC jurisdiction over the citizens of non-party states.[50] The ICC can even exercise its jurisdiction within the territory of non-party states with respect to citizens of party states.[51] This is in direct contravention of standing international law which binds states only to those international agreements to which they consent.[52] Article 34 of the Vienna Convention on the Law of Treaties states "[a] treaty does not create either obligations or rights for a third State without its consent."[53]

Under the Rome Treaty's jurisdictional regime, however, U.S. soldiers operating in foreign lands can be brought before the ICC for actions taken during the conduct of their official military duties, even though the United States is not a party to the treaty. With American soldiers deployed around the world, from Korea to the Balkans, this places a great number of U.S. citizens in danger of being subjected "to a

44. *See* William F. Jasper, *Courting Global Tyranny*, 14 THE NEW AMERICAN No. 18 at 15 (August 1998). European Commissioner Emma Bonino stated that the ICC "is not designed to replace national courts but to complement them." *Id.* According to John Anderson, president of the World Federalist Association, "[t]he principle of complementarity underlying the treaty assures that the court will hear a case only when no national court is available or willing to hear it." *Id.*

45. Rome Treaty, *supra* note 1, art. 17.

46. *Id.*

47. Article 19 of the Rome Treaty states that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it." *Id.*

48. Dempsey, *supra* note 6, at 3.

49. *Id.*

50. Rome Treaty, *supra* note 1, art. 12. *See supra* note 39 for text of article 12.

51. *Id.*

52. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 8 I.L.M. 679.

53. *Id.*

jurisdiction foreign to our constitution, and unacknowledged by our laws."[54]

Under this regime, the ICC can also assume jurisdiction over individuals within U.S. territory if those individuals are nationals of a party state.[55] For example, if the ICC had been in existence in the late seventies and Iran was a party to the Treaty, the ICC could have assumed jurisdiction over the deposed Shah of Iran during his brief asylum in the U.S. While there are probably those who would consider this to be just, such an occurrence would be a major step towards the subordination of national sovereignty to a single world institution. The disregard of national borders and the will of national governments should not be condoned, even for noble goals.

B. Efforts to Expand the ICC's Jurisdiction

"The potential for jurisdictional expansion of the Rome Treaty is virtually limitless."[56] Frighteningly, many advocates of the ICC already desire to expand its jurisdiction beyond the core offenses of genocide, war crimes, crimes against humanity, and aggression.[57] The Final Act adopted by the delegates to the Rome Conference recommends an additional conference to "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court."[58] Human rights groups, such as Amnesty International for example, have urged that a wide variety of human rights violations be included in the court's jurisdiction as well.[59] Others have proposed including such "crimes" as "outrages upon personal dignity,"[60] and "causing serious threats to the environment."[61] The amendment procedures under Article 121 of the Treaty would allow such crimes to be added to the court's jurisdiction.[62]

This possible expansion of the court's jurisdiction is extremely dangerous. First, the vague and ambiguous nature of some of the proposed crimes is such that it is difficult to imagine any workable definition for them being articulated. Second, the addition of crimes such as terrorism and drug trafficking to the ICC's jurisdiction "would infringe upon a na-

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54. This was one of the grievances against the King of Britain listed in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

55. Rome Treaty, *supra* note 1, art. 12(2)(b).

56. Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, 833 (1999).

57. Dempsey, *supra* note 6, at 4-6.

58. *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Resolution E, U.N. Doc. A/CONF 183/10 (1998).

59. Dempsey, *supra* note 6, at 4.

60. *Id.* at 5.

61. *Id.*

62. Rome Treaty, *supra* note 1, art. 121 (outlining amendment procedures). Under this article, seven years after the Treaty's entry into force, any State Party may propose amendments. *Id.* There is no language restricting the subject matter or scope of amendments. *Id.*

tion's sovereignty and ability to try crimes that affect domestic policy in their home setting."[63]

C. The Dangers of the ICC Prosecutor

Article 15 of the Rome Treaty provides that the prosecutor of the court "may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."[64] Thus, the ICC prosecutor may, on his own initiative, launch investigations and indict individuals for crimes within the ICC's jurisdiction. There is no requirement that the prosecutor act on the request of a sovereign state or at the direction of an international organization such as the United Nations Security Council. The prosecutor is completely independent, without any accountability (other than to the ICC).[65] The danger of politicized investigations and indictments clearly exists. With the authority to initiate investigations on his own, the ICC prosecutor has the potential to become a grand inquisitor of unprecedented dimensions, able to impose his office wherever he pleases with complete disregard for national sovereignty.

D. The Death Knell for Sovereignty?

"If allowed to stand—and to thrive and grow, as its champions intend—this Court will sound the death knell for national sovereignty, and for the freedoms associated with limited, constitutional government."[66]

There are those, however, who feel that sovereignty is an outmoded concept and should be discarded. Some, such as J. L. Brierly, argue that the whole notion of sovereignty is a false idea.[67] Legal scholar Louis Henkin suggests that "[f]or legal purposes at least, we might do well to relegate the term [sovereignty] to the shelf of history as a relic from an earlier era."[68] Writer Sandra Jamison argues that the doctrine of sovereignty "is no longer tenable," and that the United States should be willing to cede some of its traditional sovereignty for the greater good of an international court.[69]

However, academic claims about the continued relevance of sovereignty should be balanced against reality. In spite of what some schol-

63. Rodriguez, *supra* note 56, at 832-33.
64. Rome Treaty, *supra* note 1, art. 15.
65. Article 15 requires that the prosecutor, upon reaching the conclusion that there is a reasonable basis to go forward with an investigation, must submit a request to the Pre-Trial Chamber of the court for authorization to proceed with the investigation. *Id.*
66. Jasper, *supra* note 44, at 10.
67. J. L. BRIERLY, THE LAW OF NATIONS 54-5 (6th ed., Waldock 1963).
68. LOUIS HENKIN, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 16 (3d ed. 1993).
69. Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 432 (1995).

ars suggest, state sovereignty is still a cornerstone of international law, and it is the bulwark from which domestic rights are defended from foreign infringement.[70] As realist scholars note, "[a]n extremely elaborate network of institutions has emerged in the world but . . . the Westphalia System [i.e., system of sovereign states] remains in place and sovereignty is undiminished as a guiding principle."[71] While it is true that every treaty imposes in some slight manner on state sovereignty, this does not mean that sovereignty should be casually discarded. Americans, as citizens of the world's only superpower, with the world's oldest written constitution, have a great deal at stake, and should therefore jealously guard the national sovereignty of the United States.

Some ICC supporters, however, simply claim that worries over diminished sovereignty are exaggerated.[72] They argue that "concerns of a runaway court are wildly chimerical," and that "[t]he principle of 'complementarity' would protect against any such tendencies."[73] Attempting to assuage such fears in the U.S. Senate, European Commissioner Emma Bonino stated that the ICC "will not . . . undermine national sovereignty."[74] The court, she said, "is not designed to replace national courts but to complement them."[75] The chief prosecutor of the Yugoslav War Crimes Tribunal, Canadian Justice Louise Arbour, has echoed this, cautioning those worried about potential dangers that "an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes."[76]

These assurances, however, are not convincing. Rather, Americans should heed the following words of Thomas Jefferson: "In questions of power let no more be heard of confidence in man but bind him down from mischief by the chains of the constitution."[77] Instead of blindly accepting the good intentions and soothing assurances of ICC supporters, Americans would do well to exercise the "prudent jealousy" described

70. The United Nations itself is based "on the principle of the sovereign equality of all its Members." U.N. CHARTER art. 2, para. 1. One of the fundamental purposes of the U.N. is to protect the territorial integrity and political independence of member states. *See* U.N. CHARTER art. 2, para. 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .").

71. BROWN, *supra* note 5, at 131 (discussing the realist critique of the functionalist theory of international relations). Professor Brown also notes that sovereignty is "both a *juridical status* and a *political concept*." *Id.* at 125. On the one hand, sovereignty describes a state's legal position in the world, that it recognizes no legal superior. *Id.* The other part of sovereignty describes a state's political powers and abilities. *Id.* at 126. He notes that the latter aspect of sovereignty can grow larger or smaller, and that state's have been willing to cede *some* aspects of their political sovereignty in order to streamline international functions. *Id.* at 125-28. However, "states have been unwilling to surrender their *juridical* status as sovereign." *Id.* at 128.

72. Jasper, *supra* note 44, at 15.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Jasper, *supra* note 44, at 7 (quoting Thomas Jefferson).

by James Madison in his Memorial and Remonstrance Against Religious Assessments.[78] Madison wrote,

> We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.[79]

Americans need to see past the good intentions and soothing rhetoric of the ICC supporters and recognize the threat it poses to national sovereignty. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[80] Americans need to recognize the consequences of the ICC and, rather than allowing it to usurp American sovereignty and strengthen itself by exercise and precedents, should avoid the ICC entirely.

IV. CONSTITUTIONAL CONFLICTS

Beyond the general threat to national sovereignty, the Rome Treaty and the ICC directly conflict with the United States Constitution. The ICC's supranational jurisdiction cannot be reconciled with the judicial system created by the Constitution.[81] The vague and ambiguous crimes that the ICC would prosecute could not pass constitutional scrutiny.[82] The pardon power of the President could be trumped by the ICC.[83] And there are no provisions in the Rome Treaty for many of the protections guaranteed by the Bill of Rights.[84]

Because the Rome Treaty allows for no reservations or modifications by states signing it,[85] the United States cannot become a party to the treaty. Within the United States, the Constitution is the supreme law of the land.[86] Countless judicial decisions have further made it clear that the United States cannot enter into a treaty that is in violation with or contravenes any provision of the Constitution.[87]

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78. James Madison, *A Memorial and Remonstrance*, ¶ 3 (1785) *in* 8 THE PAPERS OF JAMES MADISON 300 (William M. E. Rachal, et al., eds. 1973).

79. *Id.*

80. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

81. *See* discussion *infra* Part IV.A.

82. *See* discussion *infra* Part IV.B.

83. *See* discussion *infra* Part IV.C.

84. *See* discussion *infra* Part IV.D-G.

85. *See* Rome Treaty, *supra* note 1, art. 120 (*see supra* note 30 for text of article).

86. U.S. CONST. art. VI, cl. 2; *see* discussion *infra* Part IV.H.

87. *See* Boos v. Barry, 485 U.S. 312, 324 (1988) (stating that a particular international obligation did not represent a compelling state interest significant enough to justify abrogating the First Amendment); Reid v. Covert, 354 U.S. 1, 15 (1957) ("no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (noting that the treaty making power "does not extend so far as to authorize what the Constitution forbids"); United States v. Wong Kim Ark, 169 U.S. 649, 700 (1898) (recognizing that international relations powers are vested in the political departments of government, except so far as the Constitution requires the

A. Parameters of Judicial Power in the U.S.

Article III, Section 1 of the U.S. Constitution establishes that "[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish."[88] Only a court of the United States may exercise jurisdiction over a U.S. citizen for offenses committed within the United States.[89] Therefore, the Rome Treaty would conflict with the U.S. Constitution if the ICC attempted to assert jurisdiction over a U.S. citizen for offenses committed on U.S. territory.

The case of *Ex parte Milligan*[90] provides pertinent case law on this issue. *Milligan* involved a civilian in Indiana who was arrested, tried, and sentenced to death by a military court during the Civil War.[91] Milligan petitioned for a Writ of Habeas Corpus, challenging, among other things, the jurisdiction of the military court.[92] The United States Supreme Court declared that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[93] The Court noted that the Constitution expressly vests judicial authority "in one Supreme Court and such inferior courts" as may be established by Congress, and that "no part of [the] judicial power of the country was conferred on [the military court]."[94] Thus, "[o]ne of the plainest constitutional provisions was . . . infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."[95] Milligan's arrest, trial, and sentence were therefore invalid.[96]

The ICC, like the military court in *Milligan*, is clearly not a court ordained under Article III of the Constitution. It therefore cannot exercise jurisdiction over a U.S. citizen for acts committed in the United

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judicial department to intervene); De Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids."); The Cherokee Tobacco, 78 U.S. 616, 620 (1870) ("[A] treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); and Doe v. Braden, 57 U.S. 635, 657 (1853) (stating that the courts have no right to annul or disregard any provisions of a treaty unless it violates the Constitution).

88. U.S. CONST. art. III, § 1.

89. *See Ex Parte* Milligan, 71 U.S. 2, 121-22 (1866). *See also* STORY, *supra* note 34, at § 18 (noting that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory"); § 20 ("[I]t would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory."); *id.* at § 34 ("[E]very nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals.").

90. 71 U.S. 2 (1866).

91. *Id.* at 107.

92. *Id.* at 108.

93. *Id.* at 120-21.

94. *Id.* at 121 (quoting U.S. CONST. art. III, § 1).

95. *Ex Parte* Milligan, 71 U.S. 2, 122 (1866).

96. *Id.* at 130.

States. If it attempted to do so, it would be in direct conflict with the Constitution.[97]

B. Due Process and the Vagueness Doctrine

A central problem with the Rome Treaty is that the crimes it covers are not well defined. The international community is not in complete agreement on the definitions for genocide,[98] crimes against humanity,[99] and war crimes.[100] The definitions used in the Treaty are

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97. If the accused were a member of the armed forces when the alleged offenses were committed, the language of *Milligan* suggests that the ICC could, arguably, exercise jurisdiction without violating the Constitution. The *Milligan* Court noted that members of the armed services give up certain Constitutional rights in this area and can be tried by non-Article III courts. *Id.* at 123.

98. Article 6 of the Rome Treaty defines genocide as follows:

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Rome Treaty, *supra* note 1, art. 6. This is the same definition used in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Although this crime has thus been defined for nearly five decades, it is still controversial. Rodriguez, *supra* note 56, at 819-20. John R. Bolton, senior vice president of the American Enterprise Institute, noted in his testimony before the Senate Foreign Relations Committee on July 23, 1998, that even though genocide is the oldest of the crimes specified in the Rome Treaty, "there is hardly complete clarity in what it means." Jasper, *supra* note 44, at 11-12. There is controversy over the omission of political groups and "cultural genocide" from the definition, and whether or not they should be added. Rodriguez, *supra* note 56, at 820. There is also disagreement over the size of a "part" of a group; does it mean a large number such as a million people, or would a village of fifty people be enough? *Id.* And finally, "the vagueness of the definition . . . makes difficult the subjective determination of the 'intent' requirement." *Id.*

99. Article 7 of the Rome Treaty lists eleven crimes as "crimes against humanity" when committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Treaty, *supra* note 1, art. 7. The listed crimes are:

> (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Treaty, *supra* note 1, art. 7. However, the Rome Treaty does not adequately define these crimes, leaving the potential for problems of interpretation. Rodriguez, *supra* note 56, at 825. Even something as presumably straightforward as the definition of murder varies from country to country. *Id.* The more vague crimes, such as the crime of "persecution," pose even greater interpretation problems. Jasper, *supra* note 44, at 13.

100. The general concepts of the law of war and war crimes are not new, although the first attempts at codification did not occur until the early twentieth century. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631. However, attempts at codification have failed to clearly define all war crimes; there is still much room for interpretation. The Rome Treaty contains an extensive list of war crimes which generally parallels those outlined in the various Hague Conventions. *See* Rome Treaty, *supra* note 1, art. 8 (defining war crimes). Therefore, problems of vagueness and interpretation remain. Jasper, *supra* note 44, at 11-

ambiguous and open to interpretation.[101] Moreover, the crime of aggression is not defined at all.[102] Such vaguely defined crimes cannot pass constitutional scrutiny in the United States. In *Lanzetta v. New Jersey*,[103] the Supreme Court stated, "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."[104]

Under the Fifth Amendment to the U.S. Constitution, "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."[105] The Supreme Court has interpreted due process to include clear notice that certain acts are unlawful:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[106]
> Therefore, criminal statutes that are unclear or ambiguous violate due process and are "void for vagueness."[107]

The purpose behind the void for vagueness doctrine "is to warn individuals of the criminal consequences of their conduct."[108] Because most of the crimes included in the Rome Treaty "are not settled matters in international law," those subject to the ICC's jurisdiction are left without clear notice of what constitutes an actionable offense.[109] Thus, the majority of the crimes included in the Rome Treaty would be considered unconstitutionally vague and invalid in the United States.

C. The Pardon Power

The President of the United States has the constitutional authority

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14; Rodriguez, *supra* note 56, at 826-28; Dempsey, *supra* note 6, at 10.

101. *See supra* notes 98-100.

102. Article 5(2) of the Rome Treaty states, "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." Rome Treaty, *supra* note 1, art. 5(2). Defining the crime, however, is going to be problematic. "Many feel that aggression is a nebulous concept. For example, . . . the International Law Commission spent twenty years unsuccessfully trying to define it. In addition [critics add], aggression is performed by governments, not individuals." Jasper, *supra* note 44, at 15.

103. 306 U.S. 451 (1939). The appellants were convicted of violating a New Jersey statute making it a crime to be a "gangster." *Id.* at 452. Because the statute used general criteria applicable to a broad range of people, and did not define what was meant by the term "gang" other than the requirement that it consist of two or more people, the Court declared the statute void for vagueness. *Id.* at 453-58.

104. *Lanzetta*, 306 U.S. at 453.

105. U.S. CONST. amend. V.

106. Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

107. Jordan v. De George, 341 U.S. 223, 230 (1951).

108. *Id.* at 230.

109. Rodriguez, *supra* note 56, at 825. *See also supra* notes 98-102.

to grant pardons for offenses against the United States.[110] Alexander Hamilton stated that the purpose of this power was to "restore the tranquillity of the commonwealth" following times of civil unrest and strife.[111] Under the Rome Treaty, the ICC could trump this constitutional power.

For example, if there was some sort of civil unrest in the U.S., such as rebellion, rioting, or terrorism, the President could, perhaps as part of the negotiations to end the unrest, pardon individuals involved. However, the ICC prosecutor could ignore the pardons and bring indictments in the ICC against those individuals if any of their acts constituted violations of the Rome Treaty. Not only would this allow a supranational actor to defeat the President's constitutional authority, it would also eliminate the pardon as a negotiating tool to end civil unrest.

If this sounds far fetched, one need only look to the recent events surrounding the former Chilean President Augusto Pinochet.[112] As part of the transition to a free democracy, the Chilean people granted Pinochet amnesty for any crimes he may have committed while he was the dictator of Chile in return for his agreement to peacefully turn over the reins of government.[113] This agreement was negotiated in good faith and both sides kept their part of the bargain. The Chilean people, in effect, gave Pinochet a pardon in order "to restore the tranquillity" of Chile.[114] However, in what could be a precursor to ICC action, a Span-

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110. U.S. CONST. art. 2, § II, cl. 1. This clause states, "[the President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." *Id.*

111. THE FEDERALIST NO. 74 (Alexander Hamilton). Hamilton explained "the principal argument for reposing the power of pardoning . . . in the Chief Magistrate [president] is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth." *Id.* The pardon power has been used often throughout American history. Its first use was in 1792 by President George Washington to end the "Whiskey Rebellion." CONGRESSIONAL QUARTERLY, INC., POWERS OF THE PRESIDENCY 65-6 (2d ed. 1997). It was used by Presidents Lincoln and Andrew Johnson to grant amnesty to confederate soldiers following the civil war. *Id.* at 66. Other presidents have not shirked from use of the pardon power; President Truman pardoned more than 1,500 violators of the Selected Service Act, and President Reagan issued nearly four hundred pardons during his tenure. *Id.* at 67. Other notable examples include President Nixon's pardon of labor leader Jimmy Hoffa, President Ford's pardon of former President Nixon following Watergate, and President Bush's pardon of six Reagan administration officials involved in the Iran-contra scandal. *Id.* at 66.

112. *See* Elliott Abrams, *Justice for Pinochet?*, COMMENTARY, Vol. 107, Issue 3, March 1, 1999, *available in* 1999 WL 3660355; Anthony Faiola, *Pinochet Case Opens Closet of a Continent*, WASH. POST, Oct. 23, 1998, at A20, *available in* 1998 WL 16564042.

113. *See* Abrams, *supra* note 112; Faiola, *supra* note 112.

114. *See* Genaro Arriagada, *Beyond Justice*, WASH. POST, Oct. 25, 1998, at C07, *available in* 1998 WL 16564451. Mr. Arriagada, Chile's ambassador to the United States and one of the leaders of the victorious political campaign that defeated Pinochet, notes in reference to the amnesty that the leaders of Chile "have undertaken the necessary but little understood task of responding to the demands for justice, while at the same time promoting stability, peace, economic development, and social progress." *Id.* He explains:

> A peaceful transition from dictatorship to democracy is not a judicial problem. Rather, politics must discriminate among the differing and sometimes antagonistic objectives that society demands. Certainly, one of those objectives must be the achievement of the highest degree of justice possible for past human rights abuses. However, that fundamental objective cannot override all others, such as: reaching political stability; ending a war, be

ish judge, with complete disregard for Chilean sovereignty, recently issued an indictment against Pinochet for genocide, torture, and terrorism, and demanded his extradition from the United Kingdom where he was visiting for medical treatment.[115] Pinochet was placed in custody in the U.K., and while it has yet to be decided whether he will be extradited to Spain, his situation illustrates what could happen under the ICC. It is thus possible that an American citizen, guilty of some heinous offense but pardoned for the good of the country, could find that pardon ignored and himself answering to the ICC.

While this seems highly unlikely at this date, one must not assume that such a situation could not arise. The American Civil War was probably unthinkable at the turn of the nineteenth century, but a little over sixty years later the country found itself torn apart with Americans fighting Americans on the field of battle. Had the ICC been around then, some of the Confederate leaders and soldiers might have found themselves indicted despite the general amnesty granted by the President after the war.[116] One should never discount the possibilities. Under the Constitution, the President can grant pardons at his discretion except in cases of impeachment.[117] This power cannot be taken away by a treaty.

D. Double Jeopardy

The Fifth Amendment to the U.S. Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[118] On its face, the Rome Treaty also appears to protect against double jeopardy.[119] Article 20 of the Treaty provides that the ICC shall try no person for conduct for which the person has already been convicted or acquitted by the ICC, or by another court.[120] However, the Rome Treaty's shield against double jeopardy is a thin veil, easily pierced. Article 20 excepts the protection in cases where the ICC

> it armed or ideological; creating a climate that allows development and progress; finding common ground between irreconcilable differences; or bringing the leaders of groups, which once relied on violent methods to achieve their ideals or objectives, to a negotiating table.

Id.

115. *See* Brook Larmer, *What's a Tyrant to Do?*, NEWSWEEK, Nov. 2, 1998, *available in* 1998 WL 17010638.

116. President Lincoln first issued a proclamation extending a pardon to those confederates who would swear an oath of allegiance in 1863. J. G. RANDALL & DAVID HERBERT DONALD, THE CIVIL WAR AND RECONSTRUCTION 560 (2d ed. 1969). President Johnson announced a similar proclamation granting general amnesty to most of the confederate soldiers on May 29, 1865. *Id.* at 561. This was followed by thousands of special pardons for those who were not included in the earlier proclamations, and finally by an unconditional pardon for all confederates issued on December 25, 1868. *Id.*

117. U.S. CONST. art. II, § 2, cl. 1.

118. U.S. CONST. amend. V.

119. *See* Rome Treaty, *supra* note 1, art. 20.

120. *Id.*

determines that the prior court proceedings were "for the purpose of shielding the person concerned from criminal responsibility," or were "not conducted independently and impartially."[121] As the sole judge of the propriety of prior court proceedings, the ICC may freely indict and prosecute those who have been tried and acquitted by national courts.[122] The Rome Treaty's protection against double jeopardy protects only at the whim of the ICC.

Thus, it is possible that a U.S. citizen accused of war crimes, tried and acquitted by a U.S. court, could find himself indicted by the ICC. For example, following the events at My Lai 4, during the Vietnam War, twelve people were indicted and tried in the U.S. for war crimes, but only one, Lieutenant William Calley, was convicted.[123] There were (and surely still are) a large number of people that did not feel that justice was done and that more people should have been convicted.[124] Had the ICC been around at that time, it could have stepped in and indicted all of those individuals who had been acquitted, violating their constitutional rights and ignoring U.S. sovereignty.

E. Trial By Jury

One of the grievances listed against the King of England by Thomas Jefferson in the Declaration of Independence was "[d]epriving us, in many cases, of the benefits of trial by jury."[125] In his *Commentaries on the Constitution of the United States*, Justice Story noted that trial by jury "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude."[126] Brought to America by the English colonists, trial by jury was incorporated into the U.S. Constitution "as a fundamental right."[127]

Trial by jury in criminal proceedings was apparently so important

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121. *Id.*

122. Article 19(1) of the Rome Treaty states: "[t]he Court shall satisfy itself that it has Jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case . . . ." Rome Treaty, *supra* note 1, art. 19(1).

123. *See* SEYMOUR M. HERSH, COVER UP 255 N. * (1972). The My Lai 4 incident involved the murder of Vietnamese civilians by U.S. soldiers during combat operations in Vietnam. *Id.* A large number of soldiers were implicated, but only twelve faced charges. *Id.* The twelve were charged with murder or assault with intent to commit murder, but only Lieutenant William Calley, a platoon leader, was convicted. *Id.*

124. *See* Jeannine Davanzo, *An Absence of Accountability*, 3 HOFSTRA L. & POL'Y SYMP. 287, 287 (1999).

125. DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

126. JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 923 (Carolina Academic Press 1987) (1833).

127. *Id.* Justice Story remarked that when the colonists settled, "they brought this great privilege [trial by jury] with them, as their birth-right and inheritance, as a part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." *Id.* Moreover, he said, "the constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognized, and confirmed it in the most solemn terms." *Id.*

to the founders of this country that they included it in two places in the Constitution.[128] Article III, section 2, clause 3 states that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury."[129] The Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[130] The object of this clause, as Justice Story observed, is not only to guarantee trial by jury, but also "to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him."[131]

The Rome Treaty has no such provision. Trials in the ICC will be conducted at the seat of the court in the Netherlands.[132] Trials will be before a panel of judges elected by the various member countries,[133] not before a jury of one's peers. In fact, the entire panel of judges would very likely be made up of foreign judges.

F. Speedy Trial

The U.S. Constitution also guarantees the right to a speedy trial.[134]

128. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. Moreover, the Seventh Amendment, preserving the right to a jury trial in civil suits "at common law, where the value in controversy shall exceed twenty dollars," is yet a third provision in the Constitution protecting the right to a jury trial. U.S. CONST. amend. VII.

129. U.S. CONST. art. III, § 2, cl. 3.

130. U.S. CONST. amend. VI.

131. STORY, *supra* note 126, at § 925.

132. Rome Treaty, *supra* note 1, art. 3, 62. Article 62 states, "[u]nless otherwise decided, the place of the trial shall be the seat of the Court." Rome Treaty, *supra* note 1, art. 62. The seat of the court is established by Article 3, which reads:

> 1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
>
> 2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
>
> 3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Rome Treaty, *supra* note 1, art. 3.

133. *See* Rome Treaty, *supra* note 1, art. 36-39 (detailing the selection of judges and judicial organization). Article 36 outlines the qualifications for judges, and the nomination and election process. Rome Treaty, *supra* note 1, art. 36. It provides that "there shall be 18 judges" chosen from "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." *Id.* Each state that is a party to the treaty may nominate one candidate for any given election who must be a national of a State Party (although not necessarily a national of the nominating state). *Id.*

Article 37 provides that "in the event of a vacancy, an election shall be held" to fill it. Rome Treaty, *supra* note 1, art. 37. Article 38 outlines the procedure for electing the President and Vice-Presidents of the Court (selected from among the judges by a majority of the judges). Rome Treaty, *supra* note 1, art. 38. Article 39 details the divisions of the court into Pre-Trial, Trial, and Appeals divisions. Rome Treaty, *supra* note 1, art. 39.

134. U.S. CONST. amend. VI. The Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." *Id.*

The Rome Treaty purports to do so as well.[135] Article 67(1)(c) of the Treaty provides that the accused has the right "[t]o be tried without undue delay."[136] However, these may be empty words. If one looks to the recent Yugoslav War Crimes Tribunal as a model for how the ICC might operate, as many ICC proponents suggest, one would note that prosecutors there have argued that as much as five years is a reasonable time for a defendant in custody to await trial.[137]

Another model that ICC advocates cite is the European Court of Human Rights, which has ruled at various times that detentions of three, four, or even seven years before trial are acceptable.[138] Under the United States Constitution, however, these are not even close to acceptable. While there is no time limit mandated by the Constitution, generally, a delay of more than eight months is deemed "presumptively prejudicial."[139] The standard under federal law is 70 days.[140]

G. Illegal Search and Seizure

Another of the protections provided by the Constitution, and one that is central to a free society, is the protection against unreasonable searches and seizures. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[141] This protection is noticeably absent from the Rome Treaty.

In the United States, the protection against unreasonable searches and seizures has been enforced by way of the exclusionary rule.[142] Un-

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135. Rome Treaty, *supra* note 1, art. 67(1)(c).

136. *Id.*

137. Jasper, *supra* note 44, at 16.

138. *Id.*

139. WAYNE R. LAFAVE & JERALD H. ISRAEL, CRIMINAL PROCEDURE 791 (2d ed. 1992).

140. 18 U.S.C. § 3161 (1994) (noting that the seventy day period begins at either the filing date of the indictment or information, or the date of the defendant's appearance before the court, whichever is later).

141. U.S. CONST. amend. IV. The history of this amendment can be traced to the controversial practice in England of issuing general warrants for the seizure of persons or papers. *See* STORY, *supra* note 126, at § 1005 (tracing general history of the Fourth Amendment). These warrants were issued in general terms, without describing anyone or anything in particular, leading to challenges in the English courts in the 1760's. *Id.* The English courts ruled that such general warrants were illegal because of their lack of specificity. *Id.* In the American colonies, the similar practice of issuing "writs of assistance" had developed, empowering revenue officers to search places for smuggled goods at their discretion, and giving them the authority to command the assistance of local public officials in so doing. *See* Boyd v. United States, 116 U.S. 616, 624-27 (1886) (describing the general history behind the Fourth Amendment). The founders of the United States were well aware of the abuses of the general warrants and writs of assistance, as well as the declared illegality of them, and sought to insure for the citizens of the United States protection against such unreasonable and arbitrary searches and seizures. *Id.*; STORY, *supra* note 126, at § 1005.

142. The exclusionary rule was born out of the cases of *Boyd v. United States*, 116 U.S. 616 (1886), and *Weeks v. United States*, 232 U.S. 383 (1914). The Court in *Boyd* noted that it was "unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself," and thus recognized a link between the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's prohibition against forced self-incrimination. *Boyd*, 116 U.S. at 633. Ac-

der this rule, courts can exclude evidence that was obtained as a result of an illegal search or seizure.[143] This serves to force law enforcement officials to follow constitutional strictures and respect the rights of individuals during their investigations.[144] Failure to do so will often result in critical evidence being excluded from trial and the accused being acquitted.[145] However, the Rome Treaty has no such protection, and the ICC has no exclusionary rule. Thus, it is possible that a U.S. citizen could be brought before the ICC and convicted on the basis of evidence that would be inadmissible in a United States court because of misconduct by law enforcement.

When one considers the proposed expansion of the ICC's jurisdiction to include drug crimes, the full impact of this is indeed frightening.[146] The ICC could provide an easy way for law enforcement officers waging the war on drugs to circumvent the Constitution. No longer would the police have to concern themselves with obtaining valid search warrants or establishing probable cause. They could conduct searches at will, at any time, in any place, seizing evidence without regard to constitutional requirements, because rather than prosecuting in a United States court (where the unlawfully seized evidence would be excluded) they could simply seek prosecution in the ICC. While this might seem improbable right now, the danger is too great to accept the risk.

H. The Supremacy of the United States Constitution

Within the sovereign borders of the United States, no law is superior to the Constitution. Article VI, clause 2 of the Constitution, known as the Supremacy Clause, states: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

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cordingly, the Court held that such items unlawfully seized were inadmissible against the defendant. *Id.* at 638. In *Weeks*, the Court followed the *Boyd* rationale and firmly established the exclusionary rule as part of U.S. constitutional law. The *Weeks* Court noted:

> If letters and private documents can thus be [unlawfully] seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Weeks, 232 U.S. at 393. While the *Weeks* decision was limited in its application to the federal government, in Mapp v. Ohio, 367 U.S. 643, 655 (1961), the Court extended the exclusionary rule to apply to the states as well.

143. Thus, in *Mapp v. Ohio*, the Court ruled that allegedly obscene materials seized following an illegal search were not admissible as evidence against the defendant. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

144. *Id.* at 648 (noting that the exclusionary rule was a "deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words'"); Elkins v. United States, 364 U.S. 206, 217 (1960) ("Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

145. *See supra* note 143.

146. *See* discussion *supra* Part III.B (noting proposals to expand the ICC's jurisdiction to include additional crimes such as terrorism and drug trafficking).

United States, shall be the supreme Law of the Land."[147] In the seminal case of *Marbury v. Madison*,[148] the Supreme Court observed, "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void."[149] The Court further noted that, "[i]t is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank."[150]

It has been suggested, however, that the wording of the Supremacy Clause indicates that treaties are of authority equal to the Constitution, not subordinate to it. In *Missouri v. Holland*,[151] Justice Oliver Wendell Holmes wrote:

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.[152]

Following this train of thought, the Rome Treaty, were the U.S. to sign it, would be of equal authority as the Constitution. The Treaty's conflicts with the Constitution would not render it invalid, and under the "last in time" approach,[153] the Treaty could conceivably be allowed to override the Constitution.

Fortunately for Americans, this line of reasoning is clearly unsupported by historical experience and U.S. case law. In 1803, Thomas Jefferson wrote, "[o]ur particular security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no Constitution."[154] There can be only one supreme law of the land, and in the United States that one is the Constitution. Therefore, a treaty cannot supersede the Constitution.

As far back as 1853, in *Doe v. Braden*,[155] the Supreme Court recognized that treaties may not violate the Constitution, and suggested that

147. U.S. CONST. art. VI, cl. 2.
148. 5 U.S. (1 Cranch) 137 (1803).
149. *Marbury*, 5 U.S. (1 Cranch) at 180.
150. *Id.*
151. 252 U.S. 416 (1920).
152. *Id.* at 433.
153. Under the "last in time" doctrine, where treaties and statutes conflict, "the one last in date will control the other." Whitney v. Robertson, 124 U.S. 190, 194 (1888).
154. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sep. 7, 1803), *in* JEFFERSON WRITINGS 1139-41, at 1140 (Merrill D. Peterson ed., 1984).
155. 57 U.S. 635 (1853).

courts may invalidate provisions of a treaty that do so.[156] The *Braden* Court stated that a treaty, made by proper authority, is law, "and the courts of justice have no right to annul or disregard any of its provisions, *unless they violate the Constitution of the United States*."[157] This rationale was followed by *The Cherokee Tobacco*[158] case in 1870, in which the Supreme Court stated that "[i]t need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."[159]

In the 1890 case of *De Geofroy v. Riggs*,[160] the Supreme Court further discussed the constitutional limitations of treaties. The Court stated:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments . . . . It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government . . . .[161]

The Court reiterated this position in *United States v. Wong Kim Ark*,[162] and again in *Asakura v. City of Seattle*.[163] The definitive pronouncement on this issue[164] came, perhaps, in *Reid v. Covert*,[165] in which the Supreme Court stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[166]

The Court most recently addressed the issue again in 1988, in *Boos v. Barry*.[167] The *Boos* Court held unconstitutional a District of Columbia statute prohibiting signs or displays critical of foreign governments within 500 feet of embassies, because the law violated the First Amendment.[168] The Court rejected the Government's argument that it had a compelling interest in prohibiting such signs or displays near em-

156. *Id.* at 657.
157. *Id.* (emphasis added).
158. 78 U.S. 616 (1870).
159. *Id.* at 620.
160. 133 U.S. 258 (1890).
161. *Id.* at 266-67.
162. 169 U.S. 649, 700 (1898) (stating that a power affecting international relations is vested in the political departments of government, regulated by treaty or act of Congress "except so far as the judicial department has been authorized by treaty or statute, or is required by the paramount law of the constitution, to intervene").
163. 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiations between our government and other nations.").
164. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 217 (5th ed. 1995).
165. 354 U.S. 1 (1957).
166. *Id.* at 16.
167. 485 U.S. 312 (1988).
168. *Id.*

bassies because it was required by the Vienna Convention on Diplomatic Relations "to prevent any disturbance of the peace of the mission or impairment of its dignity."[169] The Court noted:

> As a general proposition, it is of course correct that the United States has a vital interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." . . . At the same time, it is well established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[170]

The Supreme Court has thus made it apparent that treaties are limited by the Constitution. The case law clearly indicates that a treaty which is repugnant to the Constitution is invalid under U.S. law. Because the Rome Treaty holds so many potential conflicts with the Constitution, it cannot be given the effect of law in the United States. If the United States were to sign and ratify the Treaty, it is likely that many of its provisions, if not the entire Treaty, would be found invalid by the Supreme Court, and any convictions obtained under the Treaty would be held unconstitutional. In its current form, the United States simply cannot agree to the Treaty or accept the jurisdiction of the ICC.

V. CONCLUSION

The United States charted the correct course by remaining out of the Rome Treaty, and should continue on that course. Although the Rome Treaty was founded on good intentions and humanitarian ideals, Americans should remember that all that glitters is not gold. While the Treaty's purpose may be noble, the ICC is a Pandora's Box that poses too many threats to U.S. sovereignty and the Constitution to be acceptable. The United States has nothing to gain by joining the Rome Treaty and has much to lose.

As Justice Brandeis observed in *Olmstead v. United States*, "[m]en born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[171] Americans should not wait until the well-meaning but misguided ICC has "strengthened itself by exercise, and entangled the

169. *Id.* at 322 (citing The Vienna Convention on Diplomatic Relations, April 18, 1961, art. 22, 23 U.S.T. 3227, 3237-38).

170. *Id.* at 323-24 (citing U.S. CONST. art. I, § 8, cl. 10; Reid v. Covert, 354 U.S. 1, 16 (1957); 1 RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 cmt. a (Tent. Draft No. 6, Apr. 12, 1985) ("[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them.")).

171. Olmstead et al. v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

question in precedents."[172] We should instead exercise reasoned skepticism and Madison's "prudent jealousy."[173] We should see the consequences in the principle, and avoid those consequences by denying the principle.[174] The United States should not become a party to the International Criminal Court.

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172. *See* Madison, *supra* note 78, at ¶ 3.
173. *Id.*
174. *Id.*