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United States Concepts of Due Process in Criminal Procedure and the International Criminal Court

Delaine Russell Swenson
J.D., Associate Professor, Department of International and European Union Law, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin; correspondence address: Al. Racławickie 14, 20–950 Lublin, Poland; e-mail: delaine.swenson@kul.pl
https://orcid.org/0000-0002-0781-0765

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Abstract: The provisions of the Rome Statute of the International Criminal Court should be evaluated considering the due process principles of the United States Constitution to determine if it would be appropriate for the US government to sanction the sending of a US citizen to the ICC or adopting the Rome Statute. There are several areas including the right to trial by jury, right to confrontation, speedy trial and the composition of the Court that raise serious due process concerns from an American perspective. Considering the ICC's inability to guarantee the same due process protected by the US Constitution there are serious doubts about American involvement in the Court.

1. Introduction

There are many reasons given for why the United States has not ratified the Rome Statute and acceded to the International Criminal Court. Among these reasons are many of a political nature given the role the US plays on the international stage and many of them pre-dating the Trump Administration.[1] In addition to these concerns of a political nature there are also objections based on issues involving whether an American defendant

[1] Anthony Dworkin, "Why America Is Facing off Against the International Criminal Court," European Council on Foreign Relations, September 8, 2020, accessed October 16, 2025, https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/.

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could get a fair trial at the ICC. Some of these questions involve political questions,[2] others involve the process or procedure a criminal defendant would receive at the tribunal. As a former criminal trial defense attorney in the United States who has spent the last 25 years working and teaching in the area of international law and human rights, I think it is interesting to discuss the legitimate questions involving American concepts of due process and constitutional protections in criminal process in light of the Rome Statute. Traditional international scholarship has dismissed due process concerns regarding the court with very limited analysis or understanding of the actual law being dismissed. First, we will look at the American concept of "due process of law" in the context of criminal proceedings, and then we will examine several key protections under American constitutional law for criminal defendants that might be implicated by the Rome Statute, including the right to trial by jury, the rights of confrontation and speedy trial, and the composition of the Court. Finally, we will ask whether the United States could still agree to the Rome Statute despite any due process differences between the Statute and the US Constitution.

2. Due Process in the Criminal Procedure of the United States

Due process of law is a legal concept that can be traced back to the Magna Carta of 1215 in England. Clause 39 of the Magna Carta included the provision:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[3]

The United States Supreme Court found that "due process of law," as included in the US Constitution, had the same meaning as "by the law of the land" in the Magna Carta.[4]

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2 See for example the discussion on the "myths and facts" about the ICC at Human Rights Watch; accessed April 14, 2025, https://www.hrw.org/legacy/campaigns/icc/facts.htm.

3 Magna Carta (1297).

4 The United States Supreme Court, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272 (1855).

Due process is included in two places in the United States Constitution: the Fifth and Fourteenth Amendments. The Fifth Amendment provision was written by James Madison and adopted as part of the initial 10 amendments to the US Constitution, now commonly known as the Bill of Rights. These amendments were based on the ideas of the Magna Carta (1215), the English Bill of Rights (1689),[5] and the Virginia Declaration of Rights (1776).[6] The Fifth Amendment provision reads that "[n]o person shall be (…) deprived of life, liberty or property, without due process of law."[7] Initially, all the provisions of the Bill of Rights applied only to the federal government; state and local governments were not subject to the provisions of the Bill of Rights.[8] In 1868, the Fourteenth Amendment to the US Constitution was adopted and took effect. This Amendment, which was a response to the US Civil War, granted citizenship to all persons "born or naturalized" in the United States, including former slaves, and included due process language that applied directly to the states. "Nor shall any state deprive any person of life, liberty, or property, without due process of law."[9] Through a process of selective incorporation, the Supreme Court has deemed most of the rights in the Bill of Rights as necessary requirements of due process against the states and local governments, beginning with free speech in 1925.[10] Over the years, many of the rights in the Bill of Rights applying to criminal procedure were incorporated into the concept of due process by the Fourteenth Amendment. This includes Fourth Amendment rights, such as representation by counsel in death penalty cases,[11] freedom from unreasonable search and seizure,[12] and requirements in a warrant;[13]

5 "Bill of Rights 1689," UK Parliament, accessed October 12, 2025, https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/.

6 "The Virginia Declaration of Rights," The U.S. National Archives and Records Administration, accessed October 12, 2025, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

7 U.S. Const. amend. V.

8 The United States Supreme Court, *Barron v. Baltimore*, 32 U.S. 243 (1833).

9 U.S. Const. amend. XIV.

10 The United States Supreme Court, *Gitlow v. New York*, 268 U.S 652 (1925).

11 The United States Supreme Court, *Powell v. Alabama*, 287 U.S. 45 (1931).

12 The United States Supreme Court, *Mapp v. Ohio*, 367 U.S. 643 (1961).

13 The United States Supreme Court, *Aguilar v. Texas*, 378 U.S. 108 (1964).

Fifth Amendment rights like double jeopardy,[14] the right against self-incrimination,[15] and the protection against taking property without due compensation;[16] Sixth Amendment rights like the right to a speedy trial,[17] right to a public trial,[18] right to an impartial jury,[19] right to notice of accusations,[20] right to confront witnesses,[21] right of compulsory process to obtain witness testimony,[22] and the right to counsel in non-capital cases;[23] and Eighth Amendment rights, such as protection against excessive bail,[24] and the prohibition on cruel and unusual punishments.[25]

The incorporation of these criminal procedure rights against the states was primarily based on the idea that due process required the incorporation of "fundamental rights essential to a fair trial in a criminal prosecution,"[26] or those "essential to the concept of ordered liberty."[27] In the area of criminal procedure, due process meant that those rights that were necessary to a fair process, as understood in the Anglo-American system of criminal procedure, were required by the Constitution to apply not only to the federal government through the Fifth Amendment but also to state and local governments through the Fourteenth Amendment.[28]

In addition to the specific rights listed in the Bill of Rights, the due process clauses of the US Constitution are given further meaning. The Court has consistently found that the Bill of Rights is not an exclusive list of

14 The United States Supreme Court, *Benton v. Maryland*, 395 U.S. 784 (1969).
15 The United States Supreme Court, *Malloy v. Hogan*, 378 U.S. 1 (1964).
16 The United States Supreme Court, *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).
17 The United States Supreme Court, *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
18 The United States Supreme Court, *In re Oliver*, 333 U.S. 257 (1948).
19 The United States Supreme Court, *Parker v. Gladden*, 385 U.S. 363 (1966).
20 The United States Supreme Court, *In re Oliver*, 333 U.S. 257 (1948).
21 The United States Supreme Court, *Pointer v. Texas*, 380 U.S. 400 (1965), hostile witnesses; The United States Supreme Court, *Washington v. Texas*, 388 U.S. 14 (1967), favorable witnesses.
22 Ibid.
23 The United States Supreme Court, *Gideon v. Wainwright*, 372 U.S. 335 (1965).
24 The United States Supreme Court, *Schilb v. Kuebel*, 404 U.S. 357 (1971).
25 The United States Supreme Court, *Robinson v. California*, 370 U.S. 660 (1962).
26 The United States Supreme Court, *Pointer v. Texas*, 380 U.S. 404.
27 See: The United States Supreme Court, *Hurtado v. California*, 110 U.S. 516 (1884).
28 Jacob W. Landynski, "Due Process and the Concept of Ordered Liberty: 'A Screen of Words Expressing Will in the Service of Desire'?," *Hofstra Law Review* 2, no. 1 (1974): 1–66, https://scholarlycommons.law.hofstra.edu/hlr/vol2/iss1/1.

fundamental rights that are protected by the US Constitution.[29] The Court has determined that within the concept of due process are two key concepts: substantive due process and procedural due process. Substantive due process protects individuals against policies that exceed the authority of government, including issues like fundamental rights in the Bill of Rights, participation in the political process, and protection of discrete minorities.[30] In criminal procedure the second aspect of due process, procedural due process, is extremely important. It mandates that whenever the government attempts to take life, liberty, or property, it can only do so if the process allowing the government action is fair. While there is no definitive list of what process is required by procedural due process, Judge Henry Friendly has generated an influential list in terms of importance:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds for it.
3. Opportunities to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.[31]

These concepts, as well as those specifically listed in the Bill of Rights, form the core of the US constitutional requirements under the Fifth and Fourteenth Amendments regarding due process requirements in criminal procedure.

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29 See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the court found that the Constitution includes a right to privacy even though that right is not clearly written into the Constitution or any of its amendments.

30 Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Washington: Cato Institute, 2010), 90–100.

31 Peter Strauss, "Due Process," Legal Information Institute, accessed September 12, 2025, https://www.law.cornell.edu/wex/due_process.

3. Due Process and the ICC

The International Criminal Court includes provisions recognized by the international community based on humanitarian legal principles as well as major human rights instruments and customary international law.[32] In fact, many of the legal due process principles recognized under international law share a common source with the American provisions including the Magna Carta of 1215, and Fourteen and Fifteenth Amendments of the US Constitution.

Article 67 of the Rome Statute includes certain rights as a part of its minimum guarantees, including the right to be tried without undue delay, to be present at trial, to conduct a defense, right to counsel assigned and paid by the court, to examine or have examined witnesses against them, to have the attendance and examination of witnesses, assistance of an interpreter and a provision against mandatory self-incrimination, right to a fair and public hearing, and the right against double jeopardy. Certain rights are provided at each stage of the proceedings including pre-trial, during trial, and on appeal.[33]

It can be said that the Rome Statute provides the basic requirements of due process in criminal proceedings as recognized under international law.[34] Although the Rome Statute has due process protections in many areas of criminal procedure there are some areas where the United States' approach and the ICC's approach differ to the extent that they raise the question whether the United States handing a US citizen over to the ICC would violate the United States Constitution in a significant way. Below are some of those areas.

4. Right to Trial by Jury

American belief in the importance of the right to trial by jury is apparent from early days. By the time the United States was formed, jury trials had been in existence in England for several centuries and carried credentials

32 David Harris, "The Right to a Fair Trial in Criminal Proceedings as a Human Right," *The International and Comparative Law Quarterly* 16, no. 2 (1967): 352–78.

33 Rome Statute of the International Criminal Court, July 17, 1998, Article 67.

34 Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2005).

traced by many to the Magna Carta.[35] In the Declaration of Independence one of the reasons given for the colonies to declare their independence from Britain was the accusation that King George III had been guilty of "depriving us in many cases, of the benefits of trial by jury."[36] Article III of the Constitution included the right to trial by jury. This right was expanded in the Sixth Amendment to the Constitution: "In 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."[37] The constitutions of the original states all included jury trial provisions and every state joining the Union thereafter included such provision in its constitution. The United States Supreme Court has consistently confirmed the importance of the right of jury trial in the American system of criminal procedure.

The arguments in favor of jury trials can be found in *Duncan v. Louisiana*,[38] the case that established the incorporation of the jury trial right through the Fourteenth Amendment due process clause to the states.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. (…) Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.[39]

Jury trials then are designed to be a democratic check against government power, in particular the potential abuse of power by the government, including the prosecution and the judiciary. They also emphasize the importance of citizen participation and investment in the criminal justice

35 E.g. William Forsyth, *History of Trial by Jury* (London: John W. Parker and Son, 1852); James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown and Company, 1898); William S. Holdsworth, *A History of English Law*, vol. 1 (London: Methuen & Co., 1903).

36 United States, Declaration of Independence (1776), National Archives, accessed September 12, 2025, https://www.archives.gov/founding-docs/declaration-transcript.

37 U.S. Const. amend. VI.

38 The United States Supreme Court, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

39 Ibid., 391 U.S. 157, 158.

system. Jury trials are also important to effecting certain other due process concepts like the Exclusionary Rule[40] and the Fruit of the Poisonous Tree doctrines,[41] as well as the important concept of jury nullification.[42] Another fundamental due process right that is effected by jury trials is the presumption of innocence.[43] Legal professionals, such as judges, prosecutors, and even defense attorneys, who are consistently exposed to work within the criminal justice system, begin to be jaded by that experience. This develops a mentality where constant exposure to crimes and criminals makes everything seem criminal.[44] A juror who has never sat on a jury before, or has sat on one or two at most, does not bring that experience with them to a case. This then makes the jurors more likely to enter a case with a greater presumption of innocence. Therefore, it is obvious that the right to a trial by a jury of your peers is an essential element of due process in American constitutional law.

5. Jury Trial and the ICC

The International Criminal Court does not allow for trial by jury, instead the finder of fact is a panel of judges.[45] This means that defendants before

40 The Exclusionary Rule is a constitutional remedy adopted by the Supreme Court that prevents evidence collected in violation of the defendant's constitutional rights from being used in a court of law. The United States Supreme Court, *Weeks v. United States*, 232 U.S. 383 (1914).

41 The Fruit of the Poisonous Tree doctrine compliments the exclusionary rule as the court found that evidence indirectly gained as a result of an illegal act is "fruit of the poisonous tree" and should also be excluded from being used in a court of law. The United States Supreme Court, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Jury trials facilitate the exclusionary and fruit of the poisonous tree doctrines because any evidence excluded by the judge is never seen by the jury and cannot influence their decisions in the case. In a judge only trial, even if a judge excluded the evidence, that judge would continue to be aware of that evidence which could influence their decision.

42 Jury nullification is the practice of a jury finding a not-guilty verdict in a criminal case in spite of convincing evidence to the contrary usually in response to the jury's perception that a guilty verdict would be unjust or in response to overreach by the government. Justice William Goodloe, "Jury Nullification: Empowering the Jury as the Fourth Branch of Government," Fully Informed Jury Association, 1996, accessed October 12, 2025, http://callmegav.com/w/wp-content/uploads/2015/01/ES_Goodloe_jury_nullification.pdf.

43 The United States Supreme Court, *Coffin v. United States*, 156 U.S. 432 (1895).

44 Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review* 93, no. 1 (2007): 1–44.

45 Rome Statute of the International Criminal Court, July 17, 1998, Part 6 – The Trial.

the court are not being tried by a jury of their peers. Instead, they are being tried by a group of professionals removed from the experience of many of those they are judging. A look at the current composition of the judges on the ICC based on their official biographies indicate the disparity between their experience and the experience of a military defendant before the court. Out of 18 judges: 13 have served as prosecutors; 13 have been part of human rights organizations; 11 have been law professors; 9 have previously served as judges; 9 have served in diplomatic positions, and only 2 have served as defense counsel. None, at least according to their official biographies, have served in the military.[46]

The background of these judges raises serious questions regarding pro-prosecution bias at the ICC. A prosecutorial background often leads to a bias for the prosecution either directly or on a subconscious level.[47] Judges with a background as human rights advocates can hardly seem to be sympathetic with those accused of serious human rights violations. Judicial, academic and diplomatic experience is significantly removed from the real-world experiences of defendants before the court, and a lack of military experience greatly hinders a complete understanding of the difficult decisions and situations that may arise in a war setting.[48] There are also serious questions concerning bias based on the nationality of the judges of the ICC.[49] In short, the ICC does not provide a trial in front of a jury of peers as required by the US Constitution.

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46 "Who's Who," International Criminal Court, accessed May 10, 2025, https://www.icc-cpi.int/judges/judges-who-s-who.

47 See: Casey J. Bastian, "Examining Pro-Prosecution Bias in the Judiciary: Unconscious Biases of a Prosecutorial Background," Criminal Legal News, March 2025, accessed September 12, 2025, https://www.criminallegalnews.org/news/2025/feb/15/examining-pro-prosecution-bias-judiciary-unconscious-biases-prosecutorial-background/.

48 See: Sabina Grigore, "Justice Delayed, Justice Denied: Bias, Opacity and Protracted Case Resolution at the International Criminal Court," Just Access, May 2, 2023, accessed October 16, 2025, https://just-access.de/bias-opacity-and-protracted-case-resolution-at-the-international-criminal-court/.

49 Milan Markovic, "International Criminal Trials and the Disqualification of Judges on the Basis of Nationality," *Washington University Global Studies Law Review* 13, no. 1 (2014), https://openscholarship.wustl.edu/law_globalstudies/vol13/iss1/5/.

6. Right to Confrontation

The Sixth Amendment to the US Constitution states that a person accused of a crime has the right to confront any witnesses against him in a criminal action. "(…) in all criminal prosecutions, the accused shall enjoy the right (…) to be confronted with the witnesses against him."[50] This right was incorporated to the States as a fundamental right via the Fourteenth Amendment incorporation doctrine.[51] The court has recognized that the fundamental purposes of the confrontation clause are to ensure that witnesses testify under oath and understand the serious nature of the trial process; to allow the accused to cross-examine witnesses who testify against him; and to allow jurors to assess the credibility of a witness by observing that witness's behavior in court while testifying.[52] It also has traditionally indicated a rejection of written testimony that does not allow the accused the right to face his accusers and put the honesty and truthfulness of that testimony to a test in front of a jury.

The right to confront witnesses is at the heart of the adversarial trial system which was adopted by the United States and other common law countries from the British system. The heart of the adversarial trial system lies in the belief that if two equal and opposing sides (in a criminal case, prosecution representing the state versus a defense attorney representing the accused) are motivated to prove the truth as they see it, that this adversarial process will lead to the finder of fact (jury or judge) to find the truth of the case. The ability to confront those witnesses in open court and subject them to cross-examination to test the truth of their testimony is an essential element of a fair trial. This system contrasts with the other major trial system, the inquisitorial system that is found in most European countries.[53] In the inquisitorial system, the judge generally has the burden to develop the evidence and seek the truth, rather than the parties to the case.

50 U.S. Const. amend. VI.

51 The United States Supreme Court, *Pointer v. Texas*, 380 U.S. 400 (1965); The United States Supreme Court, *Washington v. Texas*, 388 U.S. 14 (1967).

52 The United States Supreme Court, *Mattox v. United States*, 156 U.S. 237 (1895).

53 John R. Spencer, "Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?," *The International Journal of Human Rights* 20, no. 5 (2016): 601–16, https://doi.org/10.1080/13642987.2016.1162408.

7. Right to Confrontation and the Adversarial Trial Process at the ICC

The Rome Statute confirms a preference for live testimony and for the parties' right to question and cross-examine witnesses. These provisions include the right of the accused to question witnesses, a preference for immediate examination of evidence by judges, the presence of all judges of the Trial Chamber at each stage of the process, and the presence of witnesses at trial.[54] However, under Article 68 of the Rome Statute, there are exceptions when the right to confront may be denied to the accused. The exceptions are based on the power of the Court to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.[55] Although the Rome Statute indicates that any restrictions under Article 68 cannot be prejudicial or inconsistent with the rights of the accused and the right to a fair and impartial trial, the rules do allow a number of restrictions on the right to confrontation that would be illegal in the American system. Included in these are the withholding of evidence from the defense and the potential for secret witnesses. One can argue that these are necessary provisions given the nature of the cases heard by the ICC, but there can be no doubt that they are inconsistent with the United States requirements on confrontation.

8. Speedy Trial

The Sixth Amendment to the United States Constitution includes a requirement for a speedy trial: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy (…) trial." This right was deemed fundamental and incorporated to the states via the Due Process Clause of the Fourteenth Amendment.[56] In *Barker v. Wingo*, the Supreme Court developed a four-part test to determine whether there has been a violation of the speedy trial right.[57] The Court said that in order to determine whether the delay was sufficient to raise a constitutional concern depended on consideration of the length of the delay, the reasons for the delay, whether the defendant had asserted his/her right to a speedy trial, and any prejudice that occurred to the defendant due to the delay. The remedy for violation of the speedy trial

54 Rome Statute of the International Criminal Court, July 17, 1998, Article 67, 68.
55 Rome Statute of the International Criminal Court, July 17, 1998, Article 68, Section 1.
56 The United States Supreme Court, *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
57 The United States Supreme Court, *Barker v. Wingo*, 407 U.S.514 (1972).

provision is dismissal of the case with prejudice. In practice, speedy trials in US criminal cases are governed by strict limitations imposed by law on both the federal and state level. The Federal Speedy Trial Act[58] mandates that the information or indictment (the beginning of legal proceedings) must be filed within 30 days from the date of the arrest or service of the summons,[59] and that the trial must begin within 70 days from the date the information or indictment was filed, or from the date the defendant appears before the court, whichever is later.[60] The Federal Speedy Trial Act also mandates that defendants must have adequate time to prepare for trial, so it does not allow trials before 20 days have passed.[61] States also have strict speedy trial provisions that are contained either in their state constitutions or laws.[62] For example, in California, an information has to be filed within 15 days and a trial has to be scheduled within 60 days.[63] The right to a speedy trial is not merely a right for the defendant to invoke, but it is also a right that protects the public's interest.[64]

9. Speedy Trial and the ICC

The Rome Statute has a provision that guarantees the right to a trial without undue delay.[65] However, in practice, there is a substantial problem with timely trials at the ICC, as there has been at the other international criminal tribunals concerning Rwanda and the former Yugoslavia.[66] Early trials at the ICC have taken several years, with the average time between opening statements and final judgment taking three to five years. This is not consistent with the United States concept of a speedy trial.

58 Title 18, Chapter 208 of the United States Code.

59 18 U.S.C. § 3161(b).

60 18 U.S.C. § 3161(c)(1).

61 18 U.S.C. ch. 208.

62 Burke O'Hara Fort et al., *A Selected Bibliography and Comparative Analysis of State Speedy Trial Provisions* (Rockville: National Criminal Justice Reform Service, 1978).

63 California Penal Code §1382.

64 The United States Supreme Court, *Zedner v. United States*, 547 U.S. 489 (2006).

65 Rome Statute of the International Criminal Court, July 17, 1998, Article 68 (1)(c).

66 See: Cynthia J. Cline, "Trial Without Undue Delay: A Promise Unfulfilled in International Criminal Courts," *Revista Brasileira de Políticas Públicas* 8, no. 1 (2018): 55–88, https://doi.org/10.5102/rbpp.v8i1.5159; Brian Farell, "The Right to a Speedy Trial Before International Criminal Tribunals," *South African Journal on Human Rights* 19, no. 1 (2003): 98–117, https://doi.org/10.1080/19962126.2003.11865174.

10. The Composition of the Court

One of the most challenging aspects of the ICC, in terms of fairness and due process standard, is the way the court is established by the Rome Statute. Eighteen judges are appointed for nine-year terms. During their term, they can serve on the pre-trial, trial and appellate divisions of the Court, and many change from one division to another. In addition, all organs and divisions of the Court share office space in one institution in The Hague, including the presidency, vice presidents, judges, and the prosecutor. Essentially, the ICC is one institution with several divisions. A valid criticism of the Court can be made based on this organization:

> The ICC will act as policeman, prosecutor, judge, jury and jailor, all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. (…) From first to last, the ICC will be the judge in its own case. (…) As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States.[67]

One result of this institutional organization is the lack of a truly independent system of appeal at the ICC. In essence, appeals are made from one division of the court to another, with no real separation of judges or interests.

11. Could the US Government Ratify the Rome Statute Even If Its Provisions Are Inconsistent with the Due Process Requirements of the US Constitution?

Assuming then that some of the provisions of the Rome Statute are inconsistent with the provisions of due process in the United States Constitution, can the United States legally join the ICC and subject its citizens to the court's authority? To answer this question, we have to look at the application of the Constitution under US law. The United States has a clear hierarchy of laws embedded in law and practice. The United States Constitution is considered the "supreme law of the land," and all other laws are subordinate

[67] Lee A. Casey, "The Case Against the International Criminal Court," *Fordham International Law Journal* 25, no. 1 (2001): 840–72, https://ir.lawnet.fordham.edu/ilj/vol25/iss3/15.

to it. This rule is made clear from the beginning by the Supremacy Clause of the Constitution:

> This 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 United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[68]

The Supremacy Clause has served as the basis for establishing the supremacy of the federal constitution and laws over state constitutions and state laws.[69] In the Supremacy Clause, treaties are given an equal status with laws passed by Congress in the US hierarchy of laws. The principle that laws passed by Congress cannot violate the US Constitution is laid down in perhaps the most important case in American constitutional history: *Marbury v. Madison*.[70] In addition to establishing the doctrine of judicial review,[71] the Marbury case also established that any law repugnant to the Constitution cannot stand. Given that laws passed by Congress that violate the Constitution are without legal effect and treaties are equivalent in the hierarchy to congressional laws, would not a treaty that violates the US Constitution also be without legal effect?

Fortunately, we do not need to guess at the answer to this question, as the US Supreme Court has provided us with an answer in a case that is directly on point: *Reid v. Covert*.[72] In that case, the defendant, Clarice Covert, killed her husband, a sergeant in the United States Air Force, at an airbase in England. In the companion case considered at the same time, Dorothy Smith killed her husband, an army officer, at a military post in Japan. According to a provision of the Uniform Code of Military Justice (UCMJ),

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68 United States Constitution, Article VI, Clause 2.

69 See: The United States Supreme Court, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); The United States Supreme Court, *Ableman v. Booth*, 62 U.S. 506 (1859).

70 The United States Supreme Court, *Marbury v. Madison*, 5 U.S. 137 (1803).

71 Judicial review is the doctrine that states that it is the prerogative of the judicial branch to determine what the law means. Specifically it the source for the US Supreme Court's power to declare actions by the other two branches of government unconstitutional.

72 The United States Supreme Court, *Reid v. Covert*, 353 U.S. 1 (1956).

persons accompanying armed forces members were subject to being tried by provisions of the UCMJ if any treaty or agreement to which the US was a party mandated so. In the cases of both England and Japan, the US had entered into treaties stating that family members accompanying military personnel would be tried for crimes committed on US military bases in their countries within the US military justice system, not in the local courts. Both Mrs. Covert and Mrs. Smith were convicted of murder by the military justice system. They both appealed these verdicts, arguing that trying civilians in a military court violated their constitutional due process rights, including the jury trial right in Article III and the Sixth Amendment. Under the UCMJ, trials have a limited jury made up of military officers only, and are conducted in a manner significantly different than normal civilian jury trial practice.[73]

In *Reid*, the Court first considered when, in acting against its citizens abroad, the United States can do so free of constitutional restraints. The Court's clear answer was no:

> At the beginning, we reject the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other sources. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and the other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[74]

The Court then reaffirmed the importance of the right to a trial by jury in the American context of due process. Next, it asked whether the language of Article III, §2 of the US Constitution on jury trials indicated a desire that the constitutional protections in the article should apply when the US government acts outside the country. The Court pointed out that the language of this section should be given its plain meaning. This includes the part of the Constitution that states all criminal trials should be by jury and the part that indicates when a crime is "not committed within any State, the Trial

73 UCMJ, 64 Stat. 109 (1950), codified at 10 U.S.C. §§801–946.

74 The United States Supreme Court, *Reid v. Covert*, 354 U.S. 5, 6 (1956).

shall be at such Place as the Congress may by Law have directed." Federal law subsequently mandated that these jury trials occur either in the district where the offender is arrested or into which he is first brought.[75] Therefore, a plain language reading clearly indicates that it was anticipated that Americans who committed crimes outside the United States would still have the protection of the right to a trial by jury.

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our Government.[76]

The Court then identifies a possible solution to the question of what can be done if the provisions of an international treaty violate US constitutional provisions. "If our foreign commitments become of such nature that the government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."[77] In other words, either obey the constitutional provisions or amend the Constitution. There can be little doubt about the certainty of the *Reid* Court's opinion regarding the question of whether a treaty commitment can override the US Constitution: "(…) 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."[78]

Another relevant and more recent case that shows constitutional limits on treaty obligations is *Medellín v. Texas*.[79] In this case, José Medellín, a Mexican national, was convicted of the gang rape and murder of two teenage girls in Texas. He was sentenced to death. Medellín challenged his conviction, arguing that he had been denied his rights under Article 36 of the Vienna Convention on Consular Relations, which gives any foreign national detained for a crime the right to contact his or her consulate. The United States is a party to this convention. However, Texas had

75 18 U.S.C. §3238.
76 The United States Supreme Court, *Reid v. Covert*, 354 U.S. 14 (1956).
77 Ibid.
78 Ibid., 354 U.S. 16.
79 The United States Supreme Court, *Medellín v. Texas*, 552 U.S. 491 (2008).

not advised Medellín of his rights under the convention. His argument was partly based on a ruling of the International Court of Justice holding that the US had violated the Vienna Convention rights of 51 Mexican nationals (including him) and ordering that those convictions to be reconsidered.[80] He argued that the Vienna Convention granted him an individual rights that state courts must respect. He also cited a memorandum from the President of the United States that instructed state courts to comply with the ICJ's ruling by rehearing the cases, arguing that the Constitution gave the President broad powers to ensure that treaties are enforced. However, the State of Texas rejected all of his arguments and dismissed his petition.

The Supreme Court first found that a treaty may constitute an international commitment, but "it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis."[81] In this case, the Vienna Convention was not self-executing, and there had been no legislation passed by Congress that indicated the Convention's provisions or the ICJ's decisions were domestic law. The argument that the President's memorandum had the ability to make the provisions of the treaty domestic law was also rejected by the Court because, under the constitutional system of government, the President lacks the authority to do so: "It is a fundamental constitutional principle that 'the power to make the necessary laws is in Congress; the power to execute in the President.'"[82] The President's authority to act must come from either an act of Congress or from the Constitution itself. In this case, neither were true. The decision of the Texas Court of Criminal Appeals was upheld. In our discussion, the lesson is clear. Actions taken by the executive in furtherance of international treaty obligations are still subject to the requirements of the US Constitution. If those acts violate the Constitution, they will not be enforced in domestic courts, including the Supreme Court.

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80 International Court of Justice, Judgment of March 31, 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 12.

81 The United States Supreme Court, *Medellin v. Texas*, 552 U.S. 493 (2008).

82 See: The United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

12. Conclusion

While the Rome Statute of the International Criminal Court strives to establish a court based on accepted international legal concepts, including the due process of law, it does not meet the same due process requirements of the United States Constitution. Questions can be raised whether committing an American citizen to the jurisdiction of the ICC would violate due process protections in the areas of jury trials, the right to confrontation, and the right to a speedy trial. There is also the issue of the composition of the Court, including the lack of a truly independent appellate process. Likewise, it seems clear that when an international treaty, such as the Rome Statute, violates provisions of the United States Constitution, the treaty cannot be used against American citizens. It would therefore seem clear that the United States government surrendering an American citizen to the ICC would violate the due process protections of American law.

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