

**Committee Report of the International Criminal Court Committee
of the American Branch of the International Law Association***

Five Recommendations for Resetting the U.S./ICC Relationship

August 23, 2023

Introduction

July 17, 2023, marked the 25th anniversary of the Rome Statute, the foundational treaty of the International Criminal Court (ICC), a Court of last resort for the gravest crimes. The situation in Ukraine has underscored the need for cooperation to bring perpetrators of atrocity crimes to justice and the recent announcement of U.S. cooperation in the ICC investigation in Ukraine is a welcome development. However, more can be done to support the ICC’s vitally important work and combat impunity worldwide. This milestone provides an opportunity to reset the U.S. relationship with the ICC and reaffirm the United States’ commitment to the rule of law and accountability.

1. The United States should fully cooperate with the ICC’s Ukraine investigation

While accounts vary regarding the precise amount of aid provided by the United States to Ukraine since the war began, estimates place the total at approximately \$77 billion in bilateral military, financial, and humanitarian support.¹ Pursuant to his delegated presidential authority, U.S. Secretary of State Anthony Blinken announced the forty-third drawdown for U.S. support for Ukraine on July 25, 2023.² The package “contains critical military assistance totaling \$400 million worth of arms and equipment from Department of Defense stocks.”³ The Fiscal Year 2024 (FY24) State, Foreign Operations, and Related Programs Appropriations Act, which passed the Senate Appropriations Committee around the same time contains significant allocations for an array of assistance programs for Ukraine.⁴ This substantial financial commitment is matched by diplomatic

* The ABILA ICC Committee consists of approximately 97 members. One Committee member opted not to join this statement. This letter does not represent the views of the American Branch of the International Law Association, which does not take positions on issues.

¹ Jonathan Masters & Will Mellow, *How Much Aid Has the U.S. Sent Ukraine? Here are Six Charts*, COUNCIL FOR. REL. (last updated July 10, 2023), at https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts?gclid=Cj0KCQjw2qKmBhCfARIsAFy8buJO5eW3WxBjvK3PHpYmLc0g2nqEEku4uAbmdSkv0dYSzRxXJ8gq2K0aAhIOEALw_wcB.

² U.S. Dep’t of State Press Release, Anthony J. Blinken Press Statement, Additional U.S. Military Assistance to Ukraine (July 25, 2023), at <https://www.state.gov/additional-u-s-military-assistance-for-ukraine-3/#:~:text=This%20package%20contains%20critical%20military,this%20unprovoked%20war%20against%20Ukraine.>

³ *Id.*

⁴ U.S. Senate Committee on Appropriations Press Release, Senate Committee Approves FY24 State, Foreign Operations Appropriations Bill (July 20, 2023), at <https://www.appropriations.senate.gov/news/minority/senate-committee-approves-fy24-state-foreign-operations-appropriations-bill>.

backing. U.S. government officials and legislators repeatedly have stated that the U.S. fully supports Ukraine and called for those who commit atrocities in Ukraine to be brought to justice.⁵

Until recently, these material and rhetorical commitments were not matched with necessary investigative and prosecutorial cooperation, despite U.S. law permitting sharing of information and evidence with ICC prosecutors. This was apparently the result of objections raised by individuals within the Department of Defense.⁶ The decisive—albeit overdue—announcement by the U.S. administration that the President will order the Pentagon to share evidence of alleged war crimes now clears a path for the United States to support the legal fight for justice and accountability in Ukraine as vigorously as it has supported Ukraine’s defense.⁷ The Administration should fully utilize the authority that Congress has granted and support the ICC’s investigation into atrocities in Ukraine.

2. The United States should remove impediments to assisting the ICC in other situations

It is positive that the United States is now assisting the ICC in the Ukraine situation. Yet it would be far more principled to support the ICC in all of its investigations, rather than treating Ukraine as an exceptional case.

The rules for U.S. engagement with the ICC have recently changed. The American Servicemembers’ Protection Act, passed in 2001, generally prohibited U.S. assistance to the ICC.⁸ The Dodd Amendment to the ASPA modified the general prohibition somewhat to permit U.S. assistance in some circumstances.⁹ In the Consolidated Appropriations Act for 2023, enacted in December 2022, Congress changed the rules regarding U.S. cooperation with the ICC, especially

⁵ See, e.g., U.S. Dep’t of State Press Release, Supporting Justice and Accountability in Ukraine, Fact Sheet (Feb. 18, 2023), at <https://www.state.gov/supporting-justice-and-accountability-in-ukraine/> (“Justice and human rights accountability are central pillars of the United States’ policy on Russia’s war of aggression against Ukraine, and the United States is focused on supporting those efforts most likely to bring perpetrators to justice.”).

⁶ *Pentagon Withholding Evidence in Russia War Crimes Case: Senators*, AL JAZEERA (May 11, 2023), at <https://www.aljazeera.com/news/2023/5/11/pentagon-withholding-evidence-in-russia-war-crimes-case-senators>.

⁷ Charlie Savage, *Biden Orders U.S. to Share Evidence of Russian War Crimes with Hague Court*, N.Y. TIMES (July 26, 2023), at <https://www.nytimes.com/2023/07/26/us/politics/biden-russia-war-crimes-hague.html>.

⁸ The provisions of the American Servicemembers’ Protection Act, 22 U.S. Code § 7423 (2001), prohibit the U.S. from providing support to the ICC. The statute prohibits several specified forms of support for the ICC, Section 7423(d) states as follows:

Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.

⁹ The Dodd Amendment to the ASPA, 22 U.S. Code § 7433 (2001), modifies the general prohibition and permits certain types of assistance. Until it was amended, the Dodd Amendment read as follows:

Nothing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda (sic), leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

with respect to Ukraine.¹⁰ The Statute now permits the U.S. to provide “assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.”¹¹

Beyond the Ukraine investigation, Congress should use the revised language of the American Servicemembers’ Protection Act as a model for support in all ongoing and potential future situations, or, alternatively, as a model for support in additional specific situations coupled with more comprehensive reforms. This could take the form of a general permission for the U.S. to share information with the ICC in its investigations or it could apply only to specific investigations. For example, the ICC is currently investigating alleged crimes against humanity and war crimes in Libya and U.S.-supplied information may be relevant to that investigation. Moreover, disclosure would be entirely consistent with U.S. interests. The same is likely true of additional investigations and prosecutions being pursued before the ICC, such as those related to the crimes committed in Myanmar and Darfur, Sudan.

The “Dodd Amendment” to the ASPA permits the United States to provide assistance to international efforts, including to the ICC, to bring to justice “foreign nationals *accused of* genocide, war crimes or crimes against humanity” (emphasis added).¹² In a comprehensive January 15, 2010, memorandum, the D.O.J. Office of Legal Counsel laid out the Executive Branch’s interpretations of most of the key issues surrounding U.S. engagement with the ICC.¹³ One issue that it did not address, but which has reportedly been addressed since then in an interpretation that is apparently not public, is the meaning of the term “accused of.”

The apparently prevailing reading of the Dodd Amendment seems to interpret “accused of” to mean that an individual has been the subject of a formal accusatory document. If this is indeed the U.S. interpretation of the phrase, it is problematic. Waiting for a formal accusation—whether in the form of an arrest warrant, indictment or other pleading from a court or prosecutor—reduces the utility of assistance. U.S. support could be useful at very early stages of a preliminary examination, when a prosecutor is seeking to identify suspects or determine who, among a group of suspects, is most legally culpable. Early cooperation also could be highly useful in exonerating suspects and determining who should not face formal charges.

Interpreting the provision as limited to formal accusation of criminal wrongdoing is also inconsistent with the rest of the provision and apparent legislative intent. The Dodd Amendment explicitly permits the U.S. to assist in efforts to bring Saddam Hussein to justice. When the Statute

¹⁰ Consolidated Appropriations Act, 2023, at <https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf>.

¹¹ 22 U.S. Code § 7433.

¹² Formally titled 22 U.S. Code § 7433 – Assistance to International Efforts.

¹³ U.S. Department of Justice, Office of Legal Counsel, Memorandum for Mary DeRosa, Legal Adviser, National Security Committee (Jan. 15, 2010), at <https://int.nyt.com/data/documenttools/2009-olc-memo-on-support-for-the-icc/b1a4ef1b0c5dc790/full.pdf>. For a comprehensive analysis of this memorandum and the issues it addresses, see Floriane Lavaud, Ashika Singh & Isabelle Glimcher, *The Binding Interpretation by the Office of Legal Counsel of the Laws Constraining U.S. Engagement with the ICC*, JUST SECURITY (Feb. 15, 2023), at <https://www.justsecurity.org/85148/the-binding-interpretation-by-the-office-of-legal-counsel-of-the-laws-constraining-us-engagement-with-the-icc-part-iii/>.

was enacted in 2002, there were no formal charges against him. It would be illogical for this early-stage assistance to be explicitly permitted by one part of the Statute but prohibited by another, at least without explicit statutory language to that effect.¹⁴

The State Department and the Department of Justice should render an unambiguous explanation of the “accused of” language so that all U.S. agencies will feel and will be fully empowered to share information with the ICC regarding foreign nationals accused of genocide, war crimes, or crimes against humanity.

3. The United States should take practical steps toward cooperation with the ICC, such as providing expertise and material support for witness protection and relocation

There are other, less visible, steps that the U.S. should take to support the work of the ICC. These measures will make it easier for the ICC to conduct its important work and recognize the ICC’s role as a vital international institution.

The ICC’s work is only possible because of the testimony of brave witnesses who are willing to share information about the atrocities they have experienced. Their testimony is vital to the Court but incredibly dangerous for many witnesses. After they cooperate with prosecutors, witnesses often need to be relocated so they can resume their lives safely. This challenge is becoming even more difficult as technology advances. For example, there have been advances in facial recognition software and open-source social media investigations that make it more difficult than ever to protect witnesses who have assumed new identities.¹⁵

The U.S. has voiced support for witnesses and for states that help to protect witnesses. It should offer witness protection and relocation for ICC witnesses, as it has done in other international prosecutions, including for the Kosovo Specialist Chambers and the Independent Investigative Mechanism for Myanmar.¹⁶ The U.S. Government is in a position to offer the most advanced assistance possible in this area. According to a 2021 report by a Task Force organized by the

¹⁴ For a more comprehensive argument regarding this issue, see Todd Buchwald, *Unpacking New Legislation on U.S. Support for the International Criminal Court*, JUST SECURITY (Mar. 9, 2023), at <https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court/>.

¹⁵ Council of Europe, Committee of Ministers, Recommendation CM/Rec(2022)9 of the Committee of Ministers to Member States on the Protection of Witnesses and Collaborators of Justice (Adopted by the Committee of Ministers on 30 March 2022 at the 1430th meeting of the Ministers' Deputies), at https://www.coe.int/en/web/cm/news/-/asset_publisher/hwwluK1RCEJo/content/protecting-witnesses-and-collaborators-of-justice-committee-of-ministers-recommendation/16695; *A Policy Framework for Responsible Limits on Facial Recognition Use Case: Law Enforcement Investigations*, (White Paper, Oct. 2021), at https://www3.weforum.org/docs/WEF_A_Policy_Framework_for_Responsible_Limits_on_Facial_Recognition_2021.pdf.

¹⁶ See U.S. Dep’t of State Press Release, Ambassador Van Schaack’s Remarks at UNGA Event Protection of Victims, Witnesses, and “Insider Witnesses” in Atrocity Trials and Investigations, (Sept. 19, 2022), at <https://www.state.gov/ambassador-van-schaacks-remarks-at-unga-event-protection-of-victims-witnesses-and-insider-witnesses-in-atrocity-trials-and-investigations/>

American Society of International Law (ASIL), the U.S. has previously provided *ad hoc* assistance to such effect:

Interlocutors report that the Obama Administration provided protection to at least two witnesses involved in an ICC prosecution, at a time when it was difficult to secure assistance from any other state, and that the United States offered one of the best opportunities for these vulnerable and traumatized individuals to remake their lives in safety. However, restrictions under ASPA, which have been interpreted to prevent the ICC from conducting at least some kinds of interviews with witnesses who are on U.S. territory, complicated the ability of witnesses located in the United States to participate in ongoing investigations. Nevertheless, various arrangements have been made under which witnesses were able to travel to third countries to meet with OTP staff and thus not encounter difficulties under the legislation.¹⁷

The U.S. should regularize such assistance through a comprehensive agreement on witness protection and relocation with the ICC. Witnesses need this support and the U.S. is in a position to offer it in a way that is entirely consistent with U.S. priorities and national interests.

4. The United States should formally and fully re-commit to its obligations as a signatory to, and work toward eventual ratification of, the Rome Statute

As this Committee has previously recommended multiple times, the U.S. should make clear to the entire world that it will uphold its obligations as a signatory to the Rome Statute.¹⁸ It should also submit the treaty to the Senate for Advise and Consent toward ratification.

The first U.S. Ambassador-at-Large for War Crimes Issues,¹⁹ David Scheffer, signed the Rome Statute on behalf of the U.S. on December 31, 2000—the deadline established by Article 125 of the Rome Statute for States to formally sign the treaty at the UN headquarters in New York.²⁰ Of the decision to sign the treaty then President Clinton noted: “We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war

¹⁷ *ASIL Task Force Report on Policy Options for U.S. Engagement with the ICC*, AM. SOC’Y INT’L L. TASK FORCE, at 23 (2021), at <https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-ForceReport-on-US-ICC-Engagement-FINAL.pdf>.

¹⁸ See, e.g., Letter to War Crimes Ambassador, Stephen J. Rapp and Legal Advisor Harold Koh: Recommendations for Future U.S. Policy Towards the ICC (Dec. 6, 2010), at https://ila-americanbranch.org/wp-content/uploads/2020/10/2010-12-06_ABILA_Letter_3.pdf; Letter to War Crimes Ambassador, Stephen J. Rapp and Legal Advisor Harold Koh: Recommendations for Future U.S. Policy Towards the ICC (Mar. 12, 2010), at https://ila-americanbranch.org/wp-content/uploads/2020/10/2010-03-12_ICC_Letter.pdf; Letter to State Department Regarding Recommendations as to United States/International Criminal Court Policy (July 24, 2013), at https://ila-americanbranch.org/wp-content/uploads/2020/10/2013-07-24_ICC_Letter.pdf.

¹⁹ Now styled Ambassador-at-Large for Global Criminal Justice.

²⁰ Rome Statute of the International Criminal Court, July 17, 1998, at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.”²¹

The United States subsequently purported to renounce its signatory obligations in a note from then Under-Secretary John Bolton to the Secretary General of the United Nations.²² Mr. Bolton stated in the note that the United States would have “no legal obligations arising from its signature” on the Rome Statute.²³

Although the legal effect of the Bolton letter is unclear, we believe that the United States could and should unambiguously accept obligations arising from its status as a treaty signatory under international law by sending a counter-note to the UN Secretary-General stating that it confirms its signature of December 31, 2000. Under the Vienna Convention on the Law of Treaties, this requires that the United States not act in any way that would “*defeat the object and purpose*” of the Rome Statute.²⁴ Such an action would thus impose very minimal obligations on the United States, which already fulfills them. It would not mean that the United States is now a State Party to the Rome Statute. It would have no specific obligation of cooperation under Article 86 of the Statute, nor would it be required to contribute to the Court’s operating expenses.

Removing or replacing the Bolton note is a necessary but insufficient step to fully realize U.S. commitments to international justice. At the time the U.S. signed the Rome Statute, President Clinton withheld a recommendation to submit the treaty to the Senate for Advice and Consent until concerns related to the protection of U.S. nationals and delineation of the crimes under the Court’s jurisdiction had been satisfied. In the opinion of the U.S. representative at the treaty conference who signed the Rome Statute on behalf of the United States, Ambassador David Scheffer, the first Ambassador-at-Large for War Crimes Issues, those concerns have now been addressed, as he writes: “The time has finally arrived to acknowledge some evolutionary developments and move towards American ratification of the treaty.”²⁵

The bedrock principle underlying the ICC’s jurisdiction, enshrined in Article 1 of the Rome Statute, is complementarity: the concept that the Court may only intervene where a State cannot or will not to bring to justice those who bear responsibility for the gravest crimes of concern to the international community. Article 17—drafted by the U.S. representative to the negotiating conference—provides that the ICC will not proceed unless the state demonstrates an “unwillingness or inability genuinely to carry out the investigation.”²⁶ Concern about the ICC’s

²¹ White House Press Release, Statement by the President (Dec. 31, 2000), at https://clintonwhitehouse4.archives.gov/library/hot_releases/December_31_2000.html.

²² U.S. Dep’t of State Press Release, Letter from John Bolton to UN Secretary General Kofi Annan (May 6, 2002), at <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

²³ *Id.*

²⁴ Vienna Convention on the Law of Treaties, Art. 18, May 23, 1969, 1155 UNTS 331.

²⁵ David Scheffer, *The United States Should Ratify the Rome Statute*, LIEBER INST. (July 17, 2023), at <https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/>, citing Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 NOTRE DAME L. REV. __ (2023, forthcoming).

²⁶ Rome Statute, *supra* note 20, Art. 17.

potential to investigate or prosecute U.S. nationals for genocide, crimes against humanity, war crimes, or the crime of aggression therefore exhibits an unwarranted lack of confidence in the U.S. domestic commitment or ability to confront atrocity crimes. Moreover, as a Party to the Statute, the United States would have the opportunity to nominate a U.S. judge to serve, and many qualified Americans would become eligible to join the Court's staff as legal officers, investigators, prosecutors, and important members of the Registry, the ICC's Secretariat. Conversely, remaining outside the treaty excludes most Americans from the Court.

5. The United States should provide financial support to the Trust Fund for Victims

Assuming the United States formally repudiates the Bolton letter, it should contribute to the ICC's Trust Fund for Victims (TFV). The TVF is an independent organization created in 2004 by the Assembly of States Parties, the ICC's management, legislative, and oversight body, pursuant to Article 79 of the Rome Statute.²⁷ The TFV operates independently from the ICC, with its own leadership, board, and mandate. It does not participate in prosecutions nor does it have authority to select cases, identify defendants, or gather evidence to establish criminal responsibility.²⁸ Instead, the TFV focuses on the rehabilitation of victims.

Specifically, the TFV has a twofold mandate to: (1) implement Court-ordered reparations to individual victims and communities; and (2) provide physical, psychological, and material support to victims of atrocity crimes and their families. By so doing, the TFV not only assists victims to lead full and dignified lives but "contributes to realizing sustainable and long-lasting peace by promoting restorative justice and reconciliation."²⁹ To date, the TFV has implemented reparations for victims in four cases and has assistance mandates underway or planned in seven countries (Uganda, the Central African Republic, the Democratic Republic of the Congo, Côte d'Ivoire, Mali, Georgia, and Kenya).³⁰

U.S. law prohibits the U.S. from providing assistance to the ICC except as outlined in the Dodd Amendment.³¹ However, the ASPA states that the "term 'International Criminal Court' means the court established by the Rome Statute."³² Nothing in U.S. law prohibits funding the separate TFV; Congress has the authority to provide funds for this independent entity. Moreover, unlike the Court itself, which does not allow for "earmarked" contributions to support prosecutions or legal proceedings in certain situations, the TFV accepts restricted contributions for designated purposes.

²⁷ ASP Resolution ICC-ASP/3/Res.7 (adopted by consensus at the Sixth Plenary Meeting, Sept. 10, 2004), at https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ICC-ASP-ASP3-Res-07-ENG.pdf.

²⁸ Int'l Crim. Ct., *Trust Fund for Victims* (last visited July 31, 2023), at <https://www.icc-cpi.int/tfv#:~:text=Though%20the%20Trust%20Fund%20for,humanity%2C%20war%20crimes%20and%20aggression.>

²⁹ *Id.*

³⁰ *Id.*

³¹ *Supra* note 9.

³² 22 U.S. Code § 7432.

Donating parties often reach agreements with the TFV to allocate their contributions to support for victims of particular crimes, although governments cannot earmark their contributions *per* Regulation 27.³³ Thus, while voluntary contributions cannot and should not be used as a mechanism to favor victims in certain situations and not others, they are an important tool to bolster a holistic and victim-centered approach for survivors, including, *inter alia*, survivors of sexual and gender-based violence.³⁴

Support for the TFV is entirely consistent with the U.S.'s stated objective of standing with atrocity victims and survivors worldwide and has been deemed in the strategic interest of the United States.³⁵

Conclusion

The recent amendments to the American Servicemembers' Protection Act and the U.S. statements regarding the ICC's efforts in Ukraine are clear indications that support for the object and purpose of the Rome Statute is entirely consistent with U.S. interests. The time has come to demonstrate commitment to these principles in a comprehensive and unambiguous manner to help achieve justice in Ukraine and beyond.

While the path to U.S. ratification of the Rome Statute requires navigating complex domestic political realities, the moral and strategic necessity of ratification remains clear. As a global leader committed to the rule of law and human rights, the United States should join the world's democracies in ratifying the Rome Statute and standing up for accountability and against authoritarianism.

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³³ Resolution ICC-ASP/4/Res.3, Regulations of the Trust Fund for Victims, Annex (Dec. 3, 2005), at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf.

³⁴ See Int'l Crim. Ct. Press Release, Trust Fund for Victims Calls for Contributions to Provide Reparations for Victims of Conflict-Related Sexual Violence (Mar. 13, 2023), at <https://www.icc-cpi.int/news/trust-fund-victims-calls-contributions-provide-reparations-victims-conflict-related-sexual>.

³⁵ For a comprehensive analysis of these issues, see Yvonne Dutton & Milena Sterio, *The United States Can and Should Broadly Contribute to the Trust Fund for Victims*, JUST SECURITY (Feb. 16, 2023), at <https://www.justsecurity.org/85156/the-united-states-can-and-should-broadly-contribute-to-the-trust-fund-for-victims-part-iv/>.