Ours is a time of unparalleled prosperity and peace, of hope in humankind and its seemingly limitless ability to race toward new horizons. Yet Charles Dickens's appellation has never rung so true: It is the best and worst of times.¹

The severity of mass killings in our own time, on the eve of the millennium, reflects how little we know of ourselves, of our neighbors, and of our future. Neither our faith in the impressive march of technology nor our other aspirations... can overshadow the grotesque reality of the massacres that characterize civilization, or the lack thereof, in today's troubled world.²

The international community has plunged into this grotesque morass and emerged with hope in the form of the Rome Statute of the International Criminal Court.

In July 1998, an overwhelming majority of the world’s nations voted for the Rome Statute’s version of the International Criminal Court ("the Court"). Yet to a few nations, the Rome Statute represented an acrid antidote to the

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¹ J.D. 2000, University of Georgia.


poison of modern inhumanity. In the end, the United States was one of seven countries refusing to vote for the statute’s version of the Court.3

After briefly examining the history and development of an international criminal court, this note will turn to the evolution of the United States’ views of such a court. After years of somewhat tepid support, Congress and the Clinton Administration in the early to mid-1990s warmed up to the notion, offering cautious support for the concept of an international criminal court. At the same time, elements within Congress and the Administration began to formulate specific United States’ objectives for an international criminal tribunal.

Following this synopsis of the United States stance on the Court, this paper will give an overview of the Rome Statute. Specifically, the definitions of offenses, jurisdictional structure, and composition of the Court will be explored.

Finally, the bulk of this effort will center around United States concerns with the International Criminal Court4—in short, why the United States refused to sign onto the Rome Statute. The United States’ chief concerns relate to the Court’s “trigger” mechanism, or who may initiate investigations, the role of the prosecutor, the Court’s jurisdiction, problems with the crime of aggression, and finally, constitutional issues. This paper outlines and discusses various arguments against United States ratification of the Rome Statute. Instead of falling into the trap of resting on idealistic platitudes or doling out underdeveloped criticisms, this note presents and refutes the best arguments against United States’ ratification of the statute. In the end, it is in the United States’ best interests to ratify the Rome Statute.

The United States’ concerns are by no means indicative of unfounded paranoia, especially given that nation’s dominant role in international military actions, which expose many United States citizens to trouble spots and potentially, to the Court’s jurisdiction. Yet the substantive provisions of the Rome Statute significantly address the United States’ primary concerns with the Court. Given this, the statute is a document which is largely compatible with United States’ policy interests. The United States should therefore give serious thought to joining other nations in ratifying the Rome Statute.


4 Throughout this note, to reduce linguistic awkwardness, the Court is referred to in the present tense even though it does not yet exist.
II. HISTORY AND DEVELOPMENT OF THE INTERNATIONAL CRIMINAL COURT

The concept of an international criminal court was not an invention of the latter half of the twentieth century. Rather, a permanent court was first proposed by the International Law Association (ILA) in 1926 after an inadequate response to World War I war crimes prosecutions. The draft, however, was never officially considered.

After the horrors of the Second World War, the Allies decided to try the Axis leaders at Nuremberg rather than execute them. Thus, the first international military tribunal in history was born. The four Allied powers—the United States, Great Britain, France, and the Soviet Union—created the International Military Tribunal (IMT) at Nuremberg by agreement on August 8, 1945. Nineteen other nations also subsequently assented to the agreement, giving the Nuremberg Tribunal an aura of international consensus. The Nuremberg Tribunal tried Nazis for crimes against peace, war crimes, and crimes against humanity. Twenty-two individuals were tried by the tribunal, and of those, nineteen were found guilty and three were acquitted. The IMT established that aggressive war, which includes crimes against peace, war crimes, or crimes against humanity, is

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6 See Wexler, supra note 5, at 665, 671.
7 See id. at 672-73. Justice Robert Jackson opened the Nuremberg Tribunal with this statement: “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.” Id. at 673.
9 See Wexler, supra note 5, at 673-74.
10 See id. at 674 n.48.
12 See Wexler, supra note 5, at 675.
contrary to international law and is therefore punishable. The foundations for international criminal law were thus laid.

The International Military Tribunal for the Far East at Tokyo (IMTFE), also coming on the heels of World War II, bore little resemblance to its distant European cousin. Unlike the IMT, the IMTFE was not created by international treaty. Instead, the IMTFE was created by General Douglas MacArthur, the Supreme Commander for the Allied Powers, acting on behalf of the Far Eastern Commission. In a special proclamation, General MacArthur established the IMTFE’s jurisdiction and substantive law. Under the tribunal’s charter, MacArthur had the power to appoint judges and the president of the tribunal. Moreover, MacArthur appointed the Chief of Counsel who led the prosecution. Although General MacArthur attempted to downplay his role in the proceedings, his involvement was readily apparent. In the end, the IMTFE, reflecting at least a trifle of international consensus, offered at best a measured step toward a permanent international criminal court.

After the Second World War, discussions began concerning the establishment of a permanent international criminal court. An International Law Commission (ILC) committee constructed draft statutes in 1951 and 1953. Yet for years there was no political will to create an international court.

In 1989, perhaps coinciding with the subsidence of Cold War tensions, many nations showed a renewed interest in creating an international criminal court. In December of that year, the United Nations General Assembly requested that the ILC inquire into the issues associated with an international

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13 See Ferencz, supra note 8, at 212; see also ROBERT E. CONOT, JUSTICE AT NUREMBERG 21-23 (1983) (stating that, ironically, the British, Russians, and French opposed the American desire to indict the Germans for launching an aggressive war. The other allies were concerned that their wartime activities could be construed as aggression).
14 See Ferencz, supra note 8, at 215.
15 See, e.g., M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 HARV. HUM. RTS. J. 11, 32 (1997) (stating that this was perhaps due to United States’ desires to limit any Soviet influence in the region and United States’ concerns about Japan’s post-war conduct).
16 See id. at 32. The Far Eastern Commission was agreed to in order to give the Soviet Union some control over the future of Japan as a reward for its entry into the war. But control of the Far Eastern Commission was left to the United States. See id.
17 See Wexler, supra note 5, at 679 n.46.
18 See id.
19 See Bassiouni, supra note 15, at 33.
20 See Wexler, supra note 5, at 679, 682.
21 See id. at 682.
tribunal. The ILC deliberated on the issue from 1990 to 1994 and issued a draft statute in 1994. After receiving the ILC draft, the General Assembly established an ad hoc committee to review issues involved in the draft statute. After the committee deliberated in the summer of 1995, the General Assembly established a Preparatory Committee to work toward a draft that would be generally accepted. The Preparatory Committee continued to meet in 1997 and 1998 and completed a draft Convention of the Establishment of an International Criminal Court in April 1998. The draft was delivered to the Conference of Plenipotentiaries, which met in Rome from June 15 to July 17, 1988. On July 17, 1998, this Rome Conference adopted the final Rome Statute of the International Criminal Court.

As the ILC was deliberating and drafting the document in the early 1990s, unspeakable atrocities were occurring in the former Yugoslavia. The Security Council created the International Criminal Tribunal for the Former Yugoslavia in 1993. At that time, no international court since the Nuremberg and Tokyo tribunals had tried individuals for crimes under international law. One year later, in 1994, the Security Council created another ad hoc tribunal to address the situation in Rwanda. The Yugoslavia and Rwanda ad hoc
tribunals demonstrated to many that persons in modern times could, at least in some fashion, be held accountable under international law.  

While the ad hoc tribunals were largely seen as successful in that some criminals were held accountable under international law, problems did arise. First, many have charged that ad hoc courts are afflicted with "tribunal fatigue," meaning that the process of creating and administering an international tribunal is slow, unwieldy, and expensive. In addition, many nations without a seat on the Security Council are wary of the ad hoc tribunal approach initiated by the Security Council because it gives permanent members of the Security Council the ability to insulate themselves and their allies from investigation. Moreover, some have suggested that ad hoc courts have limited deterrence power. These tribunals are established after the crimes occur and arguably do little to make perpetrators fear accountability under international law. Reliance on ad hoc tribunals also creates, at minimum, an appearance that enforcement of international criminal law is selective or inconsistent.

31 See, e.g., United States Mission to the United Nations, U.S. Statement on the International Criminal Court, Oct. 31, 1996, 6th Comm. (visited Sept. 21, 1998) <gopher://gopher.igc.apc.org:70/00/orgs/icc/natldocs/GA51/us.1096> ("There is no doubt that the ad hoc war crimes tribunals for the former Yugoslavia and for Rwanda have been critical first steps" to making international criminals truly accountable under international law.).


35 See David Stoelting, Status Report on the International Criminal Court, 3 HOFSTRA L. & POL'Y SYMP. 233, 238 (1999). For example, why should a tribunal be established to investigate alleged abuses in the former Yugoslavia and Rwanda but not those in Cambodia under the Khmer Rouge?
As a result of the problems of ad hoc tribunals, interest in a permanent international criminal court began to build.\textsuperscript{36}

III. EVOLUTION OF AMERICAN VIEWS AND OBJECTIVES CONCERNING THE INTERNATIONAL CRIMINAL COURT

In the mid to late 1980s, prior to any significant international movement toward an international criminal court, the United States, and the United States Congress in particular, lent general support to the idea of a limited court that would prosecute terrorists and drug traffickers. For example, the 1986 Omnibus Security and Terrorism Act mandated that the president "consider the possibility of eventually establishing an international tribunal for prosecuting terrorists."\textsuperscript{37} In 1989, when asked about the possibility of an international court, Secretary of State James Baker termed the idea "interesting." He added that the concept had "some fundamental problems" but noted that the idea was worthy of consideration.\textsuperscript{38} By 1990 some within Congress, including Senator Arlan Specter (Republican, Pennsylvania), a long-time proponent of an international court, favored a tribunal with jurisdiction broader than that previously discussed.\textsuperscript{39}

The aftermath of the Persian Gulf War in 1991 brought renewed vigor to United States congressional support for a limited international court. Yet the Senate favored only a tribunal with jurisdiction over war crimes involving Iraqi leaders and soldiers.\textsuperscript{40} Especially when read in conjunction with a subsequent concurrent resolution passed only by the House of Representatives,

\textsuperscript{36} See id. (stating that "[i]n the 21st Century we will need a permanent court that both deters such heinous crimes globally and stands prepared to investigate and prosecute their perpetrators").


\textsuperscript{38} \textit{Id.} at 41 (stating that "we could probably reach some sort of a United States position on that and then after some period of time, perhaps an international agreement").

\textsuperscript{39} See, e.g., 136 CONG. REC. S18160-01 (daily ed. Oct. 25, 1990). Specter endorsed an international court and noted that many countries are "seriously being affected" by crimes "such as aggression, war crimes, crimes against humanity, apartheid, torture, piracy on board commercial vessels, aircraft hijacking, kidnaping [sic] of diplomats. . . , taking of civilian hostages and environmental damages to name a few." \textit{Id.}

\textsuperscript{40} See S. Res. 76, 102d Cong., 137 CONG. REC. S3345-01 (daily ed. Mar. 14, 1991) ("Resolved, That it is the sense of the Senate that the President should confer with Kuwait, other member nations of the coalition or the United Nations to establish an International Criminal Court or an International Military Tribunal to try and punish all individuals involved in the planning or execution of the above referenced crimes, including Saddam Hussein.").
it appears that Congress favored the creation of an ad hoc court with jurisdiction limited to the Iraqis.\footnote{See H. R. Con. Res. 137, 105th Cong., 143 CONG. REC. H10870-02 (daily ed. Nov. 13, 1997) (declaring that "it is the sense of the House of Representatives that the Congress... work actively and urgently within the international community for the adoption of a United Nations Security Council resolution establishing an International Criminal Court for Iraq").}

In 1993, as the debate over the International Criminal Court began to focus on more substantive issues and draft provisions, Congress and the executive branch each offered qualified support for the Court. As the ILC was deliberating on its draft statute, the Clinton administration decided to take a “fresh look” at the establishment of the Court.\footnote{See 139 CONG. REC. S14443-02 (daily ed. Oct. 26, 1993).} In the words of Conrad K. Harper, the State Department legal adviser, “the concept of an international criminal court is an important one, and one in which we have a significant and positive interest.”\footnote{Id.} At the same time, the administration expressed concerns about the ILC draft’s treatment of subject-matter jurisdiction, definitions of crimes, appellate procedure, and drug and terrorism-related crimes.\footnote{See id.}

The Senate’s approach to the Court mirrored the cautious stance of the Clinton administration. In the 1994 Foreign Relations Authorization Act, the Senate declared that an international criminal court would greatly strengthen the international rule of law, thereby serving the interests of the United States.\footnote{See H.R. 2333, 103d Cong., 108 Stat. 382 (1994).} Thus, the Senate advised the United States delegation to advance this proposal at the United Nations.\footnote{See id.} Some senators, however, suggested that the Senate would not consent to a treaty that “permits representatives of any terrorist organization” or citizens of any country listed by the secretary of state as having repeatedly provided support for acts of terrorism to sit in judgment of American citizens.\footnote{S. Res. 559, 103d Cong., 140 CONG. REC. S559-02 (daily ed. Feb. 2, 1994).} Some senators also intimated that unless American citizens were guaranteed their First and Fourth Amendment rights (including the right to freedom of speech and the right to be secure against unreasonable searches and seizures by the government), Senate consent would not be forthcoming.\footnote{See id.} Until the mid-1990s, Congress remained vaguely supportive of the tribunal but did not delve into the specifics of any proposals.\footnote{See Timothy C. Evered, An International Criminal Court: Recent Proposals and American Concerns, 6 PACE INT’L L. REV. 121, 130 (1994).}
The Clinton administration continued this bargaining stance of qualified support. In an October 1996 statement to the United Nations General Assembly, the United States pledged its support for "the establishment of a permanent international criminal court" even as members of the Preparatory Committee attempted to pen a generally accepted draft. The United States went on to pronounce its positions on several issues. Among other things, the United States advocated a strong Security Council role and clear and detailed definitions of crimes.

IV. OVERVIEW OF THE ROME STATUTE ESTABLISHING THE INTERNATIONAL CRIMINAL COURT

The Rome Statute limits the Court's jurisdiction to genocide, crimes against humanity, war crimes, and crimes of aggression. The statute indicates these are the "most serious crimes of international concern." The text of the statute lays out detailed definitions of offenses for genocide, crimes against humanity, and war crimes. The crime of aggression, however, is not defined by the statute but will be defined later by amendment. In addition, the Elements of Crimes will be adopted by a two-thirds majority of states parties in order to assist the Court in the interpretation of the definitions of crimes.

The Rome Statute advances a policy of strict construction concerning interpretation of the definitions of offenses. The definitions of crimes are to be "strictly construed and shall not be extended by analogy." This "strict construction" policy mirrors the United States' insistence that the Court prosecute for violations of "well-established crimes" and not for "violations of..."

51 See id. (mentioning also that member states should only be able to refer "situations" and not lodge charges against individuals and that the United States also supported a jurisdictional system characterized by complementarity, where the international court would only complement or supplement national jurisdiction).
52 Rome Statute, supra note 26, art. 5; see Congressional Testimony, supra note 2 (indicating that the conference adopted an annexed resolution that stated that crimes of terrorism and drug crimes should be included within the jurisdiction of the Court).
53 Rome Statute, supra note 26, art. 1.
54 See id. arts. 6-8.
55 See id. arts. 5, 121 and 122.
56 See id. art. 9.
57 Id. art. 22(2).
of principles."\textsuperscript{58} A strict textual interpretation inevitably would reduce the amount of discretion the prosecutor or others would have in investigating and prosecuting.

In addition to specifying a regime of strict statutory construction, the statute incorporates "threshold" levels into the definitions of several offenses. These thresholds limit the number of acts included in the Court's jurisdiction. For example, crimes against humanity include certain acts "when committed as part of a widespread or systematic attack."\textsuperscript{59} So murder, torture, rape, or enslavement, for instance, are not crimes against humanity if not part of a "widespread" attack "directed against any civilian population."\textsuperscript{60} The definition of war crimes similarly allows jurisdiction when the acts are committed as part of a "plan or policy" or on a "large scale."\textsuperscript{61}

While the definition of genocide adopted in the statute does not contain a quantitative threshold, it does require a specific \textit{mens rea}, or intent, of the actor. Genocide, by definition, requires killing or other acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."\textsuperscript{62} So even though genocide is not required to occur on a large scale or as part of a plan for the Court to have jurisdiction, this \textit{mens rea} requirement limits acts that fall under the Court's jurisdiction.

Assuming that crimes have occurred, there are several other prerequisites for the Court to exercise jurisdiction. The Court has jurisdiction only if a state involved is a party to the statute. At least one of the following must be a party to the statute or must have accepted jurisdiction of the Court: the state where the conduct occurred or the state of the accused.\textsuperscript{63} In addition, jurisdiction must be triggered either by a referral to the prosecutor or by initiation of an


\textsuperscript{59} \textit{Rome Statute}, supra note 26, art. 7. Crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sex offenses (including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization), persecution on certain grounds, enforced disappearance, apartheid, and "other inhumane acts of similar character..."

\textit{Id.}

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} art. 8. According to Professor Edward M. Wise, "Genocide has always been understood as requiring a 'specific intent' or purpose." Yet article 30(2) of the Rome Statute defines "intent" as if it were knowledge. This problem may be addressable in the Elements of Crimes. \textit{Association of American Law Schools Panel on the International Criminal Court}, 36 \textit{AM. CRIM. L. REV.} 223, 246 (1999).

\textsuperscript{62} \textit{Rome Statute}, supra note 26, art. 6.

\textsuperscript{63} \textit{See id.} art. 12(2).
investigation by the prosecutor herself. A referral, if used, must be issued by a state party or by the Security Council acting under chapter VII of the UN Charter. For example, one nation might refer a situation to the prosecutor. Or, alternatively, the prosecutor may begin an investigation under her own initiative, or “proprio motu,” based on “information on crimes within the jurisdiction of the Court.”

If jurisdiction exists, the case must also be admissible in order for the Court to hear the matter. The statute declares cases inadmissible where the case is already being investigated or prosecuted (or has been investigated) by a state with jurisdiction. Therefore, for example, if Serbia (assuming it were to ratify the Rome Statute and the statute had entered into force) had either investigated or prosecuted a case over which it had jurisdiction, then the case would be inadmissible before the Court. An exception to this rule occurs when the state with jurisdiction is “unwilling or unable genuinely” to investigate or prosecute. Somewhat remarkably, the statute allows the prosecutor initially to determine when a state is “unwilling or unable genuinely” to prosecute.

If jurisdiction is determined to exist, and the case is admissible, then there is only one other possible obstacle to the Court hearing the case. The statute mandates that the Security Council may delay investigation or prosecution for twelve months in a resolution adopted under chapter VII of the UN Charter. This deferral ability is especially powerful since the Security Council may be constrained in their actions.

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64 See id. art. 13(a)-(c).
65 See id. art. 13(a)-(b).
66 Id. art. 15(1).
67 See id. art. 17.
68 See id. art. 17(b). At least one writer has argued that one way to demonstrate that a court is “unwilling or unable genuinely” to investigate or prosecute is that the court is not able to provide minimum guarantees necessary for a fair trial. Sara Stapleton, Note, Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation, 31 N.Y.U. J. INT’L. L. & POL. 535, 544 (1999).
69 Rome Statute, supra note 26, art. 53(1)(b). In deciding whether to initiate an investigation, “the Prosecutor shall consider whether: (b) The case is or would be admissible under article 17.” Id. Yet article 17(1) states that “the Court shall determine that a case is inadmissible,” and elsewhere the ability to rule on the admissibility of evidence is attributed to the pre-trial chamber. Id. art. 64(8)(a). So it would seem that the prosecutor initially makes this evaluation, which may subsequently be overturned by the pre-trial chamber.
70 Id. art. 16. Chapter VII of the UN Charter states: “The 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.” U.N. CHARTER art. 39.
renew the deferral.71 The Security Council in this way may delay a prosecutor's investigation, perhaps indefinitely.72

After receiving a referral of a situation or upon the prosecutor's own initiative, the prosecutor begins an investigation. First, the prosecutor must determine the seriousness of the information obtained regarding the situation.73 If the prosecutor concludes that there is a reasonable basis to proceed with the investigation, then he must request authorization for an investigation from the pre-trial chamber. That body then evaluates whether the Court has jurisdiction and whether there is a reasonable basis to proceed.74 If the prosecutor finds no reasonable basis to continue or concludes that there is not a sufficient basis for a prosecution,75 then the state that referred the matter may appeal the prosecutor's decision to the pre-trial chamber.76 The pre-trial chamber also conducts such pre-trial functions as issuing warrants of arrest and summons to appear.77 The actual trials are conducted by the trial chamber, a group of three judges of the trial division.78

The Court is composed of eighteen judges who are dispersed among the presidency, an appeals division, a pre-trial division, and a trial division.79 The number of judges, however, may be changed by a two-thirds vote of state parties.80 Each candidate for election shall be competent in criminal law and procedure or in relevant areas of international law.81 In addition to providing

71 See Rome Statute, supra note 26, art. 16.
72 See id. The Statute leaves open the possibility that the Security Council may renew its request for deferral indefinitely. The Statute states that the "request may be renewed by the council under the same conditions." Id.
73 See id. art. 15(2). The prosecutor may seek such information from "States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources. . . ." Id.
74 See id. art. 15(4).
75 See id. art. 53(2)(c) (indicating that the prosecutor may decline to prosecute because "a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator. . . "). Id.
76 See id. art. 53(3)(a).
77 See id. arts. 57-61.
78 See id. art. 39.
79 See id. art. 34. The presidency, composed of the president and the first and second vice-presidents, is responsible for the administration of the Court, with the exception of the Office of the Prosecutor, and for other statutory functions. See id. art. 38(3).
80 See id. art. 36(2)(b).
81 See id. art. 36(3)(b).
for competent judges, the statute requires that they be independent. As an added safeguard to insure independence and fairness, no two judges may be nationals of the same state.

V. EVALUATION OF CURRENT UNITED STATES' CONCERNS: JURISDICTIONAL TRIGGERS AND THE PROSECUTOR’S ROLE

A major concern the United States has with the Rome Statute involves the "trigger" mechanism for jurisdiction. Under the statute, whoever can initiate investigations can trigger the Court’s jurisdiction. The statute provides for two such triggers: by a state party referral of a situation to the prosecutor or by prosecutorial initiative.

A majority of nations favored a prosecutor with powers to trigger jurisdiction (or to receive the complaint directly from state parties) because many nations felt that the Court would be less politicized if its investigations were free from approval from any political body such as the Security Council. These nations argue that requiring Security Council approval for jurisdiction to be triggered would effectively give a veto power to any member of the Security Council. As a result, countries with representation on the Security Council could insulate themselves from the Court’s jurisdiction. This would politicize the process to the disadvantage of smaller nations without permanent seats on the Security Council.

During the Rome Conference, the United States reiterated its preference for Security Council involvement in the Court’s functions, including the “trigger” mechanism. The United States put forth a plan allowing for Security Council referrals to the Court. The United States has desired that the Security

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82 Rome Statute, supra note 26, art. 40 (“The judges shall be independent in the performance of their functions.”).
83 See id. art. 36(7).
84 Rome Statute, supra note 26, arts. 14, 15.
85 See Brown, supra note 29, at 427; see also Scheffer Lecture, The Hague, supra note 34.
87 See Scheffer Lecture, The Hague, supra note 34. There the United States stated its position that the Security Council should be able to refer situations to the prosecutor. In addition, the United States believes that the Security Council should be able to undertake a “mandatory” referral under chapter VII of the United Nations Charter. Although it is not stated, the implication is that the Court in such a “mandatory” referral situation could not decline to
Council approve the Court’s involvement if the situation were one involving international peace and security and the Security Council were already dealing with the situation. Thus, in these situations, the Security Council could essentially veto the Court’s exercise of jurisdiction. The United States has argued that there is no alternative to Security Council approval because the United Nations Charter mandates that the Security Council maintain and restore international peace and security. The real, unspoken fear of the United States, however, as articulated in other contexts, is that politically motivated states could target American military personnel and citizens with frivolous prosecutions. The Security Council approval would enable the United States to veto any action against its citizens, protecting members of its far-flung military, at least in matters where international peace and security are involved.

It is also out of fear of a politicized Court that the United States opposes a prosecutor who may initiate investigations on her own without a state referral. As mentioned, the United States preference is that the prosecutor investigate crimes only when referred by state parties or by the Security Council. The prosecutor would then decide whom to investigate and prosecute. The United States is concerned that a biased prosecutor could launch unfounded political attacks in the form of investigations against citizens of the United States. In the words of David Scheffer, who would later head the United States delegation to the Rome Conference, “a completely independent prosecutor would have free rein to probe into any and all decision-making processes and military action anywhere. . .” The United States has indicated some flexibility on the issue, showing a willingness to consider the concept of exercise jurisdiction. Id.

See id.

See id.


U.S. Policy, supra note 58, at 19.
a self-initiating prosecutor at a later time.\textsuperscript{93} Yet it is clear that the United States wants a weaker prosecutor in order to protect members of its military.

Is the United States’ fear of a politicized prosecutor valid? The Rome Statute offers several safeguards against abuses of the prosecutor’s power. The safeguards of the Rome Statute would not protect the United States’ interests in every conceivable situation, yet the risk of abuse would be significantly minimized. In the end, these safeguards are likely to provide effective checks against prosecutorial misconduct and protect the United States’ interests.

The first safeguard against an abuse of power is the requirement that the prosecutor get independent authorization to continue an investigation. Under the statute, if the prosecutor concludes that there is a reasonable basis to proceed, he must then get authorization from the pre-trial chamber to continue.\textsuperscript{94} If the prosecutor were motivated by political or personal goals, then he would presumably not be able to obtain approval of the pre-trial chamber and thus could not proceed with prosecution.

Requiring pre-trial chamber approval will likely be an adequate precaution against prosecutorial abuse, as the approval of that body is unlikely to be politicized due to its composition. After elections the court is to organize itself as quickly as possible into divisions, one of which is the Pre-Trial Division.\textsuperscript{95} This division is to be composed of six or more judges.\textsuperscript{96} Since the divisions are determined before any case comes before the Court, there is not much chance that judges with certain predispositions would be chosen to rule on the prosecutor’s request for authorization in any particular situation.

The United States’ objection to this pre-trial “approval” safeguard would likely relate to the number of judges. The statute will probably be construed so as to require that two judges on the pre-trial chamber concur in the approval. Article 39 of the statute states that the functions of the pre-trial chamber may be carried out either by three judges or by a single judge.\textsuperscript{97} But the statute also indicates that certain rulings of the pre-trial chamber, including authorizations of investigations, “must be concurred in by a majority of its

\textsuperscript{93} See Richardson Remarks on International Criminal Court, Rome, June 17, 1998 (visited Sept. 13, 1998) <http://www.usia.usemb.se/topical/pol/usandun/richcl7.htm> (noting that “[a]t best, the proposal for a self-initiating prosecutor is premature. We should first give the Court the opportunity to establish its credibility”).

\textsuperscript{94} Rome Statute, supra note 26, art. 15(4).

\textsuperscript{95} See id. art. 39(1).

\textsuperscript{96} See id.

\textsuperscript{97} Id. art. 39(2)(iii).
[pre-trial chamber’s] judges."98 The statute does not indicate how many judges are in the pre-trial chamber, but since three are authorized to carry out the pre-trial chamber’s functions, it may be inferred that two judges—a majority of three judges—are needed to approve an authorization.99

The United States could argue that the authorization of two judges is not sufficient to safeguard its interests. It is unlikely, however, that any two judges would be motivated by the same political bias as the independently elected prosecutor. As it stands, the "authorization" safeguard seems an adequate protection of the United States’ (as well as others’) interests, particularly when considering other institutional safeguards.

The statute’s requirements for candidates and election protocol also diminish the possibility that the pre-trial chamber would be politicized. Candidate and election requirements would ensure that the pre-trial chamber’s authorization to proceed with the investigation would act as an effective check on the prosecutor’s power. That all candidates for judge are required to be competent in either criminal law or in relevant areas of international law insures that politicians or others without appropriate experience do not find a place on the Court.100 In addition, no two judges are permitted to be from the same state.101 So even if the judges were to have political agendas, their agendas would reflect different interests and would thus be unlikely to coincide.

The independence of the Court is also bolstered by the requirement that the election of the judges must occur by secret ballot and by no less than two-thirds of the state parties present and voting.102 These provisions will help to exclude politically minded judges by curbing coercion in the election process. Finally, the person being investigated may request the disqualification of any judge when the judge’s “impartiality might reasonably be doubted on any

98 Id. art. 57(2)(a). A majority of the pre-trial chamber’s judges must concur, not a majority of the pre-trial division, which is to be comprised of at least six judges. Each division of the Court (appeals, trial, and pre-trial) has a respective chamber (e.g., the pre-trial chamber) which carries out the judicial functions of that division. See id. art. 39(2)(a).

99 This argument assumes that when the statute states that “the judicial functions of the Court shall be carried out in each division by Chambers” and thereafter declares that “[t]he functions of the pre-trial chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division,” the three judges make up the entire pre-trial chamber. Rome Statute, supra note 26, art. 39(2)(a) & (2)(b)(iii). Otherwise, the mandate in article 57(2)(a) that in certain instances, a majority of the pre-trial chamber’s judges must concur would be nonsensical, as a majority of a one-judge chamber would have to concur.

100 See id. art. 36(3)(b)(i)-(ii).

101 See id. art. 36(7).

102 See id. art. 36(6)(a).
These institutional safeguards, coupled with the requisite approval by the pre-trial chamber, would act to minimize greatly any threat to United States citizens from a "rogue" prosecutor or Court.

In addition to these safeguards, the United States has a "backup" protection in the form of a Security Council deferral. Even though the Security Council must act unanimously, the United States would have much clout within the Council if United States citizens were ever unfairly prosecuted. While much more limited in utility than a veto, the Security Council could possibly renew a deferral indefinitely, thereby making it as effective as a veto.

Finally, one scholar has argued that the Court's dependence on the Security Council for enforcement of its arrest warrants and other orders will cause the Court to rely on the Security Council. Therefore, the argument goes, there is no reason for the United States, as a permanent member of the Security Council, to fear frivolous prosecutions of its nationals. Unfounded prosecution of American citizens would be "futile and irrational." Since the court has no political or enforcement powers, it appears the Court would, at least in some situations, rely on the United Nations for enforcement of its orders. The Court would therefore be unwise to alienate even one member of the Security Council.

A. Jurisdictional Concerns: "Opting-Out" and Non-Party Jurisdiction

The United States also has based its opposition to the Rome Statute on the jurisdictional structure of the statute. For example, the United States preferred an arrangement where jurisdiction over certain crimes would be

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103 Id. art. 41(2)(a)-(b).
104 See Association of American Law Schools Panel on the International Criminal Court, supra note 61, at 259-60.
105 See Rome Statute, supra note 26, art. 16.
106 See id.
107 See Brown, supra note 29, at 429. Also, ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia have had to rely extensively on states to enforce orders made by the court. See Gabrielle Kirk McDonald, The International Criminal Tribunal for the Former Yugoslavia, Address Before the American Society of International Law’s Conference on War Crimes Tribunals: The Record and the Prospects, in 13 AM. U. INT’L L. REV. 1413, 1428 (1998).
108 See Brown, supra note 29, at 429.
109 Id.
110 See Congressional Testimony, supra note 2 (arguing in part for a ten-year period in which the Court's jurisdiction over crimes against humanity and war crimes would be optional).
optional. According to the United States’ plan, all state parties would accept automatic jurisdiction over the crime of genocide. However, for a ten-year transitional period, states could “opt-out” of the Court’s jurisdiction over two other crimes: crimes against humanity and war crimes. The United States favors the use of one of three options after the ten year opt-out period ends. A state could accept inherent jurisdiction of the court over all three crimes, cease to be a party, or seek an amendment to the treaty extending this “opt-out” period.

The United States’ proposal for optional jurisdiction is similar to the one incorporated in the ILC’s 1994 Draft Statute. Under that draft statute, the Court was to have inherent jurisdiction over the “core crime” of genocide. The draft statute went on to establish an “opt-in” system where states could accept the Court’s jurisdiction over each non-core crime. The United States’ proposal varied from the 1994 draft statute only in that under the United States’ plan, the Court would have jurisdiction over all crimes unless states “opted-out.”

The United States has argued that an “opt-out” provision would allow it to evaluate the Court’s performance and attract a “broad range” of state parties. Attracting broad support is likely not a concern now, as the Rome Statute’s text was approved by a vast majority of nations and will likely be ratified by the required number of countries. So the only remaining rationale for the provision is that it would allow the United States and other nations to participate in the Court on a limited basis before relinquishing sovereignty to an untried tribunal.

Despite the fact that an “opt-out” provision might provide nervous nations a measure of security, the inclusion of an “opt-out” provision in the Court treaty would likely not have been entirely favorable to the United States. The

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111 See id.
112 See id.
113 See id.
115 See id. art. 22; see also Wexler, supra note 5, at 669 (examining the “opt-in” provision of the 1994 draft statute and contrasting it with “opt-out” jurisdiction).
116 Congressional Testimony, supra note 2.
117 While as of August 5, 1999, only four nations had ratified the Rome Statute (Senegal, Trinidad and Tobago, San Marino, and Italy), eighty other nations had signed the Rome Statute, indicating an intent to ratify. Under the statute, sixty nations must ratify the statute. See Rome Statute, supra note 26, art. 126.
drawback of the “opt-out” or “opt-in” approaches to jurisdiction is that a much weaker Court is created as a result. A country prone to such acts could “opt-out” of jurisdiction over one or more of the following crimes: crimes against humanity, war crimes, and the crime of aggression. Thus, the “opt-out” provision could have worked to the detriment of the United States by causing the Court to be unable effectively to exercise jurisdiction over non-genocidal acts conducted by heads of state and government officials. Had the “opt-in” program been included, the United States might have won the battle but lost the war against international criminals.

The existence of an “opt-out” provision in the Rome Statute, although perhaps somewhat beneficial to the United States, is not necessary to protect American interests and does not warrant the United States’ refusal to sign. The same safeguards that prevent the pre-trial chamber and the Court from becoming politicized make the “opt-out” provision unessential to American interests. Electoral requirements, as mentioned above, will insure the impartiality of the Court. As a result of these protections against a politicized Court, the United States need not be reluctant to subject its citizens to the Court’s jurisdiction.

The jurisdictional regime based on complementarity—that the Court’s jurisdiction complements national jurisdiction, which is primary—could also act to provide protection to United States’ interests. In the event that the Court were to prosecute United States citizens, complementarity could provide an “escape” from the Court’s jurisdiction. As mentioned above, the statute declares cases inadmissible when the case is already being prosecuted or investigated (or has been) on the national level. Thus, if the United States were charged with war crimes, crimes against humanity, or crimes of aggression, the United States could prevent Court jurisdiction by undertaking a “genuine” investigation or prosecution. A problem could arise, however, when the United States believes its citizens to have been unfairly charged. Suppose, for example, that United States soldiers involved in the 1983 military operation in Panama were charged with the crime of aggression. In that case, the United States could be deemed unwilling to undertake a genuine investigation if the situation were not investigated or prosecuted according to the meaning of the statute. So, while complementarity could help the United

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119 See Evered, supra note 49, at 149.
120 See supra text accompanying notes 100-102.
121 Rome Statute, supra note 26, art. 17(1)(a)-(b).
122 The statute is unclear about what constitutes an investigation or prosecution. While the latter is perhaps easier to define, it is especially uncertain as to an “investigation.” Need such “investigation” be by a prosecutor or is a military inquiry sufficient? Many questions remain
States avoid the Court's jurisdiction even in the absence of an "opt-out" provision, it would not necessarily do so. Given that the other safeguards, however, would protect United States' interests, an "opt-out" provision—which is somewhat beneficial to the United States—is not indispensable.

The other jurisdictional concern of the United States involves jurisdiction over citizens of non-party states. Notwithstanding United States' objections, the Rome Statute authorizes a form of jurisdiction over nationals of non-party states. As a precondition to jurisdiction, either the state where the crime was committed or the state of nationality of the perpetrator must be a party to the treaty or have consented to jurisdiction. As a result, the Court could have jurisdiction over citizens of a non-party state if the crime were committed within the territory of a state party.

The United States' real concern regarding non-party jurisdiction—and jurisdiction over state parties were the United States to ratify the Rome Statute—is that United States military forces (either as part of a United States' mission or under the rubric of an international peacekeeping mission) could be exposed to the Court's jurisdiction. All this could occur without United States' consent to the statute. For example, even if Serbia does not sign the statute, if it were to consent to jurisdiction, the Court could exercise jurisdiction over United States troops involved in international peacekeeping actions in Serbia. The United States complains that, ironically, nations involved in frequent international peacekeeping missions would unfairly be exposed to the Court's jurisdiction more often than many of the worst offenders of humanitarian law. Citizens of non-party states that commit massacres internally would be insulated from the Court's reach absent a Security Council referral.

Some have intimated that the Rome Statute's exercise of jurisdiction over nationals of non-party states is contrary to international law and, thus, is an invalid constraint on the sovereignty of those non-party nations. The Vienna Convention states the general rule of international law that "[a] treaty does not create either obligations or rights for a third State without its consent."

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unanswered. See, e.g., Rome Statute, supra note 26, art. 15.

123 Id. art. 12(2)(a)-(b).
124 See id.
126 See Congressional Testimony, supra note 2.
127 See id.; Association of American Law Schools Panel on the International Criminal Court, supra note 61, at 231.
"[T]he consent of a State is always necessary if it is to be bound by a provision contained in a treaty to which it is not a party."\(^{129}\) The Rome Statute, however, does not bind non-party states but merely authorizes jurisdiction over citizens of non-party states. Non-party states are not bound by the treaty.

The United States' decision to remain a non-party state and not to ratify will cost it any influence on the Court it would otherwise have had. Nationals of non-party states are subject to jurisdiction when the state where the conduct in question occurred is a state party or consents to jurisdiction.\(^{130}\) Under the statute, United States citizens in some cases would be subject to the Court's jurisdiction, yet none could serve as judges, and the United States would have no role in Court elections or in formulating Court procedure.\(^{131}\) Thus, in refusing to assent to the statute, the United States gains little and forsakes any influence over the Court.

**B. The Crime of Aggression**

The United States has also revealed its opposition to the Court's jurisdiction over the yet-to-be-defined crime of aggression. First, the United States has argued that the historical precedent for the crime of aggression is tenuous.\(^{132}\) The United States has argued that there is a historical precedent for criminalizing wars of aggression, but no such precedent for proscribing individual acts of aggression.\(^{133}\) While the International Military Tribunal at Nuremberg considered aggression to be the "supreme" international crime, that tribunal specifically condemned only aggressive war and not individual acts of aggression.

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\(^{129}\) **Restatement (Third) of Foreign Relations Law of the United States** § 324(1) (1987) (stating that "[a]n international agreement does not create either obligations or rights for a third state without its consent").

\(^{130}\) See Rome Statute, supra note 26, art. 12(2)(a).

\(^{131}\) Id. Member States may nominate persons to serve as judges (art. 36(4)(a)); judges shall be elected at a meeting of the members of the Assembly of State Parties (art. 36(6)(a)); the prosecutor and deputy prosecutors shall be elected by the members of the Assembly of States Parties (art. 42(4)); members of the Assembly of States Parties shall participate in the adoption of the Elements of Crimes, which will assist the Court in the interpretation and application of articles 6, 7 and 8 (art. 9); and members of the Assembly of States Parties shall define the crime of aggression and set out conditions under which the Court shall exercise jurisdiction over this crime (art. 5(2)), pursuant to the procedures for amendment of the Statute (arts. 121, 123).


\(^{133}\) See id.
of aggression. In response, some argue that condemnation of aggressive acts has become part of customary international law and should therefore be included in any international criminal statute.

The United States also has explained its opposition to inclusion of the crime of aggression by pointing out the lack of an accepted definition for such a crime. This is certainly reinforced by the Rome Statute, which gives the Court jurisdiction over the crime of aggression only after an amendment is adopted “defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”

The United States also warns that inclusion of the crime of aggression could “impose unnecessary risks” on military forces acting for the international community. This likely is the United States’ chief concern with the entire statute: that United States soldiers could be accused of aggressive acts, even where they act in self-defense or for humanitarian purposes. The United States is also worried that members of the military could be charged by the Court for actions which are part of official military operations. Senator Jesse Helms (Republican, North Carolina) has bluntly stated his fears that authorized United States military operations, such as those in Grenada and Panama, could result in the Court charging United States soldiers with crimes

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134 Leila Sadat Wexler, Committee Report on Jurisdiction, Definition of Crimes, and Complementarity, 25 DENV. J. INT’L L. & POL’Y 221, 224, 226 (1997) [hereinafter Committee Report]; see also CONOT, supra note 13, at 23 (emphasizing that the United States pushed for the prosecution of Nazis for waging an aggressive war and not merely for aggressive acts).

135 See Committee Report, supra note 134, at 226 (stating that most members of the International Law Association Committee on a Permanent International Criminal Court favor the inclusion of this crime and its definition in the International Criminal Court statute).

136 See U.S. Policy, supra note 58, at 19; see also Michael P. Scharf, The Jury Is Still Out On the Need for an International Criminal Court, 1991 DUKE J. COMP. & INT’L L. 135, 139 (stating that the 1952 draft statute for an International Criminal Court, along with a Draft Code of Offences Against the Peace and Security of Mankind (“draft code”) were not adopted because of the lack of a definition of aggression); Association of American Law Schools Panel on the International Criminal Court, supra note 61, at 233 (noting that “[t]he International Law Commission has tried unsuccessfully for many years to reach agreement on a definition of aggression”).

137 Rome Statute, supra note 26, art. 5(1)-(2).

138 U.S. Policy, supra note 58, at 22.

139 See id. at 20; see also U.S. Statement on the International Criminal Court, supra note 132 (stating that precedent “concerns particular situations which did not present some of the difficult issues potentially involved, such as cases of arguable self-defense or humanitarian intervention”).
of aggression or other crimes.\textsuperscript{140} For example, had the Rome Statute been in effect, soldiers involved in the August 1998, United States missile strike against a Sudanese pharmaceutical plant could have faced indictment if the Court had deemed any United States investigation not to be genuine.\textsuperscript{141} This threat is heightened because the crime of aggression is yet to be defined.

The inclusion of the crime of aggression does pose a threat to the United States, but the threat is not overly menacing. According to the statute, after seven years from its entry of force, any state party may propose amendments to the statute.\textsuperscript{142} Any amendment to article five (crimes within the jurisdiction of the Court) will enter into force one year after seven-eighths of the states parties ratify or accept the amendment.\textsuperscript{143} Yet "in respect of a State Party which has not accepted the amendment [to article five], the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that state party's nationals or on its territory."\textsuperscript{144} In other words, state parties may decline to be bound by any crimes subsequently added to article five of the statute.

The crime of aggression, however, will not be a non-binding crime subsequently added to the litany of article five crimes. Article five already contains jurisdiction over the crime of aggression. Therefore, any amendments will not occur to article five but simply will define the already existing crime of aggression and work out the situations in which the Court will have jurisdiction over the crime.\textsuperscript{145} As a result, the amendments necessary to enable the Court to exercise jurisdiction over the crime of aggression would likely be binding on all states parties—including the United States if it were to ratify—one year after ratification or acceptance of the amendment by seven-eighths of the states parties.\textsuperscript{146}

\textsuperscript{140} Senator Jesse Helms, \textit{Slay This Monster: Voting Against the International Criminal Court Is Not Enough}, FIN. TIMES, July 30, 1998, at 12. "This court proposes to sit in judgment on United States national security policy. Imagine what would have happened if this court had been in place during the United States invasion of Panama? Or the United States invasion of Grenada? Or the United States bombing of Tripoli?"
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Rome Statute, supra note 26, art. 121(1).}
\textsuperscript{143} \textit{See id. art. 121(4)-(5).}
\textsuperscript{144} \textit{Id. art. 121(5).}
\textsuperscript{145} \textit{See id. art. 5(2).}
\textsuperscript{146} \textit{See id. art. 121(4) (stating the "default" rule that, "[e]xcept as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations".).}
Without any means of escape, the binding nature of any amendments regarding the crime of aggression would admittedly be difficult for the United States to stomach. Yet the Rome Statute does not require any nation to be bound by amendments with which it cannot agree. Any state party "which has not accepted [any] amendment may withdraw from the Statute with immediate effect" by giving notice within one year of the amendment’s entry into force. Thus, if seven-eighths of the state parties were to accept a definition of the crime of aggression with which the United States disagreed, that nation could then decide to be no longer bound by the Court’s Statute. For this reason, the uncertainty surrounding the crime of aggression should not prevent the United States from ratifying the Rome Statute. After ratification, the United States could use the desire of the international community for continued United States participation to mold a palatable definition of the crime of aggression.

C. The Constitutional Dimension

Constitutional arguments against United States acceptance of the Rome Statute can be classified in two ways: those asserting that constitutional guarantees and liberties should be included in the Rome Statute and those claiming that such guarantees must be included in the Statute. While "prudential" constitutional arguments should be examined as matters of public policy, it is more important to examine arguments claiming that any international court must include United States constitutional guarantees. There are two oft-mentioned constitutional arguments of this type: "(1) [That] the full range of constitutional guarantees must apply to an international criminal court before the United States may constitutionally participate; [and] (2) United States criminal procedure guarantees, most notably the right to trial by jury, must apply to international trials in order for the United States to participate."  

One way to avoid the arguments that either the full range of United States constitutional guarantees or key constitutional rights must be incorporated into the Rome Statute is to view the Court as an entity separate from the United States judicial system. The Court would not be under the control of the

\footnote{147} [Id. art. 121(6). This section does condition the state party’s withdrawal on the state’s satisfaction of any “obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued.” \textit{Id.} art. 127(2).]


\footnote{149} [See \textit{id.} at 105.]}
United States government but would act under its own authority and apply its own law. Under article III of the United States Constitution, sections one and two, the judicial power of the United States is "vested in one supreme Court" and inferior courts established by Congress, and this "judicial Power shall extend to all Cases... arising under this Constitution." Since the judicial power of the United States would not be invoked, article III of the Constitution would not apply. Thus, the Court's jurisdiction over United States nationals ostensibly would not conflict with the United States Constitution.

If one considers the International Criminal Court to be an independent entity, the surrender of a person to the Court may essentially involve extradition to that Court. Even if the process by which suspects are handed over to the Court is not extradition exactly, it is sufficiently close to extradition for United States constitutional purposes.

This "extradition model" would allow United States assent to the Rome Statute under the Constitution. According to the rule of non-inquiry, United States courts generally do not review the procedural or substantive rights an extradited party would have in the requesting nation if the extradition is authorized by law. So the law of the requesting entity, here, the Court, would not have to provide due process guarantees to the extraditee that mirror those of the Constitution. There appears to be no valid constitutional or policy rationale for distinguishing between an international tribunal and the courts of a foreign nation for extradition purposes.

150 See id.
151 U.S. CONST. art. III, §§ 1, 2.
152 See Marquardt, supra note 148, at 105. Marquardt cites Hirota v. MacArthur, 338 U.S. 197 (1948), to support that international criminal tribunals do not exercise the judicial power of the United States for purposes of article III. See id. at 106.
153 See Marquardt, supra note 148, at 106.
154 Id. In fact, "surrender" of American nationals to the Court would be more consistent with United States interests, as the United States government could influence the composition and procedures of the Court. Conversely, the United States has no control over other nations' courts to which its citizens are extradited. See id.
155 See id. at 109; see also Glucksman v. Henkel, 221 U.S. 508, 512 (1911); Neely v. Henkel, 180 U.S. 109, 123 (1901).
156 One possible exception was mentioned by the Second Circuit Court of Appeals in dicta in Gallina v. Fraser, 278 F.2d 77, 79 (1960). The court there held that there could be "procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle." Id. at 79. See generally Marquardt, supra note 148, at 112-13 (arguing that the Gallina exception to the rule of non-inquiry would not enable the United States to deny extradition to an international criminal court).
157 See Marquardt, supra note 148, at 118.
The "extradition model" crumbles, however, if the process by which persons are surrendered to the Court is not extradition or sufficiently analogous to extradition. The Rome Statute refers to the "surrender" of suspects and in no way mentions "extradition." Another problem presented is that extradition may only be possible between two sovereign states. Extradition occurs where one state agrees to relinquish the accused to a state with jurisdiction. There are superficial differences between the surrender of an accused national from a sovereign state to an international criminal court, which represents the international community as a whole and not a sovereign government, and traditional extradition. Yet the surrender of a national to another state with jurisdiction and to an international tribunal with jurisdiction involve essentially the same act. Thus, "surrender" under the Rome Statute should be viewed as extradition for purposes of United States constitutional analysis.

Even if the Court falls outside the scope of article III of the United States Constitution, some aver that due process rights guaranteed to United States citizens must be afforded by the Court. Despite the fact that the Court is international in nature and not subject to article III, the argument is that United States' cooperation with the Court is nonetheless "properly subject to constitutional scrutiny." Yet this assertion that the Court must guarantee accused persons due process as envisaged by the United States Constitution is flawed. Such an argument discounts that the rule of non-inquiry generally means that United States courts do not review the procedural or substantive rights that an extraditee would be afforded in the requesting nation. This argument seems to rest on the assumption that surrender to the Court is not extradition or sufficiently similar to extradition. Yet, as mentioned above, surrender to a nation or to an international court created by nations appears essentially to be one and the same.

Ultimately, even if the "extradition model" fails and the United States Constitution requires that the Rome Statute contain due process guarantees

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158 Rome Statute, supra note 26, art. 59(1). This does not necessarily dispose of the question as to whether extradition is involved, as even if the statute did not construe the transfer as extradition, the exchange could be treated as extradition for purposes of constitutional analysis. See Marquardt, supra note 148, at 107.

159 See GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 5, 17 (1991).

160 See Ilia B. Levitine, Constitutional Aspects of an International Criminal Court, 9 N.Y. INT'L L. REV. 27, 42 (noting that "historically, extradition has been understood to exist exclusively in the context of relations between sovereign states").

161 Id. at 47.
based on the United States model, the Rome Statute may sufficiently safeguard United States due process rights. The United States' cooperation with the Court may be subject to a "macro level" of scrutiny looking to key "constitutional values" and "not some technical aspects of American constitutional procedure." Under this approach, the Court must guarantee key rights guaranteed by the United States Constitution. Because these due process guarantees are examined on a "macro" level, that the Court's double jeopardy provision (art. 20), appellate procedure proviso (arts. 81-84), and non-jury trial provision (art. 64) differ from the constitutional due process requirements is not significant. Rather, the Rome Statute would graft onto the world of international relations the major purpose of the Constitution: to insure the supremacy of laws.

Many of the Rome Statute's provisions were created to meet the demands of the United States and are substantially similar to United States constitutional protections. The statute includes provisions generally prohibiting double jeopardy (art. 20), allowing an appeal of the decision (by either the defendant or the prosecutor) (arts. 81-83), and providing for a presumption of innocence (art. 66). The statute also guarantees the right to an attorney (art. 67(d)), the right to a trial "without undue delay" (art. 67(c)), and a right to avoid self-incrimination (arts. 67(g), 55(a)). So even though the Rome Statute does not incorporate all due process guarantees of the United States Constitution, it may incorporate enough such rights as to comply with due process in a "macro" sense.

While this "macro" constitutional analysis is attractive, it assumes that United States constitutional due process guarantees can be satisfied holistically and mystically. Such an approach miraculously reduces the founding document of the United States to one overarching principle. Yet there are assuredly other purposes for the Constitution and for its due process requirements in particular, including the safeguarding of individual liberty. The possible weakness of the "macro" approach need not make the Court unamenable to the United States Constitution. Because United States

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162 Id. at 47.
163 Rome Statute, supra note 26, arts. 20, 64, 81-84.
164 See Levitine, supra note 160, at 47.
165 See, e.g., Congressional Testimony, supra note 2 (stating that the United States successfully lobbied for several provisions ultimately included in the statute).
166 That certain protections, such as the right to have defense counsel available at an early stage, are not enumerated in the statute can presumably be resolved by spelling out such protections in the Rules of Procedure and Evidence. Association of American Law Schools Panel on the International Criminal Court, supra note 61, at 252-53.
interaction with the Court can properly be conceived of as extradition, one can object to this "macro" view of the United States Constitution and still find the Rome Statute to be valid under the Constitution.

VI. CONCLUSION

The United States has withheld its assent to the Rome Statute of the International Criminal Court, a treaty which may make the concept of an international criminal tribunal a reality. The Rome Statute, the United States has maintained, deviates unacceptably from United States objectives for such a court. The chief concerns cited by the United States relate to the Court's "trigger" mechanism, the role of the prosecutor, jurisdictional issues, definitions of crimes, and constitutional issues. As a dominant military power and leader in peacekeeping efforts, the United States understandably has indicated its willingness to assent only to an international tribunal which is in its best interests.

After close examination, however, most United States' concerns with the Court can be allayed. The Rome Statute is a document that is essentially consonant with the United States' interests. Much of the statute, in fact, reflects that nation's influence. By ratifying the International Criminal Court, the United States would immeasurably bolster the institution.

It remains to be seen whether the International Criminal Court will be a savior for our troubled times. Opponents of the Court too often have painted a picture of a flawed tribunal with almost sinister designs. Only the future will reveal the role of the Court. At the very least, however, the International Criminal Court offers the possibility of a more just and hopeful reality.