STRANGE BEDFELLOWS: THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED STATES

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ABSTRACT

The United States and the International Criminal Court ("ICC" or "Court") have had a tempestuous relationship since the Court's founding in 1998. Although the United States was heavily involved in negotiating and drafting the ICC's Statute ("Rome Statute"), it was one of seven countries to vote against the final agreement. Since then, the United States has resisted calls to become a member of the Court due to its persistent objections to certain aspects of the Rome Statute, many of which focus on the way in which the ICC can exercise its jurisdiction. This article examines the legitimacy of the United States' objections to the ICC to establish whether the United States would be a suitable State Party should it wish to join the Court at some later date. It does this in two substantive parts. First, this article appraises the relationships each of the last five presidential administrations have had with the ICC. Through this it identifies the different approaches taken by each administration toward the Court and the nature of their objections to the ICC. Next, this article reviews three different aspects of the negotiations leading to the Court's establishment to determine whether there is any basis for the United States' position vis-à-vis the Court. This article concludes that the way the United States would like the Rome Statute to be applied is not consistent with the ICC's object and purpose. As a result, if the ICC were to welcome the United States as a member, it would likely have to sacrifice success in its overall mission to do so.

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I. Introduction

The International Criminal Court ("ICC" or "Court") has had a tumultuous history with the United States of America ("United States" or "USA"). The United States played a very active role in the arduous process of negotiating the ICC's Statute ("Rome Statute"), but ultimately voted against the final agreement.[1] The United States objected to the agreed version of the Rome Statute for several reasons, the most significant being the ICC's potential ability to exercise jurisdiction over American citizens in some circumstances.[2] Due to this, and other concerns, the United States has resisted calls to join the ICC.[3]

The United States' refusal to join the ICC inhibits the Court's ability to achieve its long-term goal of having every global state become a member of the Court.[4] The importance of universal membership was identified even before the ICC's formation.[5] The *ad hoc* committee set up by the UN General Assembly in 1995 to review the Draft Statute for an ICC asserted that universal participation in the Court was necessary to further the interests of the international community.[6] The Court continued to pursue that goal after its creation.[7] In 2006, the ICC's Assembly of States Parties adopted a plan of action for achieving universality and full implementation of the Rome Statute.[8] That plan remains under review, and a report is prepared annually about the efforts being made to reach universal ratification.[9]

While the United States is not alone amongst states that are non-members of the ICC, its absence is significant. The United States' intelligence community, military might, and financial power could be

1. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHTS (Aug. 11, 1998), https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court.

2. *Id.* ("[T]he Administration feared that an independent ICC Prosecutor might single out U.S. military personnel and officials.").

3. *See generally* Adam Taylor, *The United States and ICC Have an Awkward History*, WASH. POST, (Mar. 16, 2023, 12:00 AM), https://www.washingtonpost.com/world/2023/03/16/icc-us-cooperation-international-criminal-court-history (describing the "poor relationship" between the U.S. and ICC since 1998).

4. Resolution ICC-ASP/5/Res.3: Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

5. *Id.*

6. *Id.*

7. *See generally* INT'L CRIM. CT., *Complementarity*, https://asp.icc-cpi.int/complementarity (listing relevant resolutions to the continuing goal of universal membership) (last visited Sept. 22, 2023 at 6:00 PM).

8. Resolution ICC-ASP/5/Res.3, *supra* note 4.

9. Resolution ICC-ASP/21/Res.2: Strengthening the International Criminal Court and the Assembly of States Parties; INT'L CRIM. CT., *supra* note 7.

a great asset to the Court if the country were to become a member.[10] Evidence of this can be found in several past interactions between the United States and the ICC, particularly the role played by the United States' military and intelligence community in facilitating the surrender and transfer of Bosco Ntaganda and Dominic Ongwen to the ICC.[11] American military intelligence has also been instrumental in allowing the United States to conclude that Russian troops committed war crimes during the 2022 invasion of Ukraine.[12] That determination has led to greater cooperation between the United States and the ICC in investigating possible war crimes committed in Ukraine.[13] Further, if the United States were to become a member of the ICC, its global influence could encourage other non-members to join the Court.[14]

For much of the ICC's history, the possibility of the United States joining the ICC has seemed remote.[15] The reaction of successive American presidents to the Court has ranged from cautiousness to open hostility and at no time has it appeared that their concerns about the Court were likely to be overcome.[16] This approach has changed slightly following Russia's invasion of Ukraine and the United States' subsequent willingness to cooperate with the ICC's investigation into possible Russian criminality.[17] Some view this conflict as an opportunity for the United States to join the Court so that it can provide even greater support to the ongoing accountability efforts being made in the Ukrainian context.[18]

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10. *See, e.g.*, Stephen J. Rapp, *Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court*, U.S. DEP'T OF STATE (Nov. 21, 2013), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2013/218069.htm (describing the impact of the U.S. War Crimes Rewards Program aiding capture of persons subject to ICC arrest warrants).

11. *See, e.g.*, *id.*; Ned Price, *Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity*, U.S. DEP'T OF STATE (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity.

12. Press Statement, Anthony J. Blinken, Sec'y of State, *War Crimes by Russia's Forces in Ukraine* (Mar. 23, 2022), https://www.state.gov/war-crimes-by-russias-forces-in-ukraine.

13. Beth van Schaack, *War Crimes and Accountability in Ukraine,* U.S. DEP'T OF STATE (June 15, 2022), https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine.

14. *See, e.g.*, Proposal for the "Global Criminal Justice Act" (Dec. 7, 2021), https://omar.house.gov/sites/evo-subsites/omar-evo.house.gov/files/OMARMN_082_xml.pdf (proposing the creation of an office to "[w]ork with . . . international organizations . . . to establish and assist . . . commissions of inquiry . . . and prosecute atrocities around the world.").

15. *See* Taylor, *supra* note 3 ("The key problem with the court, as made clear by successive administrations . . . .").

16. *Id.*

17. *See* van Schaak, *supra* note 13.

18. *See, e.g.*, H.R. 1058, 117th Cong. (2d Sess. 2022) (proposing the United States become a full member of the International Criminal Court); H.R. 7523, 117th Cong. (2d Sess. 2022) (proposing the repeal of the American Servicemembers' Protection Act of 2002).

Numerous efforts have been made to convince the United States to join the Court.[19] The United States has resisted those calls, citing the same problems with the Rome Statute that prevented the United States from voting for it at the Rome Conference.[20] Much of the commentary on the issue of whether the United States should become a member of the ICC has assumed that the Court would welcome United States membership should the country wish to join.[21] This perspective overlooks that the United States wants the Court to function in a way that is fundamentally different from what was agreed at the time of its formation.[22] Therefore, the Court would have to make fundamental changes that may be incompatible with its object and purpose if it welcomed the United States as a member.

This article examines the adversarial relationship between the United States and the ICC in two parts. First, it tracks the different positions each American presidential administration has taken toward the Court and discusses the objections raised by different administrations. Consideration is also given to whether some compromised position might be found that could overcome those objections, making the ICC and the United States more harmonious partners. Second, the article will examine the *travaux preparatoires* to the Rome Statute and the text of the Rome Statute itself in an effort to identify the Court's purpose. That is followed by an assessment about whether that purpose is compatible with how the United States wants the ICC to function. The article concludes that while universal ratification is desirable to ensure maximum accountability, the ICC should not compromise its basic principles to achieve such ratification. Should this occur, the ICC will undermine its core mission and essentially render itself ineffective.[23]

II. THE POSITION OF THE UNITED STATES TOWARD THE ICC

There have been five United States presidents since the ICC was created in 1998. All five opposed the United States becoming a

19. *See, e.g.*, Benjamin B. Ferencz, Remarks Made at the Opening of the ICC (Mar. 2003), https://benferencz.org/articles/2000-2004/remarks-made-at-the-opening-of-the-icc; Elizabeth Evenson & Esti Tambay, *The US Should Respect the ICC's Founding Mandate*, HUM. RTS. WATCH (May 19, 2021, 1:13 PM), https://www.hrw.org/news/2021/05/19/us-should-respect-iccs-founding-mandate.

20. *See* Todd Buchwald, *Unpacking New Legislation on US Support for the International Criminal Court*, JUST SECURITY (Mar. 9, 2023), https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court (analyzing the ongoing concern that the ICC would gain jurisdiction to prosecute U.S. nationals).

21. *See, e.g.*, Evenson & Tambay, *supra* note 19 (expressing concern that United States' involvement with the ICC may be contrary to the ICC's goals).

22. *Id.*

23. *Id.*

member of the Court.[24] The vehemence of that opposition has varied, with some condemning the ICC as a rogue organization that threatens American sovereignty to others seeking a more cooperative relationship with the Court.[25] These differences obscure the fact that all five presidential administrations had the same objections toward the Court. Each administration was concerned that the Rome Statute, as written, could allow the ICC to exercise its jurisdiction to prosecute American citizens or the citizens of its allies.[26] Of particular concern to the United States was its inability, either as a non-party to the Rome Statute or as a permanent member of the UN Security Council, to halt those possible prosecutions.[27]

The next section will look at the ways each presidential administration voiced those concerns and the arguments used to support their positions. It will also consider the validity of their objections and whether some compromise position might be found.

A. The Clinton Administration's Tepid Acceptance of the ICC

Of the five American presidents to serve since the ICC's creation, Bill Clintonwas probably the one most interested in providing American support for the ICC. Throughout his presidency, Clinton represented himself as a staunch advocate of establishing a permanent international criminal court.[28] In his 1997 address to the UN General Assembly, he called on the nations of the world to establish such an international criminal court by the end of the twentieth century.[29] Clinton again backed the creation of an international criminal court in the months leading up to the Rome Conference, suggesting that it was the best way to guarantee that future *génocidaires* would be held accountable for their actions.[30] Clinton viewed a permanent international criminal court as an extension of his overall approach to foreign policy and his emphasis on the importance of rule of law enforcement and the protection of human rights.[31]

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24. Buchwald, *supra* note 20.

25. *See, e.g.*, CONG. RSCH. SERV., RL 31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (2006).

26. Buchwald, *supra* note 20.

27. *Id.*

28. Eric Schwartz, *U.S Policy Toward the International Criminal Court: The Case of Ambivalent Multilateralism*, WILSON CTR. (July 2, 2001, 12:00 AM), https://www.wilsoncenter.org/event/us-policy-toward-the-international-criminal-court-the-case-ambivalent-multilateralism.

29. William J. Clinton, Address by President Bill Clinton to the UN General Assembly (Sept. 22, 1997).

30. William J. Clinton, *Text of Clinton's Address to Genocide Survivors in Rwanda*, CBS NEWS (Mar. 25, 1998), https://www.cbsnews.com/news/text-of-clintons-rwanda-speech.

31. David J. Scheffer, An International Criminal Court: The Challenge of Enforcing International Humanitarian Law, An Address Before the Southern California Working Group

Despite President Clinton's enthusiasm for a permanent international criminal court, the United States ultimately did not support the Rome Statute in the form agreed upon during the Rome Conference.[32] This made it one of seven countries present at the Conference to vote against the Rome Statute's adoption.[33] David J. Scheffer, the United States' chief negotiator at the Rome Conference, later explained that the United States' primary objection to the Rome Statute lay in the provisions relating to jurisdiction found in Article 12.[34] Scheffer would call Article 12 "the single most problematic part of the Rome Statute," and felt that resolving the issues contained in the Article was the key to overcoming American opposition to joining the ICC.[35] Those objections to Article 12 were shared by subsequent presidential administrations. Both the Bush and Trump administrations contended that the Article's jurisdictional approach did not align with American constitutionalism, and, as such, was a threat to the nation's sovereignty.[36] The jurisdictional arrangement found in Article 12 remains the most significant barrier to United States' membership in the Court.

The United States' specific concerns about Article 12 centered on Subsection 2, which permits the ICC to exercise jurisdiction when either: (1) crimes are allegedly committed in the territory of a State Party or that of a state that has accepted the jurisdiction of the Court; or (2) the alleged perpetrator is a national of a State Party or state that has accepted the ICC's jurisdiction.[37] The United States disagreed with the decision to allow the Court to exercise jurisdiction if only one of the Article 12(2) conditions were met, taking the position that both should exist before the Court could proceed against a suspect.[38] The U.S. government believed that individual nations should have greater control over when and if its citizens were prosecuted by the ICC.[39]

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on the International Criminal Court (Feb. 26, 1998), https://1997-2001.state.gov/policy_remarks/1998/980226_scheffer_hum_law.html.

32. Scharf, *supra* note 1.

33. *Id.*

34. David J. Scheffer, Testimony Before the Senate Foreign Relations Committee (July 23, 1998), https://1997-2001.state.gov/policy_remarks/1998/980723_scheffer_icc.html.

35. David J. Scheffer, An International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999), https://1997-2001.state.gov/policy_remarks/1999/990326_scheffer_icc.html; David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19 (1999).

36. Marc Grossman, *Remarks to the Center for Strategic and International Studies*, U.S. DEP'T OF STATE (May 6, 2002), https://2001-2009.state.gov/p/us/rm/9949.html; *see also* John Bolton, Text of John Bolton's Speech to the Federalist Society (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

37. Rome Statute of the International Criminal Court art. 12(2).

38. Scheffer, *supra* note 35, at 20.

39. *Id.* at 19.

The United States also challenged Article 12 of the Rome Statute on the basis that it violates Article 34 of the Vienna Convention on the Law of Treaties ("VCLT").[40] The VCLT was adopted in 1969 for the purpose of codifying the rules to be applied when interpreting international treaties.[41] Article 34 of the VCLT states that a treaty cannot bind or obligate a third state unless that state consents to the treaty.[42] The United States claimed that Article 12(2) of the Rome Statute does just that by authorizing the ICC to investigate and prosecute citizens of non-States Parties who were alleged to have committed crimes on territory controlled by a State Party.[43] This was interpreted as an effort to impose jurisdiction on citizens of states that had not joined the Court so as to give the ICC a type of quasi-universal jurisdiction over international crimes.[44]

There are several flaws with the argument advanced by the United States. First, as Article 1 of the VCLT makes clear, the VCLT is designed to govern the treaty relations between states.[45] There is nothing in the VCLT to support the suggestion that it is applicable to individuals or that it can protect them from international treaty obligations. This is further borne out in Article 2 of the VCLT, which defines a "third state" as a state that is not party to a treaty.[46] The VCLT contains no language that could be reasonably construed to mean that individuals might be considered "third states" for Article 34 purposes.

Since Article 34 specifically states that a treaty cannot create obligations or rights for a third state absent consent, it cannot also protect individuals under the same provision.[47] Further, the VCLT does not stand for the proposition that individuals are relieved of treaty rights or obligations when their nation of origin has not signed the relevant treaty. If that were the case, rights and obligations which are held by individuals by virtue of their humanity could become dependent upon one's nationality. Therefore, the United States' argument in opposition to Article 12 of the Rome Statute based on the Vienna Convention is without merit. This conclusion is further reinforced by the fact that the United States has not ratified the VCLT.[48] It is rather hubristic to claim the benefits of Article 34 of the VCLT, such as protection from the jurisdictional provisions of the Rome Statute, without joining the treaty regime that would entitle the United States to those protections.

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40. *Id.* at 18.

41. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 437 (2004).

42. Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1151 U.N.T.S. 331.

43. Scheffer, *supra* note 35, at 18.

44. *Id.*

45. *See supra* note 42, at art. 1.

46. *Id.* at art. 2.

47. *Id.* at art. 34.

48. Daniel L. Hynton, *Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations*, 27 VAND. J. INT'L L. 419, 421 (1994).

Article 12(2)(a) of the Rome Statute is better understood as an expression of the territorial principle of jurisdiction rather than one based in treaty law.[49] Considered the most basic jurisdictional principle in international law, the territorial principle is the concept that a state has the sovereign right to exercise jurisdiction over any crimes that occur or are committed on its territory, regardless of the nationality of the perpetrator.[50] That means that if a crime is committed in a state, regardless of who committed it, the state has the right to investigate and prosecute that crime.[51] There is nothing controversial about this proposition, and the United States practices the same principle when foreign nationals commit crimes in the territory of the United States.[52]

In addition to the ability to exercise jurisdiction over crimes committed on its territory, a state also possesses the sovereign power to voluntarily delegate some of its territorial jurisdiction to international organizations or tribunals.[53] The ICC derives the right to exercise territorial jurisdiction in relation to atrocity crimes occurring within the territory of a State Party or of a state that makes such a delegation.[54] When a state delegates some part of its jurisdiction to an international organization, that entity can then exercise jurisdiction in a way that is consistent with the power previously held by the state and in accordance with the agreement that instigated the delegation.[55] In essence, the ICC's exercise of jurisdiction under Article 12(2)(a) is an extension of the delegating state's already existing authority over its territory and its right to investigate and prosecute crimes that occur within that territory.[56] The state has simply allotted part of that right to the ICC by ratifying the Rome Statute and grants the Court a portion of the power to investigate and prosecute atrocity crimes that were previously held exclusively by the state.[57] No new right or obligation has been created; instead, Article 12(2) constitutes the expression of an

49. Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 EUR. J. INT'L L. 938, 950 (2018).

50. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 42 (1st ed. 2008).

51. KENNETH S. GALLANT, INTERNATIONAL CRIMINAL JURISDICTION 181 (2022).

52. *Id.*

53. Monique Cormier, *Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?*, 16 J. INT'L CRIM. JUST. 1043, 1052-53 (2018); 5 ALEXANDRE SKANDER GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT 16 (Carsten Stahn et al. eds., 2019).

54. *How the ICC Works*, ABA-ICC, https://how-the-icc-works.aba-icc.org (last visited Sept. 29, 2023).

55. Galand, *supra* note 53, at 17.

56. Rome Statute of the International Criminal Court, art. 12, ¶ 2(a), July 17, 1998, 2187 U.N.T.S. 38544; 5 Galand, *supra* note 53, at 13–14, 16.

57. *Id.*

already existing right.[58] As such, there is no need for third party consent under Article 34 of the VCLT.[59]

Scheffer recognized the relevance of the territoriality principle to Article 12(2) when explaining the United States' reasons for not joining the ICC, but he dismissed it as "the blind application of territorial jurisdiction."[60] Quoting from the work of Madeline Morris, Scheffer argued that it is dubious whether a state can delegate to another state the authority to try a suspect without the consent of the accused's state of nationality.[61] From that, Scheffer extrapolated that it is even less clear whether a state can delegate that authority to an international court.[62] Scheffer, again relying on Morris, noted that there is no precedent in international law of a state delegating territorial jurisdiction to an international court and that doing so has no basis in the customary international law of territorial jurisdiction.[63] In essence, Scheffer argued that, because the jurisdictional arrangement of the ICC has no existing basis, then it is presumptively invalid.[64]

Of course, the same could be said of the Nuremberg Tribunal. Its jurisdictional basis was defined in the 1945 London Agreement, in which it was agreed that trials should be held to prosecute and punish war criminals acting on behalf of the Axis powers, and in the Charter of the International Military Tribunal, establishing the rules by which the Nuremberg trials were held.[65] The Charter granted the Tribunal jurisdiction to punish the "major war criminals" of the European Axis countries for crimes against peace, war crimes, and crimes against humanity.[66] This was seen, even at the time, as a legitimate exercise of the right of any state to prosecute and punish individuals accused of committing war crimes and crimes against humanity.[67]

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58. Utkarsh Dubey, *Jurisdiction of the International Criminal Court Over Non-Party States: Legitimate or Ultra Vires?*, JURIST (May 19, 2021, 9:00 AM), https://www.jurist.org/commentary/2021/05/utkarsh-dubey-icc-jurisdiction-over-nonparty-states.

59. *See* Vienna Convention on the Law of Treaties, *supra* note 42, at 13; *see also* 1155 U.N.T.S. 331.

60. Scheffer, *The United States and the International Criminal Court*, *supra* note 35, at 18.

61. David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (citing Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-State Parties*, 64 L. CONTEMP. PROBS. 13 (2001)) (Scheffer's comments were based on a pre-publication draft of Professor Morris' article. The wording of the published version differs somewhat from the version Scheffer relied on. However, the crux of the arguments is identical in both.).

62. *Id.*

63. *Id.*

64. Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of The U.S. Position*, 64 L. CONTEMP. PROBS. 67, 69-72 (2001).

65. Trial of the Major War Criminals, 22 Libr. Of Cong. 460 (Int'l Mil. Trib., Nuremberg 14 Nov. 1945 – 1 Oct. 1946).

66. U.N. Charter of the Int'l Mil. Trib. art. 6, Aug. 8, 1945, 82 U.N.T.S 251.

67. Willard B Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. J. 177, 218 (1945).

However, the Nuremberg Tribunal was not the result of a single state exercising jurisdiction over war crimes; rather, it was formed through the cooperation of multiple states jointly exercising the sovereignty granted to them as occupying powers following Germany's unconditional surrender.[68] In so doing, they were acting in place of the then defunct German government, making the establishment of the Nuremberg Tribunal a delegation of the criminal jurisdiction of German domestic courts to an international court.[69] While the Tribunal never referred to itself as an international court, President Harry S. Truman did, when he called the Nuremberg Tribunal "the first international criminal assize in history."[70] As Truman's statement illustrates, the Tribunal was unique and as such would not have met the test Scheffer imposed on the ICC.[71]

The United States also objected to Article 12 out of a fear that it could discourage non-States Parties from participating in peacekeeping activities.[72] The United States was particularly concerned that Article 12 might expose the servicemembers of non-States Parties to politically motivated prosecutions launched by belligerent states.[73] The U.S. government argued that greater protections should be afforded when those individuals were engaging in "official actions" attributable to the non-States Parties.[74] In addressing this point, Scheffer later clarified that "official state actions" included humanitarian interventions, peacekeeping solutions, or defensive actions to eliminate weapons of mass destruction.[75] Adopting the American perspective on this would essentially mean that troops from non-States Parties could commit Rome Statute crimes on the territory of States Parties without facing any sort of accountability for their actions so long as they were engaging in an official state action when the violation occurred.[76] Creating that sort of exception to the ICC's jurisdiction would be antithetical to the purpose of the ICC as will be discussed in the second part of his article.[77]

The above approach ignores the obvious answers to that problem: the U.S. government could either make a stronger effort to prevent its soldiers from committing Rome Statute crimes or it could

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68. *See* Trial of the Major War Criminals, *supra* note 65, at 461.

69. Galand, *supra* note 53, at 17–18.

70. Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 38 (1947); Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 39 (2004).

71. *See* Wright, *supra* note 70, at 38.

72. Scheffer, *The United States and the International Criminal Court*, *supra* note 35, at 20.

73. *Id.*

74. *Id.*

75. David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Dep't of State, Address at American University (Sept. 14, 2000).

76. *Id.*

77. *See generally* Rome Statute of the Int'l Criminal Court, July 17, 1998, 2187 U.N.T.S 3.

adequately investigate and prosecute those crimes when they are committed. As made clear in the Preamble to the Rome Statute, the jurisdiction of the ICC is complementary to national jurisdiction.[78] As such, domestic courts retain primary jurisdiction over crimes that fall under the Rome Statute.[79] Under this system, the ICC can only exercise its jurisdiction in the absence of meaningful action on the part of state-run justice institutions.[80] This principle is fully explained in Article 17 of the Rome Statute, which sets out the four grounds for finding that a case is inadmissible at the ICC due to a lack of complementarity.[81] These grounds are when: (1) the case is being investigated or prosecuted by a state with jurisdiction over the alleged conduct; (2) the case has been investigated by a state and it chose not to prosecute; (3) the person concerned has already been tried by a state for the same conduct described in the complaint against them; and (4) the case is not of sufficient gravity to justify further action.[82] Under this principle, citizens of the United States suspected of committing Rome Statute crimes are only vulnerable to investigation and prosecution by the ICC in the absence of meaningful domestic proceedings.[83] To prevent this, all the United States must do is investigate alleged crimes that may have been committed and prosecute the suspected perpetrators if warranted.[84]

Instead, the United States dismissed the complementarity regime described in Article 17 as deficient.[85] It suggested that even if the United States were to investigate crimes allegedly committed by its troops, the Court could still find those efforts inadequate and launch its own investigation.[86] While it is true that the ICC could still proceed following an inadequate investigation, there are no examples in more than twenty years of ICC practice of the Court dismissing a legitimate national investigation and launching its own proceedings against an accused.[87] To the extent this was ever a legitimate reason for criticizing Article 17, the clear practice of the Court suggests that this is not a reasonable basis for challenging the Article's approach to jurisdiction.[88]

Despite these numerous and varied objections to the Rome Statute's jurisdictional arrangement, the Clinton administration nonetheless signed the Statute prior to the December 31, 2000,

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78. *Id.*

79. William A. Schabas, THE INTERNATIONAL CRIMINAL COURT: COMMENTARY ON THE ROME STATUTE (2nd ed., 2016), at 447.

80. *See* Rome Statute, *supra* note 77, at art. 17.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Scheffer, *The United States and the International Criminal Court*, *supra* note 35, at 19.

86. *Id.*

87. *See generally* Scheffer, *The United States and the International Criminal Court*, *supra* note 35.

88. *See* Rome Statute, *supra* note 77, at art. 3.

signing deadline.[89] In a statement accompanying the signing, President Clinton identified the importance of holding accountable those individuals accused of committing crimes under the Rome Statute and the United States' "tradition of moral leadership" when it comes to those efforts.[90] Moreover, he highlighted that the ICC is a court of complementary jurisdiction, although his explanation of how complementarity works was somewhat lacking.[91] Despite these positive aspects of the Rome Statute, President Clinton also identified several negative aspects that militated against the United States signing the Rome Statute.[92] This included a fear that the Court would prosecute citizens of non-member states (i.e., the United States) and that trials at the Court would become politicized.[93] President Clinton counselled his successor, President George W. Bush, to exercise caution regarding the ICC and to not submit the Rome Statute to the Senate for ratification until the United States' myriad concerns were addressed.[94]

B. President Bush's Stance Against the ICC

President Bush shared President Clinton's concerns about the ICC and quickly established himself as a firm opponent of the Court.[95] The Bush Administration's first significant policy decision regarding the ICC was to inform the United Nations that the United States had no intention of becoming a member of the ICC.[96] It viewed this declaration as effectively undoing the decision of the Clinton Administration to sign the Rome Statute in December 2000.[97] When announcing that the United States was "un-signing" the Rome Statute, a Bush Administration official identified a number of different beliefs that the Administration held about the Court.[98] These beliefs were: (1) the ICC's approach to jurisdiction threatens American sovereignty; (2) the ICC undermines the role of the UN Security Council; (3) the ("Prosecutor") power of the ICC's Prosecutor is unchecked; and (4) the ICC is built on a flawed foundation that leaves it open to exploitation and politically

89. William J. Clinton, *Statement on Signature of the International Criminal Court Treaty*, (Dec. 31, 2000), https://1997-2001.state.gov/global/swci/001231_clinton_icc.html.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. John B. Bellinger, Legal Advisor, Remarks to the DePaul Univ. Coll. of Law: The U.S. and the Int'l Crim. Ct.: Where We've Been and Where We're Going (Apr. 25, 2008).

96. *See* Grossman, Remarks to the Center for Strategic and International Studies, *supra* note 36.

97. *Id.*

98. *Id.*

motivated prosecutions.[99] All four of the Bush Administration's stated reasons for rejecting membership in the Court are interconnected, and they all relate to the concern that the United States would be unable to prevent its citizens from prosecution by the Court.

Much of the Bush administration's argument against Article 12 jurisdiction runs along the same lines as the Clinton administration's critiques of the Rome Statute.[100] Like its predecessor, the Bush administration claimed to be concerned that jurisdiction could be exercised against American citizens in the absence of the United States agreeing to be bound by the Rome Statute.[101] Moreover, the Bush administration suggested that any exercise of jurisdiction by the ICC is presumptively invalid because there is no precedent for an international organization to do so in the absence of a Security Council mandate.[102] This unease about the lack of potential oversight from the Security Council would become a running theme in administration officials' statements about the ICC.[103] The Bush administration did little to expand on its reasons for taking these positions beyond what had already been expressed by Clinton administration officials.[104]

The Bush administration's remaining concerns were more novel and relate to the fear that the Rome Statute dilutes the power of the UN Security Council ("Security Council" or "UNSC") by assuming some of its authority over peacekeeping activities.[105] In particular, the administration felt the Rome Statute permitted the Court to identify threats to and infringements upon global peace despite the fact that Article 39 of the UN Charter grants that authority exclusively to the Security Council.[106] Further, the administration also believed that the Prosecutor's ability to conduct investigations of its own volition (*proprio motu*) created the possibility that it would interfere with the work already being done by the Security Council.[107] The administration's objection to the Prosecutor's *proprio motu* power was compounded by a concern that the Prosecutor would misuse their power by engaging in politically motivated investigations aimed at the United States.[108] From the United States' standpoint, the Rome Statute did too little to prevent this from happening, and the

99. *Id.*

100. Andrea Birdsall, *The "Monster That We Need to Slay"? Glob. Governance, the United States, and the Int'l Crim. Ct*, 16 GLOB. GOVERNANCE, 451, 453 (2010).

101. *Id.*

102. *Id.* at 453–55.

103. Special Research Report, Security Council, Security Council Action Under Chapter VII: Myths and Realities, 2008 No.1 (June 28, 2001).

104. Bellinger, *supra* note 95.

105. *Id.*; *see also* John R. Bolton, Under Secretary for Arms Control and International Security, Remarks to the Federalist Society (Nov. 14, 2002).

106. *Id.*; *see also* U.N. Charter art. 39, ¶ 0.

107. Bolton, *supra* note 105.

108. *See generally id.*

lack of greater Security Council oversight over the Court meant that insufficient external control existed to thwart vexatious prosecutions.[109]

John Bolton, the Secretary of State for Arms Control, played a formative role in determining the nation's policy toward the ICC during President Bush's first term.[110] Bolton was already an outspoken critic of the Rome Statute before joining the Bush Administration, particularly demonstrated by his belief that the Rome Statute was incompatible with "American standards of constitutional order" and that it constituted a "stealth approach to erode [American] constitutionalism."[111] These rather grandiose claims are consistent with Bolton's general worldview—that a global agenda exists to constrain the United States through the application of international law.[112]

Bolton's arguments about the Court rest on the assertion that the ICC is both substantively and structurally flawed.[113] The substantive argument is based on the idea that the Court's authority is not clearly defined in the Rome Statute and that its power to interpret the meaning of different crimes is so broad that it makes its decisions political and legislative in nature.[114] Structurally, Bolton felt that the Court's authority is an incoherent constitutional arrangement that does not clearly delineate how laws are made, adjudicated, or enforced.[115] In Bolton's view, this is all worsened by the fact that the Court's Prosecutor and judiciary are not subject to popular accountability or an elected executive or legislative branch, which Bolton interprets as a crucial check on their power.[116]

Bolton's criticisms of the Court's structure do not really engage with several statutory safeguards that exist to prevent the Prosecutor or individual judges from abusing their power. The Rome Statute contains explicit provisions whereby the Assembly of States Parties can remove the Prosecutor or a Judge from office for serious misconduct or a breach of their duties.[117] The Rome Statute also includes a mechanism for disqualifying the Prosecutor or a Judge from acting in individual cases should there be any questions about their impartiality in the matter.[118] Further, the Rome Statute has a provision prohibiting the Court from initiating or continuing an

109. *Id.*

110. *See generally id.*

111. John R. Bolton, *The Risks and Weaknesses of The International Criminal Court from America's Perspective*, 64(1) L. & CONTEMP. PROBS. 167, 169 (2000).

112. John R. Bolton, *Is There Really Law in International Affairs*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 9 (2000).

113. *See* Bolton, Remarks, *supra* note 105; *see also* Bolton, *supra* note 111, at 169.

114. *See* Bolton, Remarks, *supra* note 105.

115. *Id.*

116. *Id.*

117. *See* Rome Statute, *supra* note 37, at art. 46.

118. *Id.* at arts. 41(2)(a), 42(7).

investigation or prosecution in a particular situation for twelve months following the Security Council's adoption of a resolution requesting the Court to defer those activities.[119] Despite the existence of these clear checks on the power of the Prosecutor and Judges, the Bush administration felt they offered insufficient protections.[120] In 2002, President Bush clarified this in a speech delivered to active members of the U.S. Army when he explicitly referenced the ICC's perceived lack of accountability.[121]

Like its predecessor, the Bush administration's approach to the ICC was motivated by the concern that the Court could be used as a tool to hold American citizens accountable for their actions.[122] The United States viewed that responsibility as being solely domestic and that matters concerning possible American criminality were the exclusive domain of the country itself.[123] Furthermore, the Bush administration also feared that the prospect of investigation and prosecution by the ICC could impair America's "global security commitments."[124] This argument is connected to the concern raised during the Clinton era that the effectiveness of the U.S. military would be compromised if some of the security decisions it made would later be subject to international investigation and prosecution.[125] However, the Bush administration took that argument a step further by alleging that it was principally concerned that U.S. military leaders would be exposed to prosecution as part of an "agenda to restrain American discretion."[126] The administration believed that the possible danger would only be exacerbated when such prosecutions arose out of actions considered legitimate under the United States' domestic constitutional system.[127]

With this understanding of the ICC in mind, President Bush specifically rejected the idea that the ICC could exercise jurisdiction over American citizens and announced a two-part plan to protect them from prosecution by the Court.[128] The first part was to negotiate and conclude more than one hundred bilateral agreements with other states, commonly referred to as Article 98 agreements in reference to the relevant portion of the Rome Statute.[129] The Article 98 agreements were designed to prevent the surrender of Americans

119. *Id.* at art. 16.

120. *See generally* Bolton, Remarks, *supra* note 105; *see also* Bolton, *supra* note 111.

121. George W. Bush, Remarks to the 10th Mountain Division at Fort Drum, New York (July 19, 2002).

122. *Id.*

123. *Id.*

124. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 31 (2002).

125. *See* Scheffer, Testimony Before the Senate Foreign Relations Committee, *supra* note 34.

126. *See* Bolton, *supra* note 105.

127. *Id.*

128. *Id.*

129. Article 98 Agreements, U.S. DEP'T OF STATE, https://www.state.gov/subjects/article-98/ (last visited June 1, 2022).

to the ICC should an arrest warrant be issued against them.[130] States Parties to the ICC are expected to comply with requests by the Court to arrest and surrender individuals within the state's territory.[131] Article 98(2) prevents the ICC from making those requests when an obligation contained in an international agreement prevents the surrender of the individual without the surrendering state first agreeing to it.[132] A typical Article 98 agreement, which qualifies as an international agreement for the purposes of the Rome Statute, contains a clause under which states agree not to extradite American citizens to the ICC, or to a third state that might then transfer the person to the ICC, without first receiving the express permission of the United States.[133] These agreements effectively solved the jurisdictional problem that prevented the Clinton Administration from joining the ICC by making the exercise of jurisdiction over American citizens contingent on American consent.[134] They also run in direct opposition to the ICC's stated goal of ending impunity as they protect American citizens from being held accountable for their actions.[135]

The second part of the United States' plan involved adopting the American Servicemembers' Protection Act ("ASPA").[136] Signed by President Bush in August 2002, ASPA prohibited federal courts, state and local courts, and state and local governments from cooperating with any requests for cooperation made by the ICC.[137] ASPA also included a provision forbidding the direct or indirect transfer of national security information or law enforcement information to the ICC for the purpose of facilitating an investigation, arrest, or prosecution.[138] This section of ASPA was not limited to information that might be used to investigate and prosecute Americans for atrocity crimes but extended to all investigations and prosecutions.[139] That means that no part of the United States government, at any level, could provide the ICC with information that might help to convict any individual accused of Rome Statute crimes regardless of whether they or their alleged crimes have any connection to the United States.[140] Both provisions represent a significant obstruction of accountability efforts as they prioritize

130. Antoinette Pick-Jones, *Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court over American Citizens*, 93 N.Y.U. L. REV. 1779 (2018).

131. *See* Rome Statute, *supra* note 37, at Preamble.

132. *Id.* at art. 98(2).

133. *E.g.*, Agreement on the International Criminal Court and Rome Statute Article 98, Republic of Chad-U.S. June 30, 2003.

134. *Id.*

135. *See* Rome Statute, *supra* note 37, at Preamble.

136. American Servicemembers Act (2002) 22 U.S.C. §7401-7433.

137. *Id.* at § 7423.

138. *Id.* at § 7425.

139. *Id.*

140. *Id.*

interfering with the ICC's work and ability to successfully conclude investigations and prosecutions.[141]

Perhaps the most controversial part of ASPA is the provision which authorizes the president to use "any means necessary" to bring about the release of American service members, U.S. government officials, or other government employees being detained by the ICC or at its request.[142] Those powers also extend to freeing people occupying similar positions within NATO and other allied states.[143] The term "any means necessary" as used in this clause is limited only to the extent that ASPA specifically prohibits the president from using bribery to effectuate the release of American citizens or citizens of its allies.[144] It does appear to allow the president to authorize military action against the seat of the Court in the Netherlands, should doing so prove necessary to further the aims of ASPA.[145] This led some to refer to ASPA as the "Hague Invasion Act."[146] Unsurprisingly, this clause of the ASPA angered the Dutch government because it represented a threat against the territorial integrity of the Netherlands, which was particularly unwarranted considering its long-term alliance with the United States and the Netherlands' support of the U.S.-led war in Afghanistan.[147]

ASPA also limited American military involvement in a variety of different international contexts.[148] In a clause that was later repealed, ASPA prohibited the U.S. military from assisting any country, including financially, that was a party to the Rome Statute unless it was in the national interest of the United States to do so, the state had entered into an Article 98 agreement with the United States, or the state was allied with the United States.[149] American servicemembers were also prevented from being deployed in international peacekeeping missions unless: (1) the Security Council resolution authorizing the action specifically exempted them from prosecution by the ICC; (2) none of the states involved in the operation were members of the Court or had accepted its jurisdiction; (3) those states that were subject to the ICC's jurisdiction had concluded Article 98 agreements with the United States; or (4) the national interests of the U.S. justified its

141. 22 U.S.C. §§ 7421–7433; Article 98 Agreements, *supra* note 130.

142. 22 U.S.C. § 7427; *see also* 22 U.S.C. §7432(4).

143. *Id.*

144. *Id.*

145. Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. LEGIS. 537, 546 (2003).

146. *Id.*; *see also* H.R. 7523, 117th Cong. (2022).

147. Giles Scott-Smith, *Testing the Limits of a Special Relationship: US Unilateralism and Dutch Multilateralism in the Twenty-First Century*, in *AMERICA'S 'SPECIAL RELATIONSHIPS': FOREIGN AND DOMESTIC ASPECTS OF THE POLITICS OF ALLIANCE* 119 (John Dumbrell & Axel R. Schäfer eds., 2009).

148. *See generally* 22 U.S.C. §§ 7421–7433.

149. 22 U.S.C. §7 426, *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181, div. A, Title XII, § 1212(a) 122 Stat. 371.

involvement in the absence of any protections against prosecution.[150] The United States used the latter two provisions to influence states to enter into Article 98 agreements with it. Ultimately, several states were cajoled into agreeing to Article 98 agreements to ensure the continued cooperation and participation of the U.S. military.[151] Consequently, the Bush administration significantly reduced the threat of American servicemembers might be subject to by limiting the likelihood that they would be found in situations that could result in accountability for their commission of any Rome Statute crimes.[152]

The Bush administration maintained its hardline stance against the ICC throughout its first term.[153] While its efforts were primarily directed at protecting Americans from investigation and prosecution by the Court, some measures were also adopted that disrupted the function of the Court in general.[154] The administration's approach to the ICC slightly softened after Bush's re-election in 2004.[155] Evidence of this can be found in the administration's decision not to oppose the Security Council's referral in 2005 of the situation in Darfur to the ICC.[156] In so doing, the United States voiced its support for justice in Darfur and the need to hold accountable those individuals committing war crimes and genocide.[157] The decision not to veto the resolution should not, however, be seen as an implicit endorsement of the ICC. Rather, the United States made clear that it disagreed with the choice of the ICC as a venue through which accountability should be pursued and that it was only acting as it did because it was important for the Security Council to speak with one voice on the issue.[158] The United States then reiterated its objection to the ways in which the ICC can exercise its jurisdiction and indicated that it abstained from voting because the resolution contained language protecting U.S. nationals from prosecution.[159]

Although the United States' statement during the Security Council debate on the Darfur resolution unequivocally rejected the ICC's authority, the language it used represented a shift from the Administration's earlier assertions about the ICC. While it briefly mentioned the danger of politically motivated investigations and trials, it lacked any reference to the "unaccountable" Prosecutor or

150. *Id.* at § 7424.

151. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 688 (2003).

152. *Id.* at 688–89.

153. *Id.* at 683.

154. *Id.* at 687–89.

155. *See, e.g.*, U.N. SCOR, 60th Sess., 5158th mtg. at U.N. Doc. S/PV.5158 (Mar. 31, 2005).

156. *Id.* at 3.

157. *Id.*

158. *Id.*

159. *Id.*

their "unchecked" powers.[160] Instead, the focus was on the jurisdictional issues first raised during the Clinton administration and the protection from prosecution granted to American nationals in the Security Council resolution's text.[161] The United States also advanced the proposition that future investigations of non-States Parties' citizens should only occur following the agreement of the state of which the individual is a national or by Security Council resolution.[162] This would give the United States its desired control over prosecutions and allow it to thwart any actions taken against American citizens.[163] The administration's concerns about the ICC's alleged lack of accountability, as well as the accompanying danger that the Court could be politicized, were less pressing when there was no risk that American citizens or the citizens of its allies might be prosecuted.[164]

The United States did not entirely back away from its criticisms of the ICC during Bush's second term, but it certainly moderated them and gave some indication that it could work with the Court under the right circumstances.[165] This continued in the following years, which saw changes to ASPA including relaxing and later repealing the prohibition against providing financial support to the militaries of governments who did not enter into Article 98 agreements.[166] Bush administration officials recognize that in some instances, like Darfur, the United States wished to see the ICC succeed and that it could have an interest in facilitating and assisting the Court's work in that area.[167] Although these changes in approach did not signal acceptance of the ICC, it suggested a move toward developing a constructive relationship with the Court more akin to what existed under the Clinton administration.[168] This should come as no real surprise as the sticking points for the Bush administration's two terms were almost identical to those that impeded Clinton from agreeing that the United States should become a member state of the ICC.[169]

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 4.
164. *Id.* at 3.
165. Kathryn Sikkink, *From "Invade the Hague" to "Support the ICC": America's Shifting Stance on the International Criminal Court*, HARV. UNIV. BLOG (Apr. 27, 2022), https://scholar.harvard.edu/ksikkink/blog.
166. 22 U.S.C. §7426; *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181, div. A, Title XII, § 1212(a) 122 Stat. 371.
167. John Bellinger, Legal Adviser to the Bush Administration, Remarks to the DePaul University College of Law (Apr. 25, 2008).
168. *Id.*
169. *Id.* at 2.

C. President Obama Builds Bridges with the ICC

Even before taking office, the Obama administration, unlike its predecessors, signaled its intent to work more closely with the ICC.[170] During the process of being confirmed as Obama's Secretary of State, Hillary Clinton indicated that the administration would end hostility toward the ICC and encourage the Court to act when doing so would promote the interests of the United States.[171] Throughout its first two years, Obama's administration demonstrated this newfound commitment to cooperation with the ICC.[172] In that time, the United States directly participated in ICC activities by attending the ICC's Assembly of States Parties as an observer and participating in the Review Conference of the Rome Statute held in Kampala, Uganda.[173]

During the ICC's Assembly of States Parties in 2009, Stephen J. Rapp, the U.S. Ambassador-at-Large for War Crimes Issues, set out the new administration's support for international tribunals as accountability mechanisms.[174] He stated that there are times when international cooperation is necessary to combat criminality and that to do that the United States needed to better understand how the ICC worked and the issues it faced.[175]

However, the following year, the Obama administration was more tepid in its support of the ICC in its National Security Strategy ("2010 NSS").[176] While the 2010 NSS again recognized the importance of accountability and the need to support institutions that achieve that goal, it qualified its support for the ICC.[177] Rather than back all ICC prosecutions, it limited its support to those that "advance U.S. interests and values" and that are in compliance with U.S. law.[178] This approach to the ICC aligns more closely with previous administrations and shows a preference for international accountability that does not apply to American citizens.

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170. Howard Salter, *Global Cooperation: The Candidates Speak*, FPIF (Mar. 26, 2008), https://fpif.org/global_cooperation_the_candidates_speak.

171. WALTER PINCUS, *Clinton's Goals Detailed,* WASH. POST (Jan. 19, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/01/18/AR2009011802268.html.

172. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Annual Meeting of the American Society of International Law*:* The Obama Administration and International Law (Mar. 25, 2010).

173*. Id.*

174. Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, Address to Assembly of States Parties (Nov. 19, 2009).

175*. Id.*

176. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 48 (2010).

177*. Id.*

178*. Id.*

The United States next participated in an ICC meeting in 2010 when it attended the ICC Review Conference in Kampala, Uganda.[179] The United States was actively involved in discussions around how the crime of aggression should be defined in order to activate the Court's jurisdiction over such acts of aggression.[180] In a statement delivered at the conclusion of the conference, a legal advisor to the Secretary of State, Harold Koh, remarkably claimed that the United States does not commit acts of aggression and therefore it was unlikely that an American would be prosecuted for such an act.[181] This viewpoint is instructive in understanding the United States' interpretation of how the Rome Statute should be applied. Specifically, it reflects the belief that American troops are responsive to the atrocity crimes of others but that they do not initiate them, despite much evidence to the contrary.[182] Thus, the United States concluded that atrocity crimes that are responsive to aggressive crimes are of lesser severity and should not result in investigation and prosecution by the Court.[183] In essence, the United States' position is that crimes committed in an effort to stop other crimes are excusable and should not be subject to criminal sanction.[184] How this formulation of the ICC's purpose conforms to other interpretations will be explored in greater detail later in this article.

The United States continued its engagement with the ICC throughout the remainder of the Obama presidency.[185] In so doing, it directly supported the Court in holding accountable individuals who were either enemies of the United States or about whom the United States was largely indifferent.[186] In 2011, the United States voted in favor of a unanimous Security Council resolution referring the situation in Libya to the ICC.[187] Susan Rice, then the United States Ambassador to the United Nations, described the resolution as an example of the world speaking with one voice, echoing the statement made by the United States when it abstained from voting for the Darfur resolution.[188] Later that year, President Obama deployed U.S. military personnel to Uganda to assist local forces in finding Joseph

179. S. REP. NO. 111-55, at v (Conf. Rep.).

180. *Id*. at 5.

181. Harold Hongiu Koh, Legal Advisor for U.S. Dep't of State & Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Special Briefing: U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010).

182. *Id*.

183. UNITED STATES PRESIDENT, *supra* note 176.

184. *Id.*

185. *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship (last visited Sept. 22, 2023).

186. S. REP. NO. 111-55, *supra* note 179, at 5-4.

187. Kevin Heller, *Security Council Refers the Situation in Libya to the ICC*, OPINIO JURIS (Feb. 27, 2011), https://opiniojuris.org/2011/02/27/security-council-refers-the-situation-in-libya-to-the-icc.

188. UN Security Council, Transcript of the 6491st Meeting, Doc No S/PV.6491 (Feb. 26, 2011), at 3.

Kony, who was (and still is) subject to an ICC arrest warrant.[189] Obama did not directly connect the deployment to the ICC's efforts to arrest Kony, although Rapp did in a statement to the Court's Assembly of States Parties.[190] This signaled a new commitment by the United States to assisting in the apprehension of suspects wanted by the ICC.[191] In 2013, Obama authorized the expansion of the State Department's Awards Program and enhanced the government's ability to offer monetary rewards for information leading to the arrest and conviction of individuals wanted by international criminal tribunals.[192] Later, the United States helped facilitate the surrender and subsequent transfer into ICC custody of Bosco Ntaganda and Dominic Ongwen, two suspects for whom rewards had been offered.[193]

Despite these efforts to positively cooperate with the Court, the Obama Administration did not always support the work of the ICC. In 2014, following the deployment of American troops as peacekeepers in Mali, President Obama issued a memorandum in which he asserted that those troops would not be subject to criminal prosecution or other assertions of the ICC's jurisdiction due to an existing Article 98 agreement between the United States and Mali.[194] This accorded with the approach set out in the National Security Strategy in 2015 ("2015 NSS"). The 2015 NSS supported the work of the ICC in holding accountable those responsible for "the worst human rights abuses."[195] It also qualified that support by stating that it must be consistent with the United States' commitment to

189. Betsy Reed, *Obama Sends 100 Troops to Combat LRA in Uganda*, GUARDIAN (Oct. 14, 2011), https://www.theguardian.com/world/2011/oct/14/obama-sends-troops-uganda.

190. Letter from President Barack Obama to the Speaker of the House of Representatives and President Pro Tempore of the Senate, (Oct. 14, 2011); *see also* Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues U.S. Statement to the Assembly of States Parties of the International Criminal Court (Dec. 14, 2011).

191. *See The US-ICC Relationship*, *supra* note 185.

192. Press Release, Barack Obama, President of the United States, Obama Statement on Enhanced State Department Rewards Program (Jan. 15, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/01/15/statement-president-enhanced-state-department-rewards-program.

193. Stephen J Rapp, Ambassador-at-Large for War Crimes Issues, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (Nov. 21, 2013); Press Statement, Ned Price, Senior Advisory to the Secretary of State, Price Statement on the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity.

194. Memorandum from President Barack Obama to Secretary of State, Concerning U.S. Participation in the United Nations Multidimensional Integrated Stabilization Mission in Mali Consistent with Section 2005 of the American Servicemembers' Protection Act (Jan. 31, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/31/presidential-memorandum-certification-concerning-us-participation-united.

195. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 22 (2015).

protecting its own personnel.[196] This is reminiscent of earlier policies designed to protect American citizens from being held accountable for their actions.[197]

Like President Bush, Obama's interest in supporting the ICC largely extended to using it as a mechanism to hold accountable those individuals America considered its enemies or about whom they were indifferent.[198] This is evident in similar statements made by American officials during the debates surrounding the two Security Council referrals to the ICC.[199] However, any suggestion that an American could be held responsible was met with strong resistance and efforts to shield them from the jurisdiction of the Court.[200] The persistence of these ideas through multiple presidencies suggests that the American position had coalesced around the notion that the ICC should be selective when deciding how its jurisdiction would apply.[201] This demonstrates the United States' determination to prioritize its own interests over the ICC's goal of full accountability for atrocity crimes. In taking this position, the United States called into question its suitability as a state party to the Rome Statute.

D. President Trump's Strident Opposition to the ICC

In a departure from the Bush administration's antagonistic relationship with the ICC and the Obama administration's more cooperative approach, the Trump administration was openly hostile to the Court.[202] Initially, the administration had little to say about the ICC. It was not mentioned in the 2017 National Security Strategy, and the administration made no major statements about the Court before 2018.[203] However, that all changed following the appointment of John Bolton as National Security Advisor in March 2018.[204] On September 10, 2018, Bolton launched a blistering attack against the Court, calling it "illegitimate" and claiming that "for all intents and

196. *Id.*

197. UNITED STATES PRESIDENT, *supra* note 176, at 48.

198. Mark Kersten, *Unfortunate but Unsurprising? Obama Undermines the ICC*, JUSTICE IN CONFLICT (Feb. 4, 2014), https://justiceinconflict.org/2014/02/04/unfortunate-but-unsurprising-obama-undermines-the-icc.

199. Press Release, UNITED NATIONS, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (Jan. 3, 2005).

200. *Id.*

201. *See, e.g.*, *id.*

202. Elizabeth Evenson, *Donald Trump's Attack on the ICC Shows His Contempt for the Global Rule of Law*, HUM. RTS. WATCH (July 6, 2020, 8:04 AM), https://www.hrw.org/news/2020/07/06/donald-trumps-attack-icc-shows-his-contempt-global-rule-law.

203. UNITED STATES PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017) (containing no mention of the ICC).

204. Mark Landler and Maggie Haberman, *Trump Chooses Bolton for 3rd Security Adviser as Shake-Up Continues*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/us/politics/hr-mcmaster-trump-bolton.html.

purposes, the ICC is already dead to us."[205] The substance of his comments was largely a replay of his Bush-era allegations, although the rhetoric used to express them was even more inflammatory.[206] Bolton described the ICC as an assault on the U.S. Constitution and the sovereignty of the United States and the "worst nightmare come to life" for the country's founders.[207] He also set out the framework for the Trump administration's approach to the ICC in no uncertain terms.[208] Bolton invoked the language of ASPA and declared that the United States would use "any means necessary" to protect Americans and the citizens of its allies from prosecution by the ICC.[209] He announced that the United States would not cooperate with, engage with, fund, or assist the Court in any way.[210] He then proceeded to threaten the ICC by suggesting that the administration would ban the Court's Judges and Prosecutors from entering the country, sanction any financial assets they held in the United States, and prosecute them criminally in American courts.[211] He extended those threats to any company or state that assisted the ICC in investigating or prosecuting American citizens.[212] Bolton's extreme response showed that a new and altogether negative phase was beginning in the relationship between the United States and the ICC. Trump reinforced Bolton's contentions in his address to the UN General Assembly two weeks later.[213] There, he asserted that "the ICC has no jurisdiction, no legitimacy[,] and no authority."[214]

The United States followed through on some of Bolton's threats in 2019.[215] That April, Secretary of State Michael Pompeo revoked the entry visa of ICC Prosecutor, Fatou Bensouda, effectively barring her from entering the United States.[216] The Trump administration

205. John Bolton, Text of John Bolton's Speech to the Federalist Society (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

206. Rebecca Gordon, *Why Are We Above International Law?*, THE NATION (Mar. 26, 2019), https://www.thenation.com/article/archive/rebecca-gordon-international-criminal-court-john-bolton.

207. Bolton, *supra* note 205.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See Remarks by President Trump to the 73rd Session of the United Nations General Assembly*, WHITE HOUSE (Sept. 25, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny (showing former President Trump's strong stance against the ICC).

214. *Id.*

215. Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html (illustrating that the U.S. government carried out Bolton's threat by revoking the visa of an ICC prosecutor who was investigating Afghan war crimes).

216. *Id.*

further escalated its attack on the Court in 2020, when it introduced economic and travel sanctions against Bensouda and Phakiso Mochochoko, the Head of the Court's Jurisdiction, Complementarity and Cooperation Division.[217] The administration justified the sanctions on the basis that Bensouda and Mochochoko were engaging in the "politically motivated" targeting of American soldiers who served in Afghanistan.[218] The sanctions order called the investigation "unjust and illegitimate" without elaborating on either claim.[219] However, an earlier Executive Order issued by Trump authorizing the use of sanctions against ICC employees linked sanctions to the ICC's assertion of jurisdiction over possible criminality occurring in Afghanistan, a State Party to the Rome Statute.[220]

The imposition of sanctions against Bensouda and Mochochoko was driven by the decision of the ICC Appeals Chamber to authorize the Prosecutor to investigate the situation in Afghanistan.[221] That decision infuriated the Trump administration—particularly Secretary of State Pompeo—because it carried with it the possibility that the Court might scrutinize the criminality of American soldiers.[222] Following the opinion's release, Pompeo referred to the ICC as an "unaccountable political institution masquerading as a legal body" and as a renegade court.[223] The following day, he called the Court a "crazy, renegade body" and "this thing they call a court."[224] Two months later, he would refer to the ICC as "corrupted."[225] Despite the vitriol, the Trump administration, like the Obama and Bush administrations, clearly saw the Court as an entity designed to prosecute rogue political regimes and any effort to do otherwise was

217. Michael R. Pompeo, Sec'y of State, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (Sept. 2, 2020), https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html.

218. *Id.*

219. *Id.*

220. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

221. ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), https://www.icc-cpi.int/court-record/icc-02/17-t-004-fra.

222. Press Remarks, Michael R. Pompeo, Secretary Pompeo's Remarks to the Press, U.S. DEP'T OF STATE (Mar. 5, 2020), https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/index.html [hereinafter Pompeo Remarks].

223. *Id.*

224. Interview by Steve Doocy, Jedediah Bila, and Pete Hegseth of Fox and Friends with Michael R. Pompeo, Sec'y of State, U.S. DEP'T OF STATE (Mar. 6, 2020), https://2017-2021.state.gov/secretary-michael-r-pompeo-with-steve-doocy-jedediah-bila-and-pete-hegseth-of-fox-and-friends/index.html [hereinafter Pompeo with Doocy et al.].

225. Interview by Marc Thiessen and Danielle Pletka of AEI's 'What the Hell Is Going On' Podcast with Michael R. Pompeo, Sec'y of State, U.S. DEP'T OF STATE (May 29, 2020), https://2017-2021.state.gov/secretary-michael-r-pompeo-with-marc-thiessen-and-danielle-pletka-of-aeis-what-the-hell-is-going-on-podcast/index.html [hereinafter Pompeo with Thiessen and Pletka].

viewed as exceeding the limits of that mission.[226] When seen from that perspective, any effort by the ICC to hold Americans accountable would necessarily be illegitimate as doing so would transcend the Court's purpose.[227]

Pompeo's statements also suggest that the Trump administration, much like earlier administrations, did not understand the ICC's complementarity regime.[228] In the aftermath of the ICC Appeals Chamber's Afghanistan decision, Pompeo repeatedly stated that American servicemembers accused of crimes committed in the context of military operations are investigated and prosecuted within the context of the American justice system.[229] To the extent that is true, the United States has nothing to worry about from the ICC. The ICC is a court of complementary jurisdiction, and as long as a genuine investigation is carried out by a state, then the case will be inadmissible before the ICC.[230] Despite this, Pompeo believed the investigation carried with it the implication that the United States was failing to properly investigate the actions of its own servicemembers and that the ICC was going to "haul these young men and women in" to Court.[231] Pompeo's assertions disregard the fact that simply because an investigation is being conducted does not mean it will lead to charges or prosecution.[232] The Prosecutor can decline to proceed with a case following an investigation on both substantive and procedural grounds, including on a finding that it lacks jurisdiction due to complementarity.[233] An investigation also does not prevent individual suspects or states with jurisdiction over the matter from challenging its admissibility.[234] Therefore, it is an error to presume that an investigation will necessarily result in arrest and prosecution.

The Trump Administration's belligerence toward the ICC seems more deeply rooted in politics than in law. The Administration appears to have been attempting to cast the Court as an independent, multinational, international entity that stood in direct opposition to Trump's "America First" mantra.[235] Rather than develop meaningful criticisms of the ICC, the administration portrayed the court as an existential threat to the sovereignty of the United States and its

226. *See id.* (arguing that the U.S. can address situations involving its wrongdoers).

227. *See id.*

228. *See generally* Nicole Jones, *Sanctioning the ICC: Is This the Right Move for the United States?*, 39 WIS. INT'L L. J. 175, 182 (2021) (discussing how different presidential administrations viewed the ICC).

229. *See* Pompeo Remarks, *supra* note 222; s*ee also* Pompeo with Doocy et al., *supra* note 224.

230. *See* Rome Statute, *supra* note 37, at art. 17.

231. *See* Pompeo w/ Thiessen and Pletka, *supra* note 225.

232. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Oct. 2, 2023).

233. *See* Rome Statute, *supra* note 37, at art. 53(2).

234. *Id.* at art. 19.

235. *See generally* Pompeo Remarks, *supra* note 222.

constitutional form of government.[236] As a result, it departed from the approaches Trump's predecessors took to the ICC and instead placed itself in opposition to the Court's very existence.[237] Instead of advocating for the country's interests as past presidents did, the Trump presidency tried to delegitimize the ICC.[238] This may have played well to Trump's political base, but it failed to meaningfully disrupt the Court's work or to advance the United States' existing concerns about the Rome Statute.[239]

E. President Biden and a Possible New Dawn in the United States' Relationship with the ICC

Following Joe Biden's election in 2020 and Russia's invasion of Ukraine in 2022, the relationship between the ICC and the United States experienced something of a reset. Within a month of the invasion, President Joe Biden identified Russian President Vladimir Putin as a "war criminal," a claim he reiterated several weeks later.[240] Biden also publicly indicated that there was a need to gather evidence to be used during a "war crimes" trial.[241] Biden followed that statement with a declaration that Putin was committing a genocide in Ukraine and that it would be up to international lawyers to decide whether Putin's actions legally qualified as genocide.[242]

Despite this, Biden has stopped short of explicitly endorsing greater cooperation between the United States and the ICC despite using the language of the Court when calling for Putin's prosecution as a war criminal.[243] Further, officials in his administration have sent mixed messages about the extent to which the United States wishes to engage with the Court in efforts to conduct trials from crimes committed in the Ukrainian context.[244] One of Biden's Deputy

236. *See generally* Pompeo with Doocy et al., *supra* note 224.

237. *See* Jones, *supra* note 228, at 182.

238. *Id.* at 182–83.

239. *See U.S. Lifts Trump's Sanctions on ICC Prosecutor, Court Official*, REUTERS (Apr. 2, 2021), https://www.reuters.com/article/us-usa-icc-sanctions/u-s-lifts-trumps-sanctions-on-icc-prosecutor-court-official-idUSKBN2BP1GY; *see also* Pranshu Verma, *Trump's Sanctions on International Court May Do Little Beyond Alienating Allies*, N.Y. TIMES (Oct. 18, 2020), https://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html.

240. '*Unforgivable': Russia Decries Putin 'War Criminal' Allegation*, AL JAZEERA (Mar. 17, 2022), https://www.aljazeera.com/news/2022/3/17/unforgivable-russia-decries-putin-war-criminal-allegation; *Bucha Atrocities Show Putin Is 'War Criminal', Biden Says*, AL JAZEERA (Apr. 4, 2022), https://www.aljazeera.com/news/2022/4/4/bucha-atrocities-show-putin-is-war-criminal-biden-says [hereinafter *Bucha Atrocities*].

241. *See Bucha Atrocities*, *supra* note 240.

242. Julian Borger, *Joe Biden Accuses Vladimir Putin of Committing Genocide in Ukraine*, THE GUARDIAN (Apr. 12, 2022), https://www.theguardian.com/world/2022/apr/13/joe-biden-accuses-vladimir-putin-of-committing-genocide-in-ukraine.

243. *Id.*

244. Laura Dickinson, *US Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, JUST SECURITY (June 20, 2023), https://www.justsecurity.org/86959/us-cooperation-with-the-icc-to-investigate-and

National Security Advisers, Jon Finer, called holding a trial at the ICC "a challenging option," citing jurisdictional and membership issues as roadblocks.[245] Conversely, Beth van Schaack, the United States' Ambassador-at-Large for Global Criminal Justice, has stated that the administration is prepared to assist the Ukrainian government should it wish to pursue accountability efforts at the ICC.[246] The United States has also joined with the European Union and the United Kingdom to create the Atrocity Crimes Advisory Group ("ACAG"), a mechanism designed to coordinate support for accountability efforts.[247] While the stated aim of the ACAG is to support the accountability efforts being pursued by the Ukrainian Office of the Prosecutor General, the group is working in conjunction with a variety of other groups, including the ICC, to gather evidence.[248] A statement made when the ACAG was formed also expressly indicates that the United States and its partners support a range of accountability efforts, including those being conducted by the ICC.[249] This suggests that while there is some ongoing hesitancy on the part of the Biden administration to directly collaborate with the Court, it is willing to support the Court's efforts through, and in conjunction with, other partners.

Perhaps more significantly, the war in Ukraine has broken down some of the pre-existing congressional opposition to the ICC.[250] On March 15, 2022, the U.S. Senate unanimously passed a resolution calling on the member states of the ICC to petition the Court to investigate war crimes and crimes against humanity being committed by and at the direction of Vladimir Putin.[251] The resolution was sponsored by Senator Lindsey Graham, a self-described "conservative problem-solver."[252] In the weeks following the vote, Graham proclaimed that Putin had "rehabilitate[d] the ICC in the eyes of the Republican party and the American people."[253]

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prosecute-atrocities-in-ukraine-possibilities-and-challenges.

245. Morning Edition, *The U.S. Insists that Russia Should Be Held Accountable for War Crimes*, NAT'L PUB. RADIO (Apr. 5, 2022), https://www.npr.org/2022/04/05/1090992292/the-u-s-insists-that-russia-should-be-held-accountable-for-war-crimes?t=1655393068640.

246. Press Briefing, Beth Van Schaack, Ambassador-at-Large for Glob. Crim. Just., War Crimes and Accountability in Ukraine, U.S. DEP'T OF STATE (June 15, 2022), https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine.

247. *The European Union, the United States, and the United Kingdom Establish the Atrocity Crimes Advisory Group (ACA) for Ukraine*, U.S. DEP'T OF STATE (May 25, 2022), https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine.

248. *Id.*

249. *Id.*

250. *See* Teresa Young Reeves, *A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification*, 8 HUM. RTS. BRIEF 15, 16 (2000).

251. S. RES. 546, 117th Cong. § 1 (2022).

252. *Biography*, U.S. SEN. LINDSEY GRAHAM, https://www.lgraham.senate.gov/public/index.cfm/biography (last visited June 16, 2022).

253. Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2023), https://www.nytimes.com/2022/04/11/us/politics/

Graham, joined by several fellow senators from both sides of the aisle, has since continued to encourage President Biden to support the ICC's investigation of crimes committed by Russian forces in Ukraine.[254]

The support offered by Senator Graham and other Senate republicans to the ICC is an important development as American conservatives have traditionally rejected the ICC as an impermissible intrusion on American sovereignty.[255] Former Republican Senator Jesse Helms, one of the early architects of conservative opposition to the Court, once commented during a sub-committee hearing of the Senate Committee on Foreign Relations that the ICC represents a threat to the national interests of the United States and that the country should actively oppose the ICC ever coming into being.[256] During the same meeting, another conservative, Senator Rod Grams, referred to the Court as "a monster" that needed to be slain.[257] These views reflect the thinking of many American conservatives about the ICC, and the criticisms levelled against the Court during the Bush and Trump Administrations were largely an espousal of that longstanding conservative position.[258] For a self-described conservative to sponsor a resolution supporting the ICC, and to continue to advocate on behalf of the court as Senator Graham has done, indicates the severity with which the situation in Ukraine is being viewed in Washington and a willingness amongst conservatives to engage with an entity that they had traditionally shunned.[259]

The House of Representatives has also shown an interest in supporting investigations into war crimes committed by Russia in Ukraine.[260] Several weeks after the Senate Resolution was passed, the House passed its own bill with bilateral support, directing the

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us-russia-ukraine-war-crimes.html.

254. Lindsey Graham and Dick Durbin, *Durbin, Graham Statement Following Biden Administration's Decision to Support the ICC's Investigation into Atrocities in Ukraine*, U.S. Senate Committee on the Judiciary (07.26.2023), https://www.judiciary.senate.gov/press/releases/durbin-graham-statement-following-biden-administrations-decision-to-support-the-iccs-investigation-into-atrocities-in-ukraine.

255. *See* Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 696 (2003).

256. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing on S. HRG. 105–724 Before the S. Comm. on Int'l Operations of the Comm. on Foreign Rels.*, 105th Cong. 2-6 (1998) (statement of Sen. Jesse Helms, Chairman, S. Comm. on Foreign Rels.).

257. 105th Cong. 2-6 (statement of Sen. Rod Grams, S. Comm. on Foreign Rels.).

258. Elizabeth Evenson, *Donald Trump's Attack on the ICC Shows His Contempt for the Global Rule of Law*, HUM. RTS. WATCH (June 6, 2020, 8:04 AM), https://www.hrw.org/news/2020/07/06/donald-trumps-attack-icc-shows-his-contempt-global-rule-law.

259. Press Release, Lindsey Graham, U.S. Sen., Graham on ICC Issuing Arrest Warrant for Putin, U.S. SEN. LINDSEY GRAHAM (Mar. 17, 2023), https://www.lgraham.senate.gov/public/index.cfm/press-releases.

260. David Scheffer, *The United States Should Ratify the Rome Statute*, LIEBER INST. W. POINT (July 17, 2023), https://lieber.westpoint.edu/united-states-should-ratify-rome-statute.

President to report on efforts the United States was making to collect, analyze and preserve evidence of Russian crimes committed in Ukraine for use in any future domestic, foreign, or international proceedings.[261] While the bill does not refer directly to the International Criminal Court, one of the bill's co-sponsors, Representative Ilhan Omar, stated in a press release that the bill would help support proceedings at the ICC.[262] Representative Omar is a longstanding supporter of the ICC, having introduced a Resolution in 2020 encouraging the United States to ratify the Rome Statute.[263] She followed up by introducing additional legislation in April 2022, once again calling on the United States to join the ICC and to repeal ASPA.[264]

Clearly, the current mood in the United States is in favor of greater cooperation with the ICC.[265] Presently, the Court is viewed as a tool to punish Russian officials, including President Putin, for their perceived misdeeds in Ukraine.[266] While there is no consensus as to what form that cooperation might take, it has been suggested that the United States should join the ICC so that it might play a greater role in the accountability efforts being made in the context of Ukraine.[267] The problem with this suggestion is that it does not propose how to address the United States' longstanding objections to Article 12(2) of the Rome Statute.

The United States' jurisdictional disagreement with the ICC remains intractable as the United States' position on Article 12 is in direct opposition to the plain text of the Rome Statute.[268] A resolution of this matter would require the occurrence of one of the following:

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261. Ukraine Invasion War Crimes Deterrence and Accountability Act, H.R. 7276, 117th Cong. (2022).

262. Press Release, Ilhan Omar, Rep., House of Reps., Rep. Omar Statement on Ukraine War Crime Deterrence and Accountability Act (Apr. 5, 2022), https://omar.house.gov/media/press-releases/rep-omar-statement-ukraine-war-crime-deterrence-and-accountability-act.

263. H.R. 855, 116th Cong. (2020).

264. H.R. 7523, 117th Cong. (2022).

265. Laura Dickinson, *US Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, JUST SECURITY (June 20, 2023), https://www.justsecurity.org/86959/us-cooperation-with-the-icc-to-investigate-and-prosecute-atrocities-in-ukraine-possibilities-and-challenges.

266. *See generally International Criminal Court Issues Arrest Warrant for Putin over Ukraine War Crimes*, PBS (Mar. 17, 2023), https://www.pbs.org/newshour/world/international-criminal-court-issues-arrest-warrant-for-putin-over-ukraine-war-crimes (explaining that the International Criminal Court is fulfilling its duties as a court of law by arresting Vladimir Putin and Maria Alekseyevna Lvova-Belova for war crimes in Ukraine).

267. Ilhan Omar, *For Putin to Face Justice, We Must Join the International Criminal Court*, WASH. POST (Apr. 13, 2022), https://www.washingtonpost.com/opinions/2022/04/13/icc-war-crimes-putin-russia-us-should-join.

268. *See generally* Reeves, *supra* note 250 (discussing U.S. opposition to the Rome Statute and how Article 12 sets for the preconditions to exercise jurisdiction but the U.S. is concerned with having to surrender a citizen to the jurisdiction of the ICC).

(1) the United States accepts the jurisdiction of the Court as currently formulated; (2) the Rome Statute is amended to conform with the American position; or (3) Article 12 is given a meaning unsupported by its text. None of these three options seem likely in the current climate. The United States has maintained the same position for twenty-five years, and has not indicated that it will change.[269] Amendments to the Rome Statute are rare, and those that have passed tended to increase, rather than decrease, the Court's jurisdiction over certain types of crime.[270] Amending or interpreting the Rome Statute in line with the American position would result in changing the fundamental meaning of it so that a state's non-membership in the ICC would shield its citizens from ICC prosecution.[271] Construing the Rome Statute in that way could disincentivize states from joining—or remaining members of—the Court. If accepted, this approach would increase impunity, decrease the ICC's membership, and undermine the Court's very *raison d'être*.[272] Therefore, other options must be pursued if the ICC and the United States are to find sufficient common ground to enable the United States to become a member of the Court.[273]

III. UNDERSTANDING THE PURPOSE OF THE ICC

Much of the United States' opposition to the ICC relates to its understanding of the Court's purpose.[274] The ICC was founded on the principle of ending impunity for individuals committing war crimes, crimes against humanity, genocide, and the crime of aggression regardless of their official position or national affiliation.[275] The principle of ending impunity can be found in the Preamble to the Rome Statute, which states that States Parties to the ICC are "determined to end impunity for the perpetrators of unimaginable atrocities that deeply shock the conscience of humanity and threaten

269. Omar, *supra* note 267.

270. *See* Assembly of State Parties RC/Res. 6, U.N. Doc. RC/11, at 17 (June 11, 2010); Assembly of State Parties ICC-ASP/16/Res. 4, U.N. Doc. ICC-ASP/16/20, at 32 (Dec. 14, 2017); Assembly of State Parties ICC-ASP/18/Res. 5, U.N. Doc. R5-E-270820, at 1 (Dec. 6, 2019).

271. *See* Adrian T. Delmont, *The International Criminal Court: The United States Should Ratify the Rome Statute Despite Its Objections*, 27 NOTRE DAME L. SCH. J. LEGIS. 335, 358 (2001).

272. *Id.*

273. *See generally* Oona Hathaway, *The U.S. Finally Sees the Point of the International Criminal Court*, WASH. POST (Apr. 13, 2022, 11:46 AM), https://www.washingtonpost.com/outlook/2022/04/13/war-crimes-russia-ukraine-icc (explaining the unlikelihood that the U.S. will formally join the ICC with current options despite the possibility of compromise in the future).

274. *See* Reeves *supra* note 268, at 15 (explaining that the purpose of the ICC is to serve complementary to national judicial systems, rather than being a substitute for them); *see also* JENNIFER K. ELSEA, CONG. RSCH. SERV., U.S. POL'Y REGARDING THE INT'L CRIM. CT. (Aug. 29, 2009) (discussing the U.S.'s understanding of the ICC's ability to prosecute crimes committed by citizens of non-member states to be an attack on sovereignty).

275. *See* The United Nations Rome Statute of the International Criminal Court Preamble, *opened for signature* July 17, 1998, 2187 U.N.T.S 90; *see id.* at art. 27.

the peace, security and well-being of the world."[276] The Rome Statute further elaborates on its purpose in Articles 1 and 5, which indicate that the ICC has the power to exercise its jurisdiction over individuals accused of having committed "the most serious crimes of international concern" as set out in the Rome Statute.[277] The only statutory limitations on the Court's jurisdiction are that the crimes alleged must have occurred after the Rome Statute came into force, that they took place either on the territory of a State Party or state accepting the jurisdiction of the Court or the person accused of the crimes is a national of a State Party or a state accepting the Court's jurisdiction, and no other court with jurisdiction over the matter is investigating or prosecuting the matter.[278] From the ICC's perspective, it can achieve its purpose by investigating and prosecuting individuals thought to have committed the types of crimes over which it has jurisdiction without limit as to the context in which the crime was committed.[279]

This differs from the United States' understanding of the Court's purpose. Officials representing several different presidential administrations have espoused the position that American troops should not be subject to ICC investigation or prosecution.[280] David J. Scheffer best exemplified this perspective in a statement made the week after the Rome Statute was agreed upon, in which he called it "untenable" for a U.S. servicemember to face accusations of war crimes committed when fighting to halt a genocide.[281] The Bush administration reiterated this position when it indicated that American servicemembers should be protected from ICC prosecution due to their "unique role and responsibility to help preserve international peace and security."[282] A second Bush administration official later asserted that it was not the purpose of the ICC to subject United States peacekeepers on UN-sanctioned missions to the jurisdiction of the Court.[283] The Trump administration implicitly made a similar point, when Secretary of State Michael Pompeo said, "the United States has consistently sought to uphold good and punish evil," and that it did not intend to let the threat of ICC prosecution prevent it from doing so.[284] The

276. *See id.* at pmbl.

277. *See id*. at arts. 1, 5.

278. *See id.* at arts. 11, 12, 17.

279. *See* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 9 (2020).

280. *See infra* notes 282–85.

281. David Scheffer, Ambassador-at-Large for War on Crimes Issues and Head of the U.S. Delegation to the UN Preparatory Comm'n for the Int'l Crim. Ct., Statement before the Congressional Human Rights Caucus (Sept. 15, 2000), https://1997-2001.state.gov/policy_remarks/2000/000915_scheffer_hrcaucus.html.

282. *See* Grossman, *supra* note 36.

283. John Negroponte, U.S. Permanent Representative to the UN, Statement in the UN Security Council (July 10, 2002), https://2001-2009.state.gov/p/io/rls/rm/2002/11756.htm.

284. Pompeo, *supra* note 217.

common thread running through these statements is the concern that American servicemembers could be held criminally responsible for crimes committed during peacekeeping missions or when halting or responding to the atrocity crimes of others.[285]

All these statements, to varying or lesser degrees, advance the idea that the ICC's purpose is limited and that some atrocity crimes are justified and should be excused. This contradicts the ICC's stated purpose of ending impunity which does not, on its face, seem to accommodate the limitations suggested by the United States.[286] Settling this dispute and identifying a constructive way forward for the relationship between the United States and the ICC necessitates an inquiry into the *travaux préparatoires* of the Rome Statute to determine whether there is any basis for the United States' position. The focus will be on three different textual issues that could provide the support necessary for the United States' position. They are whether: (1) the purpose of the ICC is to only prosecute and punish aggressive crimes; (2) the gravity requirement found in Article 17 of the Rome Statute prevents prosecution for defensive atrocity crimes; or (3) certain defenses can limit criminal responsibility for defensive crimes.

A. The Overarching Purpose of the ICC

Little evidence exists in the *travaux préparatoires* to the Rome Statute to suggest that the ICC was designed to only punish aggressive forms of criminal behavior.[287] The United Nations' efforts to establish an international criminal court began in earnest in 1947 when the UN General Assembly passed a Resolution creating the International Law Commission ("ILC").[288] The ILC was initially assigned two tasks: (1) to formulate the Nürnberg Principles of international law; and (2) to prepare a draft code of offences against the peace and security of mankind.[289] Soon after, the General Assembly passed a Resolution establishing the Committee on International Criminal Jurisdiction ("CICJ").[290] The CICJ was charged with preparing proposals and a preliminary draft for the establishment of an international criminal court.[291]

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285. *See infra* notes 282–85.

286. *See* INT'L CRIM. CT., *supra* note 279, at 6.

287. *See generally* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 211–51 (Stefan Barriga & Claus Kreß eds., 2012) (providing documents and reports from the six meetings prior to the Rome Statute).

288. *See* G.A. Res. 174 (II), at 105 (Nov. 21, 1947); *see also* G.A. Res. 177 (II), at 111 (Nov. 21, 1947).

289. *See* G.A. Res. 177 (II), at 112 (The International Law Commission used the German spelling of "Nürnberg," rather than the anglicized spelling of "Nuremberg." The principles authored by the ILC are referred to in this article as the "Nürnberg Principles" as that was their official name. "Nuremberg" will be used in all other instances in this article.).

290. G.A. Res. 489 (V), at 78 (Dec. 12, 1950).

291. *Id.*

The first drafts of the ILC's code of offences against the peace and security of mankind and the CICJ's statute for an international criminal court were presented in 1951.[292] The ILC's draft code outlines what constitutes a crime against peace and security and does not contain a blanket exemption from prosecution for individuals accused of committing atrocity crimes in response to crimes being committed by others.[293] Instead, it focuses on identifying the sorts of behavior that constitutes international criminality. For example, the article on war crimes simply states that "acts in violation of the laws or customs of war" constitute a crime.[294] It is not qualified in a way that excludes any group from prosecution, making clear that anyone who commits a war crime can be held liable for their actions.[295] The CICJ's draft statute takes a similar approach, indicating that the purpose of the proposed permanent international criminal court is to "try persons accused of crimes under international law" as identified in treaty law or by agreement amongst the States Parties to the Rome Statute.[296] The ability of the prospective court to act is in no way limited to suspects thought to have committed aggressive criminal acts.[297]

The approaches taken by the ILC and the CICJ are consistent with the Nürnberg Principles identified by the ILC in 1950. The purpose of the Nürnberg Principles was to identify the international legal principles established in the Charter and Judgment of the Nuremberg Tribunal.[298] Principle 1 unequivocally states that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor (sic) and liable to punishment."[299] The commentary appended to the principles recognizes that Principle 1 draws from the text of Article 6 of the Nuremberg Charter.[300] Although Article 6 specifically limits criminality to people acting in the interests of the Axis Powers, the commentary explains that the Principle has been expressed in general terms "as a matter of course."[301] The members of the ILC believed it was appropriate to broaden the scope of the Article and to expand it to include the

292. *Report of the International Law Commission to the General Assembly*, Y.B. Int'l L. Comm'n 1951, 134, U.N. Sales No. 1957. V. 6, Vol. II; *see* Comm. on the Int'l Crim. Jurisdiction, Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, U.N. Doc. A/2136 at 1 (1952).

293. *See Report of the International Law Commission to the General Assembly*, *supra* note 292, at 135–37.

294. *Id.* at 136.

295. *See id*. at 135–36.

296. Comm. on the Int'l Crim. Jurisdiction, *supra* note 292, at 21.

297. *Id.*

298. G.A. Res. 177(II), *supra* note 289, at 111–12.

299. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries*, *reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 374, UN Doc. A/CN.4/SER.A/1950/Add. 1.

300. *Id.*

301. *Id.*

criminality of all sides to a conflict so as to avoid the perception that trials like those held at Nuremberg were nothing more than victor's justice.[302]

The Americans' position on the purpose of the ICC may be rooted in this discrepancy between the Nürnberg Principles and the Charters of the Post-World War II Tribunals.[303] Limiting the personal jurisdiction of those individuals who could be tried by the Nuremberg Tribunal to people acting in the interests of the Axis countries meant that the Tribunal lacked the competence to try citizens of the Allied countries for any crimes they may have committed during the War.[304] Like the Nuremberg Charter, the Charter of the Tokyo Tribunal also contained a jurisdictional limit, albeit one worded in a somewhat confusing way.[305] Article 1 of the Tokyo Charter states that the Tribunal was established for the purpose of trying and punishing "the major war criminals in the Far East."[306]

This phrase can be understood in two ways. Broadly interpreted, the Tokyo Charter could refer to anyone alleged to have committed war crimes in the Pacific theatre of the war. When given a narrower meaning it may refer to individuals accused of war crimes who are nationals of a country located in the Far East. It would seem the latter reading is more likely the correct interpretation when read in conjunction with other parts of the Charter, particularly Article 5, which states that the Tribunal has the power to try and punish "Far Eastern war criminals."[307] Although the meaning of this term is not definitive, it lends itself to being understood to refer to people of Far Eastern origin. Perhaps even more persuasive is the fact that all the accused at the Tokyo Tribunal were of Japanese descent. While it is possible that the Charter permitted the Tribunal to prosecute crimes committed by people from outside of the Far East, it was never used in that way.[308]

Limiting who could be tried by the Post-World War II Tribunals to German and Japanese nationals implies that there was a qualitative difference between crimes committed by the Axis

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302. *Report on the 43rd Meeting of the International Law Commission*, *reprinted in* [1950] 1 Y.B. INT'L L. COMM'N 20, U.N. Doc. A/CN.4/SER.A/1950.

303. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 559–60 (2006) (noting that the post-WWII tribunals arose from war as opposed to more modern human rights proceedings).

304. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 251 U.N.T.S. 286 [hereinafter London Agreement].

305. Charter of the International Military Tribunal for the Far East, art. 1, Jan. 19, 1946, T.I.A.S. No. 1589, at 21–22 [hereinafter Tokyo Charter].

306. *Id.*

307. *Id.* at 22.

308. *See* Ann Marie Prèvost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 315 (1992) (stating that trials under the Tokyo Charter occurred only in Tokyo and Yokohama).

countries and the Allied countries.[309] Distinguishing the criminality of people acting on behalf of the Axis powers from those working to further Allied interests, as well as making only the Axis side subject to prosecution, suggests their crimes were of such severity that they require a legal response.[310] Further, it serves to absolve citizens of Allied countries of responsibility for crimes they may have committed during the war, even where those crimes were aggressive in nature. As a result, it leads to the conclusion that criminal responsibility only lies with one side of the conflict as they were primarily responsible for the war. This understanding of post-conflict prosecutions aligns with the United States' interpretation of the ICC's purpose.[311]

The practice of limiting who may be exposed to criminal prosecution was carried forward into the ad hoc tribunals set up for Rwanda and the former Yugoslavia.[312] The International Criminal Tribunal for Rwanda avoided investigating and prosecuting crimes committed by members of the Tutsi ethnic group, nor did it consider any possible criminality arising from the inaction of international peacekeeping forces during the genocide.[313] Prosecutions at the International Criminal Tribunal for the former Yugoslavia were similarly limited, as the Tribunal did not investigate crimes allegedly committed by NATO or the role played by the Dutch government in the Srebrenica genocide.[314] This should come as no surprise as the United States was heavily involved in establishing both ad hoc Tribunals and its past practice indicates that it generally approves of the idea that only citizens from particular States should be subject to international criminal jurisdiction.[315] It logically follows that if the United States believed in limited accountability in the context of

309. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 337 (2013) (noting that the idea of war crimes emerged directly as a response to the "massive" atrocities of the Nazi regime).

310. *See id.*

311. *See* Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 54–55 (2004) (noting the contradictions between American policy toward the ICC and its support of the post-war tribunals).

312. RONEN STEINKE, POLITICS OF INTERNATIONAL CRIMINAL JUSTICE: GERMAN PERSPECTIVE FROM NUREMBERG TO HAGUE 13 (2012).

313. Megan A Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34(1) CAL. W. INT'L L. J. 47, 57–58 (2003) (discussing the pressure the Rwandan government brought upon the Tribunal); Roger S. Clark, *Doing Justice to History: Confronting the Past in International Criminal Trials by Barry Sander*, 91 NORDIC J. INT'L 265 (2022) (book review).

314. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND BALKANS, 33–34 (Cambridge University Press 2008); *see* Steinke, *supra* note 312 at 16; Janine Natalya Clark, *The Limits of Retributive Justice*, 7(3) J. INT'L CRIM. JUST. 463, 472 (2009).

315. *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, https://aba-icc.org/about-the-icc/the-us-icc-relationship (last visited Sept. 21, 2023); *The United States and International Criminal Justice: A Complex and Challenging Relationship,* PARLIAMENTARIANS FOR GLOB. ACTION, https://www.pgaction.org/ilhr/rome-statute/united-states-and-international-criminal-justice.html (last visited Sept. 21, 2023).

Nuremberg, Tokyo, and the ad hoc Tribunals, then it would also be interested in having the ICC pursue a similar approach.

It does not appear that the states negotiating the Rome Statute followed the lead of the international criminal courts and tribunals that preceded the ICC. The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Rome Conference") began in Rome on June 15, 1998.[316] UN Secretary-General Kofi Annan opened the Conference with a speech, indicating that people all over the world were interested in a court where anyone committing atrocity crimes could be held accountable regardless of their official position in the government or military.[317] These comments largely accord with his earlier thoughts on the Court, when he expressed his desire for a court that would ensure no state, army, ruler, or junta could commit human rights violations with impunity and that would provide a venue for all such crimes to be punished.[318] The Secretary-General clearly envisioned a court that would prosecute all types of human rights violations, regardless of the reasons they were committed.[319] This viewpoint was further reinforced during the opening of the Rome Conference when its President, Giovanni Conso, proclaimed that the establishment of the ICC was important because it ensured that justice would no longer be selective.[320] This too suggests that the purpose of the ICC is to try all crimes falling under its jurisdiction.

This opinion was shared by the leaders of some of the national delegations to the Rome Conference. Boris Frlec of Slovenia and Didier Opertti of Uruguay both indicated that the perpetrators of atrocity crimes must be brought to justice without qualification.[321] Similarly, the Syrian representative, Mohammad Said Al Bunny, believed that all individuals who violate international law should be prosecuted.[322] Implicit in these statements is the idea that all perpetrators of atrocity crimes should be eligible for prosecution by the Court. By comparison, Hisashi Owada of Japan and Elena Zamifrescu of Romania took the position that prosecutions should be reserved for "the most heinous crimes," while other delegates spoke of prosecuting the most serious violations of international law.[323] These assertions suggest a more limited purpose for the ICC and that

316. Summary of Records of United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc A/CONF.183/13 (Vol. II), at 61 (2002) [hereinafter UN Diplomatic Conference].

317. *Id.*

318. Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT'L L. J. 363, 366 (1997).

319. *See id.*

320. *See* Summary of Records of United Nations Diplomatic Conference, *supra* note 316, at 63.

321. *Id.* at 70, 115.

322. *Id.* at 83.

323. *Id.* at 67, 76, 91.

the severity of the crimes alleged is important when determining whether the Court is authorized to act.[324]

The latter viewpoints prioritizing the severity of crimes align with the text of the Rome Statute.[325] The Rome Statute repeatedly refers to the idea that the Court's jurisdiction extends to "the most serious crimes of international concern" and that it has a responsibility to ensure that those crimes do not go unpunished.[326] Two important and related questions arise from these statements and statutory provisions. First, are references to the severity of the crime a reflection of the idea that the crimes falling under the Rome Statute are all necessarily severe and therefore investigations and prosecutions are appropriate whenever such a crime is committed? Or, does severity relate to the circumstances under which crimes are committed, meaning that prosecutions should only take place when the statutory crimes are committed in a particularly severe manner? If it is the former, then the statements are of the same type as those made without qualification and simply reflect a desire to ensure that anyone who commits an atrocity crime can be subject to prosecution. However, if it is the latter, it could offer support for the United States' position to the extent that crimes committed in response to other crimes are often less severe than the acts they are responding to.[327] A result of following the latter approach could lead to the interpretation that crimes committed during peacekeeping operations or in response to other crimes may not be sufficiently grave to warrant attention from the ICC.[328] While there is no clear evidence in the Rome Statute to conclude that the ICC is only intended to prosecute international crimes resulting from aggressive behavior, the requirement that crimes be particularly serious to be eligible for prosecution may bolster the United States' interpretation of the Court's purpose.[329] For that reason, it is necessary to examine whether the gravity requirement found in Article 17(1)(d) mandates that crimes meet a particular seriousness threshold.

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324. Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOB. STUD. L. REV. 1, 5 (2017).

325. *See id.* at 6.

326. *See* Rome Statute *supra*, note 37, at pmbl., arts. 1, 5.

327. *See generally* Melissa De Witte, *In a War Perceived As Just, Many Americans Excuse Soldiers Who Commit War Crimes, Stanford Scholar Finds*, STAN. NEWS (Dec. 9, 2019), https://news.stanford.edu/2019/12/09/war-perceived-just-many-americans-excuse-war-criminals ("According to his data, Sagan found that Americans believe that soldiers who fight for the just side of conflict—in this case, defending against an aggressor who invaded their country—should be allowed more leeway than soldiers who fought on an unjust side—that is, the side who carried out the act of aggression.").

328. *See* Rome Statute, *supra* note 37, at arts. 5, 17.

329. *Id.*

B. Gravity of the Crimes

The severity of alleged crimes may be an important consideration when determining which perpetrators should be prosecuted by the ICC.[330] In the parlance of the Rome Statute, this is referred to as "the gravity of the crime."[331] The notion of gravity was first introduced in 1994 in the draft statute for an international criminal court adopted by the ILC.[332] The draft statute references gravity briefly in draft article 35, which states that the Court may decide not to proceed with a case if it is not of sufficient gravity to justify further action.[333] The commentary to draft article 35 instructs that the gravity of a crime is determined by referencing the purposes of the draft statute as stated in the Preamble.[334] Unfortunately, the Preamble is not particularly instructive in this regard. It simply indicates that the Court's jurisdiction is limited to "the most serious crimes of interest to the international community as a whole."[335]

Instead, it is necessary to refer to draft article 20, which identifies the crimes over which the proposed Court would have jurisdiction.[336] They include: genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and a catch-all provision encompassing treaty-based crimes of particular seriousness.[337] While the article itself is silent about gravity, the use of the adjective "serious" to modify the crimes of violating the laws of war and the catch-all provision relating to treaty-based crimes indicates that not all acts are of sufficient seriousness and that a severity threshold must be met before an alleged crime is eligible for investigation and prosecution.[338] This is more explicitly reinforced in the commentary to draft article 20, which indicates that not all war crimes are of sufficient gravity to be subject to the jurisdiction of the Court.[339] Further, the term "serious violations" was used intentionally to avoid confusion with the term "grave breaches" as employed by the 1949 Geneva Conventions and the 1977 Additional Protocol thereto when describing contraventions of the laws of war.[340] The ILC emphasized that the terms are not synonymous and that not all grave breaches

330. *Id.*
331. *See id.* at arts. 53(1)(c), 17(1)(d).
332. *Draft Statute for an International Criminal Court*, [1994] 2 Y.B. Int'l L. Comm'n 52, A/49/10.
333. *Id.*
334. *Id.*
335. *Id.* at 27.
336. *Id.* at 38.
337. *Id.*
338. *See id.* at 38–39.
339. *Id.* at 39.
340. *Id.*

are serious violations.[341] The commentary on the draft statute does not, however, contain an explanation of how to identify those violations that are sufficiently grave so as to warrant attention from the Court.

The gravity requirement in draft article 35 of the ILC's draft statute was retained in future drafts and was ultimately included in the Rome Statute itself.[342] Article 17 of the Rome Statute contains a provision under which the Court can decide that a matter is inadmissible because it lacks sufficient gravity to justify further action.[343] There appears to have been little discussion about the gravity principle during the Rome Conference.[344] The delegations that did address it mostly questioned the inclusion of the provision in the final Statute, with the Chilean delegation suggesting that the term "gravity" was vague and in need of further explanation.[345] Despite these objections, the provision incorporated into the Rome Statute is almost identical to the one first introduced by the ILC in 1994.[346]

The Rome Conference also failed to clarify what threshold must be met to demonstrate that criminal behavior is sufficiently grave to fall under the jurisdiction of the ICC.[347] Several delegates referenced the need to establish responsibility for serious crimes threatening international peace or of the greatest concern to the international community.[348] That could be interpreted to mean that those two criteria should be the baseline against which gravity should be judged and that criminality can only be investigated and prosecuted if at least one of them is met. Alternatively, other delegations took the position that the gravity of a crime relates to the circumstances surrounding its commission.[349] Bill Richardson, the American Ambassador to the United Nations, spoke during the conference about the need for the ICC to focus on "atrocities of significant magnitude."[350] Similarly, Ljerka Hodak of Croatia insisted that the matters brought before the ICC must be of "sufficient gravity and significance" to avoid burdening the Court with "minor violations."[351]

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341. *Id.* at 39–40.

342. *See* Rome Statute, *supra* note 37, at art. 17.

343. *Id.*

344. *See* Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT'L L. REV. 807, 821–22 (2008) (discussing broad acceptance of the gravity principle during negotiations).

345. *See* UN Diplomatic Conference Summary, *supra* note 316, at 215.

346. *Id.*; *see also Draft Statute for an International Criminal Court with Commentaries*, *supra* note 332.

347. *See* Summary of Records of United Nations Diplomatic Conference, *supra* note 316, at 106.

348. *See id.* at 102, 106, 115.

349. *Id.* at 123.

350. *Id.* at 95.

351. *Id.* at 94.

This approach adds a contextual consideration to gravity missing from other interpretations of the gravity threshold.

Other delegations argued that the crimes covered by the Rome Statute were already of sufficient gravity, which was signaled by the decision to include them in the first place.[352] That reading of the gravity requirement was exemplified by the Moroccan representative, Moustafa Meddah, when he indicated that the Rome Statute should only include crimes of extreme gravity, suggesting that all of the crimes included in the Rome Statute met the gravity requirement of Article 17.[353] Didier Opertti from the Uruguayan delegation felt that at least two categories of crimes, genocide and war crimes, were of sufficient gravity, and left open the possibility that other types of crimes could be grouped with them.[354] He also insisted that no international crime rising to that level of gravity should go unpunished.[355] Not all of the delegations agreed that a crime's inclusion in the Rome Statute demonstrated the requisite gravity to warrant investigation and prosecution.[356] Israel voted against the Rome Statute because it felt that the war crime of an occupying state transferring its own citizens into occupied territory was not of sufficient gravity to warrant inclusion in the Rome Statute.[357] This suggests that, at least from the perspective of some delegations, the crimes contained in the Rome Statute are not of equal gravity.

This diversity of opinions from the delegates indicates that there was no consensus at the Rome Conference about how or when the gravity threshold should apply.[358] However, the very existence of the threshold signifies that the severity of a particular crime is relevant. Different Pre-Trial Chambers have confirmed this and attempted to make sense of the gravity threshold.[359] In *Prosecutor v. Lubanga*, Pre-Trial Chamber I considered the meaning of the Article 17(1)(d) gravity threshold.[360] There, the Pre-Trial Chamber found that the gravity threshold found in Article 17(1)(d) exists in addition to the inherent gravity of the crimes contained in the Rome Statute and that to meet the threshold there must be a showing that the conduct under consideration is "especially grave."[361] To meet that standard, conduct must be either systematic or large-scale and due

352. *See id.* at 298.
353. *Id.*
354. *See id.* at 116.
355. *Id.*
356. *Id.* at 123.
357. *Id.*
358. *See id.* at 102, 106, 115, 123.
359. Prosecutor v. Lubanga, ICC-01/04-01/06-1-Corr-Red 17-03-2006, Decision on Prosecutor's Application for Warrant of Arrest pursuant to Art. 58 of the Statute, ¶¶ 42–45 (Feb. 10, 2006); Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 55–57 (Mar. 31, 2010).
360. *Lubanga*, ICC-01/04-01/-06-8-Corr, ¶ 42.
361. *Id.* at ¶ 45.

consideration must be given to the social alarm the behavior causes in the international community.[362] However, the inquiry does not end there.[363] Pre-Trial Chamber I further explained that gravity considerations are not only limited to the nature of the conduct but are also concerned with the identity of the person alleged to have engaged in the criminal behavior.[364] In particular, gravity requires that the person against whom charges may be brought is a senior leader in the situation under investigation and that they are most responsible for the alleged criminality.[365]

Pre-Trial Chamber II followed a similar approach when considering whether crimes committed in the context of the *Situation in Kenya* were of sufficient gravity to warrant prosecution.[366] It found that all of the Rome Statute crimes were severe and the purpose of the gravity threshold was to prevent the ICC from pursuing matters that fall under the Rome Statute but are peripheral to other matters.[367] As a result, gravity is to be assessed by considering whether the people who are likely to be the object of the investigation are most responsible for the crimes committed and by evaluating the context in which the crime was committed.[368] The contextual aspect should be considered both quantitatively and qualitatively and include aggravating factors, such as the scale of the crimes, the nature of their commission, the means by which they were committed, and their impact.[369]

The approaches to gravity taken by Pre-Trial Chambers I and II support the United States' position that crimes committed by peacekeeping forces or that are otherwise responsive to atrocity crimes are not the ICC's intended focus. Those crimes can be seen as peripheral to other crimes because they are not the dominant source of criminality; rather, they are a response to that criminality.[370] When considering the factors applied by the Court, it is entirely possible that responsive atrocity crimes may lack sufficient gravity rendering them appropriate for investigation or prosecution. However, that conclusion should not lead to the assumption that individuals committing Rome Statute crimes for defensive purposes will necessarily avoid ICC scrutiny. Any future Chamber confronted with crimes of this nature may still consider the factors identified by

362. *Id.* at ¶ 46.

363. *Id.* at ¶ 49.

364. *Id.* at ¶ 50.

365. *Id.* at ¶ 63.

366. Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 55–57 (March 31, 2010).

367. *Id.* at ¶ 56.

368. *Id.* at ¶¶ 59–61.

369. *Id.* at ¶ 62; *see also* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L. J. 1400, 1451–54 (2009).

370. *See* deGuzman, *supra* note 369, at 1457.

Pre-Trial Chambers I and II before reaching a decision about whether a case will proceed and leave open the possibility that individuals who committed responsive atrocity crimes will be held accountable for them.[371]

C. Grounds for Excluding Responsibility

After remaining dormant for nearly thirty years, interest in international criminal justice saw a revival in 1981, when the U.N. General Assembly invited the ILC to resume its work on the draft code of offences against the peace and security of mankind.[372] Doudou Thiam, a Senegalese lawyer and diplomat, was appointed Special Rapporteur to lead the project, and in 1983, he produced a report raising a number of issues for discussion about how to reform the existing draft code, including whether under international law responsive behavior, such as self-defense, could be used as a basis to excuse otherwise criminal behavior.[373] The report did not reach a conclusion on the issue, nor did it clarify whether it would extend to all of the forms of self-defense discussed in Article 51 of the UN Charter.[374] During the ensuing debate, some ILC members suggested that the draft code should contain a separate section addressing exceptions to criminal responsibility arising out of self-defense or actions taken pursuant to decisions made under Chapter VII of the UN Charter.[375] In 1984, Thiam prepared a subsequent report in which he revisited the issue of exculpatory pleas.[376] There, he explained that pleading self-defense or the defense of others would not relieve the accused of criminal responsibility; however, it could mitigate their punishment should they be convicted.[377]

In 1991, the ILC provisionally adopted its Draft Code of Offences Against the Peace and Security of Mankind.[378] This version contained an article permitting trial courts to decide what defenses would be applicable during trial and how extenuating circumstances should be taken into account during sentencing.[379] The ILC intentionally chose to leave this provision vague because it was unable to select more specific wording with any consensus amongst the Committee's members.[380] It left open the possibility that more specific wording

371. *Id.*
372. G.A. Res. 36/106, ¶ 1 (Dec. 10, 1981).
373. *Id.* at 147.
374. *Id.*
375. Int'l Law Comm'n, Rep. on the Work of Its Thirty-Fifth Session, U.N. Doc. A/CN.4/L.369 at 29 (1984).
376. *See* Doudou Thiam, *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, [1986] 2 Y.B. INT'L L. COMM'N 81, U.N. Doc. A/CN.4/398.
377. *See id.* at 73.
378. *See Draft Code of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. Int'l L. Comm'n 94, U.N. Doc. A/CN.4/SER.A/1991/Add. 1.
379. *See id.* at 95.
380. *See id.* at 100.

would be agreed to regarding what types of defenses and extenuating circumstances might be relevant, although it again reiterated the need to consider criminal law concepts including: self-defense, necessity, force majeure, coercion, and error.[381]

An effort was made to identify more specific wording in the years leading up to the Rome Conference.[382] In 1995, the UN General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court to expedite the creation of a permanent international criminal court.[383] Through its Working Group on General Principles of Criminal Law, the Preparatory Committee explored a number of different ways to formulate the concepts of self-defense and the defense of others.[384] The Preparatory Committee was unable to reach a conclusion, and it remained an open issue for the delegates at the Rome Conference to resolve.[385]

Unlike the gravity provision, the clause on excluding criminal responsibility was a topic of significant discussion during the Rome Conference.[386] This is highlighted by a note in the draft article on this topic that was transmitted by the Working Group on General Principles of Criminal Law to the Committee of the Whole.[387] It indicated that the draft article "was the subject of extensive negotiations" and that the wording of it was the result of "quite delicate compromises."[388] The United States submitted a particularly contentious proposal during those discussions that was designed to expand the types of behavior for which criminal responsibility could be excluded.[389] In addition to the provisions on self-defense and the defense of others that appeared in earlier drafts of the Rome Statute, the United States also proposed excluding the criminal responsibility of people serving as members of the armed forces whose actions were the result of a government or military order.[390] Under this proposal, a member of the military would be excluded from criminal responsibility unless they knew the orders were unlawful or where

381. *See id.*

382. *See* G.A. Res. 50/47, ¶ 2 (Dec. 18, 1995).

383. *Id.*

384. *See* Preparatory Comm. On the Establishment of an Int'l Crim. Ct., Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, at 16–17, U.N. Doc. A/AC.249/1997/L.9/Rev. 1 (Dec. 18, 1997).

385. *See id.* at 16, 18.

386. *See* U.N. Diplomatic Conference of Plenipotentiaries, on the Establishment of an International Criminal Court, at 255 n. 57, U.N. Doc. A/CONF.183/13 (Vol. III).

387. *See id.*

388. *Id.*

389. *See* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *United States of America: Proposal Regarding a Single Provision Covering Issues Currently Governed by Articles 31 to 34*, at 259, U.N. Doc. A/CONF.183/C.1/WGGP/L.2 (Vol. III) (June 16, 1998) [hereinafter American Proposal].

390. *Id.*

the orders were manifestly unlawful.[391] Ultimately, this sweeping provision that would have permitted the defense of superior orders was not adopted. Instead, the delegates to the Rome Conference included a more limited form of the defense of superior orders in Article 33 of the final Statute.[392] While it contains some of the same limitations proposed by the United States, Article 33 is framed in negative terms and forbids the assertion of superior orders unless certain exceptions apply.[393] Self-defense and the defense of others were retained as defenses in the agreed Statute.[394]

If the United States' proposal had been adopted, it would have created the sort of exception from prosecution the United States continues to advocate for.[395] The understanding that the delegates to the Rome Conference could have expanded the principle of protecting military personnel acting under orders from prosecution—and declined to do so—undermines the United States' argument that it is outside the ICC's purpose to prosecute members of the military who commit defensive atrocity crimes.[396] This is further reinforced by the plain language of Article 31(1)(c).[397] It states that an individual is not excluded from responsibility under the Rome Statute solely by virtue of their involvement in a defensive operation at the time of their alleged criminality.[398] This rejects the notion that the ICC's purpose is limited to only prosecuting aggressively-committed atrocity crimes.

While it is apparent that the ICC's purpose may include prosecuting members of the military engaged in defensive operations, the defenses of self-defense and the defense of others could still shield them from responsibility in some circumstances.[399] Self-defense and the defense of others are described in the Rome Statute as "grounds for excluding criminal responsibility," meaning that when either is adequately proven they protect the accused from being held accountable for their otherwise criminal acts.[400] These defenses are established through the presentation of testamentary and documentary evidence proving three elements: (1) the accused was protecting themself or another (or property under certain circumstances); (2) from imminent and unlawful attack; and (3) the actions taken in defense were proportionate to the degree of danger threatened.[401] Whether that burden has been met is decided by the

391. *Id.*
392. *See* Rome Statute, *supra* note 37, at art. 33.
393. *Id.*
394. *Id.* at art. 31(1)(c).
395. *See* American Proposal, *supra* note 391.
396. *See id.*
397. *See* Rome Statute, *supra* note 37, at art. 31(1)(c).
398. *Id.*
399. *Id.*
400. *Id.*; *see also* Kai Ambos, *Defences in International Criminal Law*, RSCH. HANDBOOK ON INT'L CRIM. L. 299, 307 (2011).
401. *See* Rome Statute, *supra* note372, at art. 31(1)(c).

Chamber of the Court considering the matter, and that assessment can only be made during the confirmation of charges hearing or the trial itself.[402] Consequently, a case must be initiated and proceed at least to the confirmation of charges hearing before criminal responsibility is excluded on these grounds.[403] This demonstrates that the requirements of Article 31(1)(c) fall short of the total immunity from prosecution advocated for by the United States.[404]

D. Conclusion

The ICC's aim of ending impunity for all serious crimes of international concern is seemingly at odds with the United States' depiction of it as a Court only for "would-be tyrants and mass murderers."[405] The *travaux préparatoires* describes a court with jurisdiction over war crimes, crimes against humanity, and genocide, with the possibility of expanding its jurisdiction in the future to include crimes of aggression.[406] No effort is made to rank those crimes or to suggest that any one is objectively more serious than the others.[407] This leaves open the possibility of investigating and prosecuting anyone committing a Rome Statute crime. It also undermines the American position that the ICC's purpose is to prosecute individuals associated with rogue regimes who commit aggressive criminal acts and not those people committing responsive atrocity crimes.

Nonetheless, some support for the United States' position that the ICC's jurisdiction is limited to aggressive crimes can be found in the *travaux préparatoires* and the Rome Statute itself.[408] The gravity provision in Article 17(1)(d) demonstrates that the severity of the alleged criminal behavior must be considered before the Court can exercise jurisdiction over a matter.[409] It can be argued that defensive crimes are inherently less severe than offensive ones; they are therefore less likely to meet the gravity threshold.[410] However, the

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402. *See* Rome Statute, *supra* note 37, at art. 31(2); *see also* ICC Rules of Procedure and Evidence 80 & 121(9), reproduced from *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York*, 3-10 Sept. 2002 (ICC-ASP/1/3 and Corr.1), part II.A.

403. *See* Rome Statute, *supra* note 37, at art. 31(2).

404. *See* American Proposal, *supra* note 391.

405. *See* UN Diplomatic Conference, *supra* note 316, at 95.

406. *See* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 287, at 211–12, 248.

407. *See id.* at 248.

408. *Id.*; *see* Rome Statute, *supra* note 37, at art. 5.

409. Susana SáCouto & Katherine Cleary, supra note 344, at 808.

410. *See Briefing of the European Parliament Members' Research Service on the International Criminal Court Achievements and Challenges 20 Years After the Adoption of the Rome Statute*, at 3, PE 625.127 (Jul. 2018), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf.

crimes alleged must be evaluated against all of the gravity criteria and just because they are defensive will not necessarily mean that a prosecution will not result.[411]

Further, Article 31's provision on excluding liability could support the United States' position.[412] It confirms that an accused acting in self-defense or the defense of others may be shielded from responsibility for their otherwise criminal acts.[413] However, it does not prevent the Court from investigating and prosecuting them, and it does not offer a member of the military protection from prosecution solely due to their involvement in a defensive operation.[414] A determination of whether someone acted in self-defense or the defense of others is a judicial decision made during the trial or the confirmation of charges hearing.[415] In other words, a proceeding must first be instituted before an accused can benefit from Article 31.[416] This undermines the argument that the ICC's purpose is limited to prosecuting atrocity crimes resulting from aggressive acts.

Despite some textual support for its position, the United States' conception of the ICC must also fail on policy grounds. Adopting the American approach would disrupt the functioning of the Court and limit its overall effectiveness. It would effectively authorize people to commit atrocity crimes far out of proportion with the harms they are trying to prevent because their criminality could be excused on the basis that it was the only way to respond to other crimes. A strict interpretation of the proposed principle could theoretically lead to a genocide going unprosecuted so long as its perpetrators could link its commission to stopping other atrocity crimes. Further, the solutions to the United States' concerns are already being pursued by the ICC in other forms. By considering the gravity of the alleged crimes before pursuing prosecutions and excluding responsibility under certain circumstances, the ICC is taking a reasonable approach to the problem. Implementing further protections from prosecution based on the context in which a crime is committed would be fundamentally incompatible with the ICC's goal of ending impunity.

IV. CONCLUSION

Since its inception, the ICC has sought universal ratification of its Statute. In that context, significant pressure has been placed on the

411. *See* SáCouto & Cleary, *supra* note 344, at 808.

412. Jérémie Gilbert, *Justice Not Revenge: The International Criminal Court and the 'Grounds to Exclude Criminal Responsibility' – Defences or Negation of Criminality?*, 10 INT'L J. HUM. RTS. 143, 146 (2006).

413. *Id.*

414. Hannah Tonkin, *Defensive Force Under the Rome Statute*, 6 MELB. J. INT'L L. (2005).

415. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 16, 2023).

416. *Id.*

United States to join the Court. The United States has consistently resisted those calls, citing a host of concerns about the Rome Statute and the perceived dangers it poses to American citizens. Despite this longstanding opposition to ICC membership, the United States joining the ICC seems more likely now than at any time in recent history. The Russian invasion of Ukraine shifted American sentiment in favor of the ICC, manifesting itself in the somewhat sympathetic Biden Administration and bilateral support from Congress. However, calls for American membership in the Court have largely failed to consider whether the ICC would welcome the United States as a member.[417]

The United States' longstanding concerns about the Court must be resolved before it can be considered a viable member. That leaves the Court with a choice if it wants to accomplish its stated goal of achieving universality: it can either change its mission in order to secure American membership by adopting mechanisms shielding some people from prosecution or stay the course and relinquish hope of universal ratification. Pursuing the first course would likely give the ICC greater access to the United States' political, financial, and intelligence resources. That, in turn, would make it easier for the Court to investigate the crimes falling under its jurisdiction and possibly lead to more successful prosecutions. However, the benefit of using American resources would almost certainly come at the cost of agreeing to immunize or exempt American citizens from prosecution in some or all situations. Other state parties, particularly those who also regularly deploy their troops in peacekeeping missions, could take exception to this and seek similar special treatment for their own citizens. Should the Court follow that approach it would find itself in danger of creating a two-tiered jurisdictional structure under which the apportionment of criminal responsibility would be as dependent on the accused's citizenship as their actions relating to their alleged criminality.

The Court's other option is to continue on its present path, accept that the United States is not a good candidate for membership, and concede that it should remain outside of the ICC structure. Should the Court maintain course, the integrity of its purpose remains intact, but it will also relinquish the possibility of additional support from the United States that could further its mission in other areas, particularly its oft-stated goal of ending impunity. The experience with the ICC's investigation of Russian crimes in Ukraine bears this out. Even in a situation where the interests of the United States and the ICC appear to largely align, the United States has been reticent about working too closely with the ICC. There is no reason to think that approach will change so long as the United States

417. *See generally* Yevgeny Vindman, *It's Time for the United States to Join the ICC*, FOREIGN POL'Y (Apr. 11, 2023, 11:11 AM), https://foreignpolicy.com/2023/04/11/russia-putin-ukraine-war-icc-united-states-crimes-arrest-warrant; *see also* Omar, supra note 267.

remains outside the ICC regime. What is clear from this is that neither of these options is a perfect solution and both require compromise and sacrifice on the part of the ICC. In the end, whichever route the Court takes will keep its overarching goal of ending impunity stubbornly out of reach.