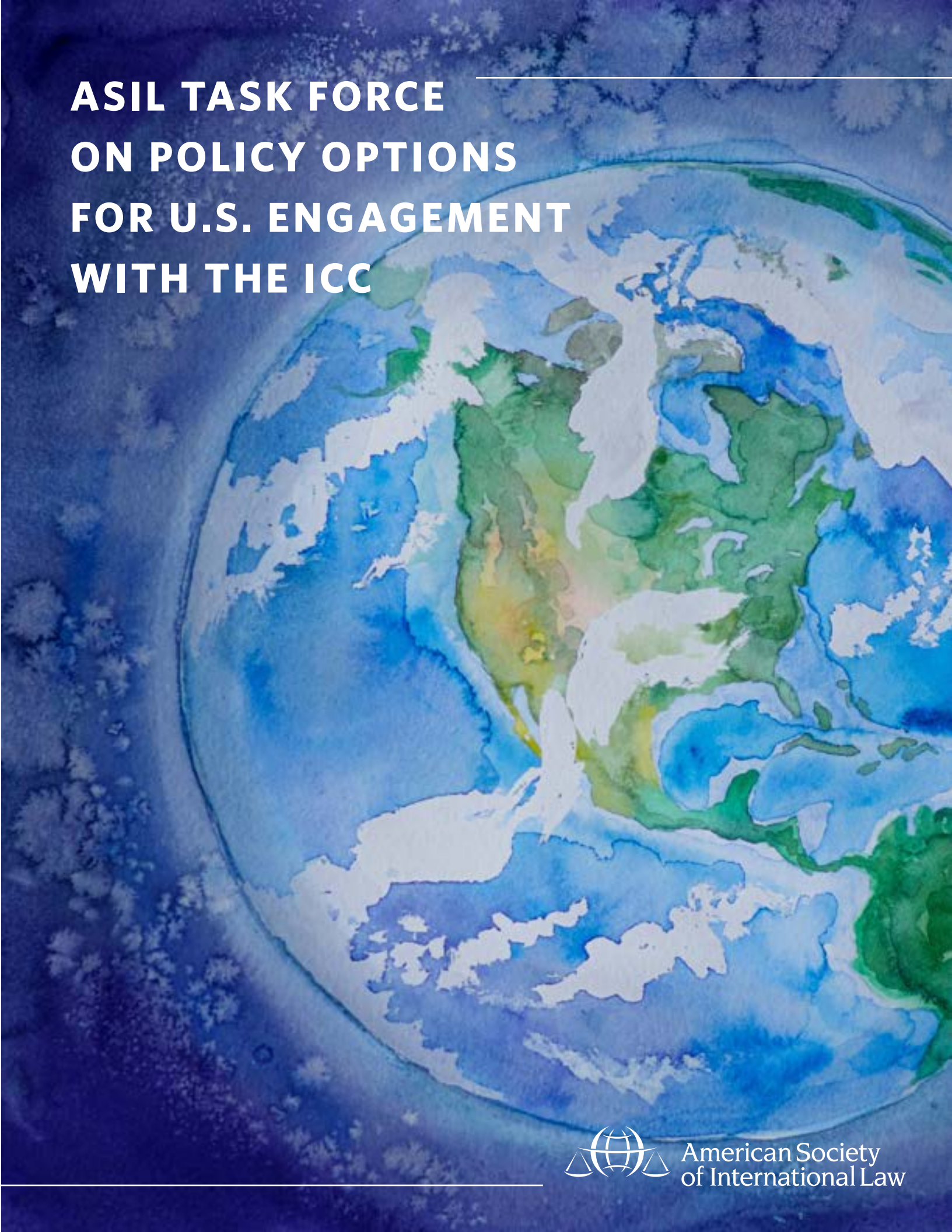
Panel 5: The Court Under Siege: ICC Independence in an Era of Great Power Hostility

CLE Reading Material:

- 2021 ASIL ICC Task Force Report: https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf
- The Future of the Int'l Criminal Court: What Follows After Removal of the Prosecutor, Alex Whiting & Rebecca Hamilton, Just Security, July 25, 2026, The Int'l Criminal Court's Future: After Removal of the Prosecutor
- U.S. Policy and the International Criminal Court, David Scheffer, Cornell International Law Journal (1999), U.S. Policy and the International Criminal Court

ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC



American Society of International Law

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FOREWORD

Over the past decades, the relationship of the United States to the International Criminal Court (ICC) has presented some of the most notable questions of international law and policy facing the U.S. Government, presenting complex and ever-shifting legal and political considerations. The Society, as a non-partisan organization devoted to the study of international law, is well-suited to the task of bringing to bear on these questions the expertise of distinguished independent experts drawing from a broad range of perspectives among policymakers, civil society, and the public.

It has been over 12 years since ASIL President Lucy F. Reed convened a task force, chaired by Ambassador William H. Taft IV and Judge Patricia M. Wald, to examine the U.S. relationship with the ICC and to produce a set of recommendations for the then newly elected Obama Administration. The report of that Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement*, built on the more nuanced relationship and greater openness to engagement with the ICC that had begun to emerge during the second term of the George W. Bush Administration, and many of the report's suggestions were ultimately reflected in the policies adopted by the Obama Administration.

Much changed over the intervening years and in late 2019, President Sean D. Murphy commissioned a new Task Force, with generous support from the Open Society Foundations. Chaired by Todd Buchwald and Beth Van Schaack, the Task Force was charged with conducting a review of the U.S. relationship with the ICC and offering recommendations to Congress and the Administration for fostering pragmatic engagement. Since the Task Force began its work, the legal and political situation has continued to shift: the ICC opened investigations into the Afghanistan and Palestine situations; the U.S. imposed sanctions on the ICC Prosecutor and a senior staff member of the Court; a panel of nine eminent experts conducted an Independent Expert Review of the ICC and made extensive recommendations for reform; and the Assembly of States Parties elected a new Prosecutor who will take office in June 2021. Such developments emphasized both the challenge and the urgency of this effort.

Over the last 18 months, the Task Force and its 13-member Advisory Group have engaged in an extensive process of consultation and analysis that are exemplary of the engagement on matters of international law that ASIL encourages. The result is this excellent Report to recommend to policymakers concrete options that could be implemented for pragmatic engagement between the U.S. Government and the ICC. I am confident that both the process of the wide-ranging consultations that the Task Force undertook and the Report itself will help to advance understanding of international law and the United States's relationship with the ICC

among policymakers and others, both in the United States and abroad. As with the previous Task Force, the Task Force and Advisory Group members were selected to represent the diversity of views on the ICC within the ASIL membership and broader legal and policy community. Of course, the recommendations remain those of the Task Force and do not necessarily represent the views of the Society or its members.

I wish to thank the brilliant co-chairs, Todd Buchwald and Beth Van Schaack, for their expertise and commitment to this project, as well as our superb Project Director, Ben Batros, whose tireless efforts kept this complex project on track. I also extend my deep gratitude to the Task Force members—David Bosco, Sandy Hodgkinson, Saira Mohamed, and Alex Whiting—and to the members of our distinguished Advisory Group, whose insights were so important to the project's success. Finally, I would like to express my appreciation to the Society's Executive Director, Mark Agrast, Deputy Director, Wes Rist, and the ASIL staff, who skillfully launched and guided this project over these many months. ASIL is also of course deeply grateful to the Open Society Foundations for funding this project.

Catherine Amirfar
President

April 2021

EXECUTIVE SUMMARY

The goal of this Report is to provide relevant background about United States policy toward the International Criminal Court (ICC or Court) and to recommend options that can be implemented by the Executive Branch and Congress for engagement with the ICC. Accordingly, our recommendations are directed toward U.S. Government actors with an eye toward balancing the competing equities within the political branches and the relevant Executive agencies.

The Report describes a broad range of support that the United States has provided for international justice efforts over an extended period of time. The U.S. government has repeatedly expressed—in legislation, presidential directives, military manuals, strategic messaging, and elsewhere—its strong national interests in accountability, compliance with international humanitarian and human rights law, the prevention of mass atrocities, and the rule of law. Deep, bipartisan support for these underlying values is reflected in numerous ways, including the United States' instrumental role in establishing the Nuremberg and Tokyo tribunals to try major war criminals after World War II, its critical support for the International Criminal Tribunals for Rwanda and the former Yugoslavia, and its ongoing support to a wide range of other international, hybrid, and domestic initiatives (as the Report recounts in Section I).

In this regard, the United States played a significant role in the negotiation of the Rome Statute creating the Court and in subsequent implementation documents, such as the ICC's Elements of Crimes and Rules of Procedure and Evidence (both of which reflect significant input by U.S. negotiators). While the United States has maintained legal and policy objections to certain key aspects of the Rome Statute since the treaty's negotiation in 1998, U.S. policy toward the Court has evolved over time, depending on a range of factors both within and without the U.S. Government. And though there have been periods of significant tension, the United States has on numerous occasions and in numerous ways provided a wide range of support to the ICC in key investigations and cases (as the Report explores in Section III).

In 2009, as the Obama Administration was taking office, an earlier Task Force, convened by the American Society of International Law and chaired by Ambassador William H. Taft IV and Judge Patricia M. Wald, produced a report examining U.S. policy toward the ICC and making recommendations to assist the incoming Obama Administration in developing its policy. Although the Bush Administration had initially been hostile toward the Court, the Task Force's central recommendation was that the new Administration should build upon the greater engagement with the Court that had taken root during the second term of the Bush Administration. Many of the report's concrete suggestions were ultimately reflected in the Obama Administration's eventual "case-by-case policy" under which the United States engaged with Rome Statute parties on issues

of mutual concern and provided support for the ICC's investigation and prosecution of cases that advanced U.S. interests and values, consistent with the requirements of U.S. law and the longstanding commitment to protect U.S. personnel.

Much has changed since the 2009 report, however. By the end of the Obama Administration, the prospect of formal investigations by the ICC Office of the Prosecutor (OTP) in the Afghanistan and Palestinian situations was increasingly placing a strain on this approach. The election of President Trump in 2016 heralded a fundamentally adversarial relationship between the United States and the Court. And while much of the Court's work in a wide range of other countries continues to align well with U.S. interests, the steps to commence investigations in these two situations have dominated the relationship during the past few years. This deterioration in relations culminated in the Trump Administration's determination that the ICC's work constituted an "unusual and extraordinary threat" to national security and its unprecedented decision to impose economic sanctions and visa restrictions on senior ICC officials, including the Chief Prosecutor herself—steps that were widely criticized and led numerous friends and allies to distance themselves from the U.S. position and to reaffirm their support for the Court.

Meanwhile, the Court appears to have reached a crossroads of its own, with many of its traditional supporters increasingly expressing concerns about the Court's output, working methods, and strategic direction. Indeed, in April 2019, four former Presidents of the ICC Assembly of States Parties (ASP) published a highly critical letter reflecting their disappointment with the Court's performance, stating that it was time to "make a new deal between the ICC and its states parties" and calling for "an independent assessment of the Court's functioning." ICC states parties subsequently launched a process of review and reform that included the appointment of a group of nine eminent experts, chaired by former Justice Richard J. Goldstone of South Africa, to conduct an "Independent Expert Review." Following wide-ranging consultations, the Independent Experts issued an extensive report in September 2020 containing searching critiques of how the Court has functioned and putting forward 384 recommendations aimed at states parties and the organs of the Court.

Importantly, a number of the critiques that are driving the ICC review and reform process align with U.S. concerns, including that the Court has overextended itself and needs to find ways to better focus its efforts on situations and cases in which it can more effectively advance justice. The implementation of these recommendations forms part of a wider process in which states parties are pursuing changes within the Court to refocus its efforts. These moves for reform also coincide with the election of a new Prosecutor, Karim Khan, a British barrister with extensive experience in international prosecutions who currently serves as Special Adviser and Head of the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), who will take office in June 2021.

In the course of the Task Force's consultations, several interlocutors questioned whether, given the growing concerns about the Court's performance, questions about its efficacy as an instrument for combating impunity and delivering justice, and the sense that the support of so many states parties has become lukewarm, efforts to improve the U.S. relationship with the Court warranted the expenditure of political capital that would be required. In fact, our consultations have indicated that the great majority of the United States' friends and allies remain invested in trying to improve the Court's performance. They thus view the unalloyed hostility of U.S. policy toward the Court over the last four years, including the imposition of sanctions and other efforts widely seen as aimed at the Court's destruction, as emblematic of the prior administration's excesses—a view shared by a range of U.S. stakeholders whom we consulted.

The approach of the new Administration to the ICC clearly needs to account for the significant challenges that the United States currently faces in its relationship with the Court, including the politically fraught terrain presented by the Prosecutor's commencement of formal investigations of the Afghanistan and Palestinian situations. But the Administration also can build on opportunities to address longstanding U.S. concerns presented by the unprecedented openness to constructive criticism and reform among states parties.

The Task Force notes that the U.S. commitment to atrocity prevention, accountability, human rights, and the rule of law extends far beyond the ICC. While the ICC looms large in discussions of international accountability, it can only ever be one piece of the global accountability puzzle. The United States has had, and should continue to have, a robust, effective policy toward global criminal justice that encompasses support for a variety of national, regional, and international justice mechanisms. As reflected in the Task Force's recommendations, the United States should work to ensure that tensions in its relationship with the ICC do not overshadow, or stand in the way of, its pursuit of robust and effective atrocities prevention and response.

In addition, it should be recognized that U.S. policy toward the ICC is not developed in isolation, but rather is part of its approach to international institutions and multilateral cooperation more generally. The new Administration will thus need to find a way to address ICC issues that fits with, and contributes to, its approach to this larger policy mosaic and its interest in maintaining a leading voice on issues of accountability, human rights, and rule of law. It is the Task Force's view that undifferentiated hostility toward the ICC will continue to entail significant diplomatic costs.

Given the terrain that this Report must cover—including the diverse U.S. interests that intersect with the ICC, the range of prior U.S. interactions with the Court, the ever-changing domestic political landscape, and the nature of the current challenges and opportunities—it is organized so as to enable readers to focus on areas of interest to them. Section I sets out basic background about the U.S. relationship with the ICC, situating the ways in which different

administrations have engaged with the ICC in the wider context of the United States' leading role in promoting accountability for international crimes prior to the formation of the Court and beyond. Section II sets out the basic legislative framework that governs U.S. relations with the ICC and how that framework has evolved over time.

Section III looks in more detail at the various ways in which the United States has engaged on ICC issues. As salient examples, the United States played a critical role in the surrender of two of the most important ICC fugitives over the last decade—Bosco Ntaganda, a rebel leader from the eastern Democratic Republic of Congo, in 2013, and Dominic Ongwen, a senior commander of the Lord's Resistance Army, which has terrorized northern Uganda and surrounding region for decades, in 2015. As another example, the U.S. decision in 2005 to allow the UN Security Council to refer the situation in Darfur to the ICC, and its subsequent support for that investigation, is a reminder that even strong concerns about the Court can be outweighed by stronger concerns about the kinds of atrocities that the Court was intended to combat. And, as yet another example, the negotiations over the crime of aggression, leading up to and including the 2010 review conference in Kampala, Uganda, illustrate both the costs of disengagement by the United States and what the United States can achieve when it participates constructively to protect its interests on issues it considers important.

Section IV describes recent developments that are particularly relevant in assessing the options for U.S. engagement with the ICC in the coming years, notably the steps taken by the ICC to commence investigations in the "situation in Afghanistan" (potentially encompassing allegations of torture by U.S. personnel) and the "situation in Palestine" (potentially encompassing allegations against senior Israeli officials, including in connection with the settlements policy). Section IV then goes on to provide background on ongoing ICC review and reform efforts, which the Task Force believes reflect an openness to constructive engagement in which the United States has a strong interest.

But these recent developments are not the only relevant considerations, and Section V endeavors to describe a broad range of ways in which numerous elements of ICC policy intersect with other U.S. interests. This includes both areas in which the Court's work potentially conflicts, and areas in which it potentially aligns, with U.S. interests. At the end of the day, there exists within the United States deep and bipartisan support for atrocity prevention and response as a key element of U.S. policy, and for the principle that those responsible for atrocities should be held to account, as evidenced, for example, by the passage of the Elie Wiesel Genocide and Atrocities Prevention Act of 2018 and other legislation supporting transitional justice and accountability measures.

In light of all these considerations, Section VI sets out the Task Force's recommendations for how the Biden Administration should engage with the ICC on a pragmatic basis moving forward.

Given the range of interests and perspectives, and the inevitable reality that different forms of engagement may be more or less feasible at different points in time, the Task Force identified four categories of recommendations: (A) initial steps to "clear the air," recast the tone following the U.S. attacks on the Court, and reinforce the U.S. approach to multilateralism and its shared goals with the ICC; (B) steps that are constructive and consistent with U.S. interests in promoting atrocities prevention and response, regardless of concerns about the ICC; (C) approaches to the three most critical issues—the Afghanistan and Palestinian situations and the opportunities presented by the ongoing ICC review and reform process (which the Task Force see as closely related); and finally (D) possibilities for support for ICC efforts in particular situations.

(A) *"Clearing the Air"*: The U.S. relationship with the ICC does not exist in a vacuum. U.S. attacks on the Court in recent years, and especially the imposition of sanctions on the ICC Prosecutor and one of her staff, came at significant cost to the U.S. reputation and to its ability to be an effective voice on issues of importance to it. These measures also created an environment in which states parties felt that the Court needed to be defended, were forced to distance themselves from the U.S. position, and found it more challenging to pursue legitimate reforms that could be seen as benefiting the United States. Against this background, the Task Force recommends that the new Administration approach and speak about the Court and its personnel in a manner that comports with its overall approach to multilateralism, international institutions, and working with friends and allies.

(B) *Steps that Should Be Pursued Regardless of Specific Concerns About the* ICC: The Report includes eighteen specific recommendations that should be considered by relevant U.S. actors, no matter what the state of its relationship with the ICC, to promote its own interests in international justice and accountability and to present U.S. positions on the ICC and related issues. These steps fall into a number of general categories:

- Enhancing and highlighting U.S. support for international justice efforts, including by building accountability into the President's National Security Strategy, maintaining the independence of the State Department's Office of Global Criminal Justice and the position of Ambassador-at-Large, and assuring steady and predictable funding for initiatives to provide accountability for atrocity crimes.
- Preserving political capital by not withholding support for multilateral resolutions or declarations supporting international justice simply on the basis that those resolutions mention the ICC or insisting on the deletion of factual references to the ICC in resolutions that are devoted to issues that the United States cares about.
- Using existing U.S. authorities to target those responsible for atrocity crimes, including by maintaining and expanding the War Crimes Rewards Program, supporting sanctions

against those responsible for atrocity crimes, and implementing a no- or restricted-contacts policy.

- Strengthening the United States' ability and commitment to prosecute international crimes domestically by enacting appropriate legislation to make crimes against humanity and superior responsibility subject to prosecution under U.S. law; encouraging the prosecution of suspects within the United States for their substantive crimes rather than relying exclusively on immigration offences; and signaling that the United States will accept information and evidence from the ICC where this could assist in such prosecutions or in other enforcement actions.
- Reaffirming the U.S. commitment to victims/survivors of international crimes and those at risk because of their willingness to serve as witnesses by supporting in-country assistance to victims of atrocity crimes, considering making a contribution to the Trust Fund for Victims, and offering protection to vulnerable witnesses.
- Attending and participating as an observer state in meetings of the Assembly of States Parties and participating in other relevant meetings and conferences; actively following the substantive jurisprudence of the ICC, which will inevitably affect the way in which other states interpret their legal obligations and those of their personnel under international law; and tasking diplomatic missions to report on relevant ICC developments and the views of relevant host states on the Court.

(C) *Dealing with the Biggest Issues—the Afghanistan and Palestinian Situations and* ICC *Review and Reform*: Virtually every interlocutor with whom we spoke who has served in the U.S. Government underscored that, for better or worse, the extent to which the United States will be in a position to be supportive of ICC efforts will inevitably be influenced by developments in those two situations. These are of course challenging issues but, as explained in considerable detail in Section VI of this Report, the Task Force believes there are pragmatic paths forward that do not trivialize the allegations but that will help the Administration achieve its goals in these two situations.

A jumping off point for a U.S. approach is a recognition that actual cases against U.S. persons are neither underway nor a *fait accompli*, and that there are numerous reasons that such cases may never be brought. Indeed, while the allegations of torture and other abuse against U.S. personnel are serious, the situation in Afghanistan covers an enormous crime base—including crimes by the Taliban, Afghan national forces, and other non-state armed groups that are far more extensive than the allegations against U.S. personnel. Meanwhile, beyond Afghanistan, there are nearly two dozen other situations that the Prosecutor has under either preliminary examination or investigation, and an increasingly widespread sentiment that the Court is spread too thin and must find better ways to identify the situations and cases on which it focuses if it is to be successful. Against this backdrop, the Report includes recommendations on ways that the Administration can frame

arguments that, considering the totality of the circumstances and the wide range of legislation and other steps that have been taken to address the allegations involving Afghanistan, these are not cases that the ICC should pursue or prioritize.

The Task Force thus sets out specific elements that the Administration could advance in explaining its position, including a clearer public explanation of arguments related to the admissibility criteria that Court actors use in selecting and prioritizing situations and cases. It could also include a fuller articulation of the many non-criminal responses that addressed allegations of mistreatment—including investigative commissions, legal and policy reforms, the withdrawal of controversial legal advice, and other steps—all with a view to describing how such responses fit into the tests that the ICC should apply in deciding which situations and cases to pursue. The totality of these steps, together with the relative gravity of the abuses, particularly as compared with the scale and ongoing nature of crimes by the Taliban and other armed groups, provide a good faith basis to argue that the Prosecutor should not prioritize any investigation of or potential case against U.S. personnel. The objective need not be to establish that the United States' responses were ideal, but rather simply that they provide an appropriate basis for the OTP not to further pursue cases against U.S. personnel.

Court actors are not the only intended audience for such arguments, and it is at least as important that the United States provide a cohesive and persuasive explanation of its views for its friends and allies in the international community. By presenting itself as constructive, motivated to engage, wanting to provide leadership, and having a stake in the principle that those responsible for atrocities should be held to account, the Administration can do a great deal to enhance the credibility of the United States as a strong voice of issues of accountability, human rights, and the rule of law. Thus, separate from whether the United States is successful in persuading Court actors, it has a compelling interest in acting in a manner that helps persuade friendly countries that it is operating forthrightly and in good faith.

In whatever approach that the U.S. Government takes to the situations of critical concern in its relations with the ICC, however, the Task Force urges that it keep perspective. It should be realistic about the true scale of any threat to U.S. personnel; avoid making the perfect the enemy of the good; and be open to different visions of "success" that include (for example) a period of inaction that becomes stable over time.

The Palestinian situation raises different questions, and it is beyond the mandate of this Task Force to make recommendations as to how Israel should address these issues. That said, the Court's recent conclusions that Palestine is a state for purposes of the Rome Statute, and that there is jurisdiction that extends to "Gaza and the West Bank, including East Jerusalem," are inconsistent with longstanding U.S. views. As a practical matter, the U.S. posture toward the investigation will likely be driven more by the Administration's policy toward Middle East

peace process issues than by its views on the ICC. That said, Israel will have a natural interest in persuading the Court to deprioritize these case, and this will align with the general approach that the Task Force is recommending that the Administration take toward the Afghanistan situation.

In considering how to present its concerns regarding the Afghanistan and Palestinian situations, the United States should view the discussion of and momentum toward reform of the Court, which has developed independently of U.S. concerns about these two situations, as an opening to engage. These discussions offer an opportunity to propose and implement changes that could both put the Court on a firmer footing and reduce the prospect of future clashes between the ICC and the United States. Indeed, many long-standing U.S. positions regarding the Court may now find a more receptive audience, and the United States can advance those positions in a manner consistent with the reasons that the United States believes pursuing an investigation of U.S. personnel in Afghanistan would be inappropriate.

(D) *Support for Particular* ICC *Cases*: While developments in the Afghanistan and Palestinian situations are likely to continue to play a significant role in the extent to which the United States is willing to assist the ICC in specific cases, the new Administration has already indicated that it is open to the possibility of providing support in exceptional cases. The Task Force believes that the Administration is proceeding wisely by remaining open to such possibilities. While the political space for such support will inevitably depend on wider circumstances, including developments on the two situations of particular concern to the United States, it seems highly likely that circumstances will again arise in which the imperatives of accountability for massive crimes may outweigh concerns about the ICC as an institution (whether in existing investigations such as Darfur and Myanmar; likely investigations such as Venezuela and Ukraine; or new situations that have not yet arisen). In this regard, the Task Force recommends that the new Administration maintain its stance of being open to providing targeted support to the ICC in particular cases where the Court's investigations are consistent with U.S. interests. It also recommends that the Administration give thought in advance to categories of situations in which it would make sense to be alert to the possibility of providing such support.

I. BACKGROUND

The United States has long exercised leadership in promoting accountability for international crimes. The global movement to establish international judicial processes to help ensure that perpetrators are held to account and that victims experience a sense of justice largely originated in the Nuremberg and Tokyo Tribunals. The United States was instrumental in the establishment of these institutions, which were created in large part due to the U.S. admonition that—in the famous words of Supreme Court Justice Robert H. Jackson—even those responsible for crimes "so calculated, so malignant and so devastating" as those committed by the Nazis "had the right to a fair trial on the facts and law" and should not (as some, including Winston Churchill, had suggested) be simply identified and summarily executed.[1] U.S. lawyers played key roles in the prosecution of the major war criminals before the tribunals, including Justice Jackson, who helped draft the Nuremberg Charter, shaped the charges, and served as U.S. Chief Prosecutor in the main trial of the major war criminals; Brigadier General Telford Taylor, who served as prosecutor in the H*igh Command* Case and Chief Counsel following Jackson's return to the United States; and Benjamin Ferencz, who served as chief prosecutor for the E*insatzgruppen* Case and remains a staunch advocate for international justice to this day. The eight "Nürnberg Principles," which sought to encapsulate the Tribunal's most important contributions to international law, still serve as an indelible testament to the precepts for which these great efforts have come to stand.[2]

Excerpt from Opening Statement by Justice Jackson to the Nuremberg Tribunal (Nov. 21, 1945)

> *"The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their bring ignored, because it cannot survive them being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that Power has ever paid to reason."*

The United States also played a decisive role reviving international justice efforts after the Cold War. During the George H. W. Bush Administration, as unspeakable war crimes engulfed the former Yugoslavia, Secretary of State Lawrence Eagleburger called for "a second Nuremberg."[3] In the face of those atrocities, and the genocide that subsequently swept Rwanda in the spring of 1994, President Bill Clinton embraced the "obligation to carry forward the lessons of Nuremberg" as the reason that "we strongly support the United Nations War Crimes Tribunals for the former Yugoslavia and for Rwanda"[4]—the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Following the creation of these two *ad hoc* tribunals, U.S. backing continued, prompting the first Prosecutor of both tribunals, Justice Richard Goldstone, to reflect that "neither [the ICTY nor the ICTR] would have been set up and neither of them would have got off the ground

without the support from the United States administration."[5] This included diplomatic support in the UN Security Council and through intercessions with other states;[6] financial support amounting to more than $1 billion over the life of the Tribunals;[7] the issuance of rewards for information leading to the capture of fugitives;[8] secondments of experienced lawyers from the Department of Justice and elsewhere;[9] operational support in the form of assistance in the capture, detention, and transfer of fugitives, including essential contributions to the May 2020 arrest of long-time ICTR fugitive Félicien Kabuga;[10] a steady stream of intelligence (notably including satellite imagery that identified the mass graves of victims of the Srebrenica massacre as well as forensic examination of ballistics evidence);[11] and legal support, such as *amicus curiae* briefs and the adoption of domestic legislation to facilitate the transfer of persons wanted by the tribunals, notwithstanding the absence of an extradition agreement.[12]

Recognizing that "the end of impunity and the promotion of justice . . . are stabilizing forces in international affairs," U.S. support to global justice efforts has not been limited to these two tribunals.[13] While no country has a perfect record on accountability, the United States has provided substantial assistance to a range of other hybrid, regional, internationalized, and domestic mechanisms to ensure accountability to perpetrators and justice for victims of international crimes. This includes backing the establishment of, and helping to ensure adequate funding for, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the Kosovo Specialist Chambers, and the Extraordinary African Chambers, as well as specialized chambers, mobile courts, and a new breed of dedicated investigative mechanisms at the international level[14] and domestically.[15] Many of these institutions benefited not only from strong institutional support from the United States but also from the contributions of U.S. lawyers and judges in key leadership positions.[16]

When the international community turned its attention to creating a permanent international criminal court, the United States was an active participant in the negotiations during the Preparatory Committee meetings and the Diplomatic Conference that led to the adoption of the Rome Statute. Indeed, the Rome Statute—together with related instruments adopted in the aftermath of Rome—reflect pervasive U.S. contributions, including on the definitions of the three atrocity crimes (genocide, war crimes—in both international and non-international armed conflicts—and crimes against humanity), with which the United States expressed general satisfaction.[17] However, the final jurisdictional framework contained elements that were problematic for the United States. With the inclusion of provisions allowing assertion of jurisdiction over nationals of states that were not parties to the Rome Statute, the United States faced the prospect of an international criminal tribunal with jurisdiction over its personnel, which brought competing U.S. interests to the fore. These and other U.S. concerns, which a previous ASIL Task Force considered in detail in its 2009 Report,[18] prompted the United States, together with only six other nations, to vote against adoption of the Statute at the conclusion of the Rome Conference. And while the Administration cited reservations about several elements of

the final treaty text, it was concerns with the Court's territorial jurisdiction that proved to be the most acute and enduring. Thus, when asked at a Senate Foreign Relations Committee hearing immediately following the Rome Conference about which flaw made it impossible for the United States to approve the final text of the treaty, the lead U.S. negotiator, Ambassador David Scheffer, pointed specifically to the provisions under which U.S. persons would be exposed to the Court's jurisdiction even if the United States did not become a party.[19]

Nonetheless, the United States ultimately signed the Rome Statute on December 31, 2000, the last day permitted. Even then, President Clinton underscored that "we are not abandoning our concerns about significant flaws in the treaty," pointed "in particular" to its "claim [of] jurisdiction over personnel of states that have not" ratified the treaty, and said that he would not recommend its submission to the Senate for advice and consent "until our fundamental concerns are satisfied."[20] U.S. engagement with the Court did not end, however. President Clinton also indicated that the point of signing the Rome Statute was to be in a position "to influence the evolution of the court."[21] In the period following the adoption of the text of the Statute, the United States participated constructively in the Preparatory Commission negotiations around the Rules of Procedure and Evidence and the Elements of Crimes. U.S. participation was critical in shaping these instruments—including in working to ensure that the elements of each crime were clearly delineated[22]—and the United States joined consensus on the adoption of these key texts.

Subsequently, during the administration of President George W. Bush and as the Court came closer to becoming operational (the Rome Statute ultimately entered into force on July 1, 2002), the United States took a number of steps to distance and insulate itself from the Court, discussed in more detail below (see Sections II.A and III below). This included informing the UN Secretary General on May 6, 2002, that the United States did not intend to become a party to the ICC Statute (and thus incurred no obligations arising out of its earlier signature of the treaty); enacting the American Servicemembers' Protection Act of 2002 (ASPA) and related statutory restrictions; concluding bilateral agreements obliging foreign states not to surrender U.S. persons to the ICC (so-called "Article 98 agreements"); and declining to participate in ICC fora, including the annual meetings of the Assembly of States Parties (ASP) as an observer or the Special Working Group on the Crime of Aggression. The full views of the Bush Administration were set out in considerable length in a speech by then-Undersecretary of State for Political Affairs Marc Grossman. The speech underscored the United States' opposition to the ICC, asserting that the Court was an institution of "unchecked power," diluted the authority of the UN Security Council, threatened U.S. sovereignty, undermined the democratic rights of U.S. citizens, and put U.S. personnel at risk of politicized prosecutions.[23] Notwithstanding the substance and overall tone of the speech, Grossman pledged that the United States would continue to lead on justice and rule of law issues, and enumerated an expansive list of actions in this regard that he maintained the United States would take (*See Text Box - Excerpt from Speech by Under Secretary of State Marc Grossman* (May 6, 2002)).

Excerpt from Speech by Under Secretary of State Marc Grossman (May 6, 2002)

"The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law. The United States will:

- *Work together with countries to avoid any disruptions caused by the Treaty, particularly those complications in US military cooperation with friends and allies that are parties to the treaty.*
- *Continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.*
- *Continue to play a leadership role to right these wrongs.*
- *The armed forces of the United States will obey the law of war, while our international policies are and will remain completely consistent with these norms.*
- *Continue to discipline our own when appropriate.*
- *We will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.*
- *We will support politically, financially, technically, and logistically any post-conflict state that seeks to credibly pursue domestic humanitarian law.*
- *We will support creative ad-hoc mechanisms such as the hybrid process in Sierra Leone – where there is a division of labor between the sovereign state and the international community–as well as alternative justice mechanisms such as truth and reconciliation commissions.*
- *We will work with Congress to obtain the necessary resources to support this global effort.*
- *We will seek to mobilize the private sector to see how and where they can contribute.*
- *We will seek to create a pool of experienced judges and prosecutors who would be willing to work on these projects on short-notice. . . .*

And when violations occur that are so grave and that they breach international peace and security, the United States will use its position in the UN Security Council to act in support of justice."

Grossman also emphasized that "the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court."

A focus on delegitimizing the Court gave way in the second term of the Bush Administration to what former State Department Legal Adviser John Bellinger III termed a "*modus vivendi*" with the Court, in which "even if [the United States] disagree[s] over the means chosen by the Rome Statute . . . we do not disagree over the Statute's end goals, and we are prepared to work with those who support the Court in appropriate circumstances,"[24] or what the 2009 ASIL Task Force Report described as "a more nuanced and pragmatic approach to the ICC."[25] A watershed moment came with rising concerns over the atrocities unfolding in Darfur, Sudan, which ultimately led the United States to acquiesce to the Security Council referring the situation in Darfur to the ICC Prosecutor (Section III.A.2 below).[26] The rationale was plain: the tangible need for "the international community to work together in order to end the climate of impunity in the Sudan" simply outweighed the United States' conceptual objections to the ICC.[27] The changes in approach to the ICC during the second term of President Bush were not limited to this referral. The Bush Administration further came to believe that ASPA restrictions on military aid to states that had

not signed "Article 98 agreements" were counterproductive,[28] leading Congress to repeal some provisions of ASPA (described in Section II.A below). Over time, the United States indicated a growing openness to supporting specific activities of the ICC when it considered them to be consistent with U.S. interests.[29] This was reflected in a comprehensive 2008 speech about ICC policy at a conference celebrating the tenth anniversary of the Rome Statute in which Legal Adviser Bellinger spoke about the interests of the United States in facilitating the Court's investigations and prosecutions in appropriate cases and in "finding practical and constructive ways to cooperate in advancing our common goals."[30] More generally, there was recognition that the Court had a "valuable role to play" in appropriate cases.[31]

It was in this context that the earlier ASIL-convened Task Force issued its recommendations in 2009. The 2009 Report observed that U.S. policy toward the Court had begun to evolve into what that Task Force considered to be an "increasingly positive attitude toward the Court, in particular supporting its efforts in Darfur." The Report thus set out thirteen recommendations in this vein (ten for the President and three for Congress) to articulate and consolidate a continued policy of positive engagement with the Court, but did not recommend that the United States ratify the Rome Statute.[32]

In the end, many of the Report's concrete suggestions were, in fact, eventually reflected in the Obama Administration's "case by case" policy for providing support to the ICC. Among notable examples of the key support it provided during this era, the United States played an instrumental role in the surrender to the ICC of two suspects who had evaded capture for many years: Bosco Ntaganda, a DRC militia leader who turned himself in to the U.S. embassy in Kigali, Rwanda; and Dominic Ongwen, a senior commander of the Lord's Resistance Army who came into the custody of U.S. special forces in the Central African Republic (see Section III. D. 2 below). In addition, the United States voted in favor of the UN Security Council referring Libya to the Court in 2011;[33] resisted efforts by Sudan and Kenya to seek an Article 16 deferral from the Security Council (see Section III.A.3 below); and expanded the War Crimes Rewards Program to include ICC indictees (see Section II.B below). Toward the end of the Obama Administration, however, concerns that the OTP would open formal investigations into the situation in Afghanistan were making it more difficult for the United States to maintain its previous supportive stance.[34]

The Trump Administration pursued a very different policy. At first, there was little public manifestation of the Administration's stance toward the Court except its statement at the 16th Session of the ASP, which articulated familiar concerns untempered by the usual recitation of the way in which the Court and the United States had worked together in the past.[35] As described in more detail in Section IV.A, the situation deteriorated with the appointment of John Bolton as National Security Advisor in March 2018 and culminated in unprecedented sanctions imposed under a June 2020 Executive Order that deemed the ICC to be an "unusual and extraordinary threat" to national security. Criticism from members of the ASP (including U.S. friends and allies),

civil society organizations, former U.S. Ambassadors-at-Large for War Crimes Issues, some members of Congress, and academics was sharp.[36] Even non-party states such as China used the opportunity to criticize the U.S. approach.[37]

The United States is now emerging from a period during which its actions have caused many to question its commitment not only to accountability for atrocity crimes but also to constructive and respectful engagement in international and multilateral affairs. The reaction by the Trump administration to the ICC has been seen by longstanding allies as extreme and as emboldening autocrats in their own attacks on the rule of law and judicial institutions.[38] Meanwhile, the rhetoric and circumstances surrounding the pardons issued to U.S. servicemembers and private military contractors who were accused or convicted of war crimes have marred perceptions of the commitment of the United States to hold to account Americans who commit heinous international crimes.[39] Numerous interlocutors with whom we spoke maintained that these outcomes also undermine the credibility of statements from senior U.S. Government officials that "[w]hen our personnel are accused of a crime, they face justice in our country."[40]

The Task Force undertook its work as these events were unfolding. It has consulted widely and this Report has been informed by discussions, individually or in small focus groups, between members of the Task Force and over one hundred current and former U.S. Government officials, foreign diplomats, members of civil society, academics, and practitioners. This includes U.S. and foreign ambassadors and other diplomatic staff who have served in ICC situation countries or in countries where indictees have traveled; other U.S. Government officials who serve or have served in a range of roles, working on issues relevant to the U.S. relationship with the ICC from varying perspectives and under both Republican and Democratic administrations; national prosecutors and other state authorities managing complementarity processes in their home jurisdictions; individuals involved in the military justice system; ICC personnel, including current and former judges, defense counsel, victims' counsel, and prosecutors; former Presidents of the ASP, Presidents and Registrars of the Court, and candidates for the position of ICC Chief Prosecutor; victim representatives and organizations of lawyers and physicians working with survivors, including within the ICC; practitioners of all stripes, including individuals pressing for accountability for those who stand accused of committing abuses and those defending individuals who might be deemed responsible; representatives of non-governmental organizations (NGOs), U.S. and foreign, working in ICC situation countries, including in Afghanistan; and individuals who worked directly on ICC-related legislation, including ASPA and the War Crimes Rewards Program. Many of these individuals have held multiple relevant roles, and so have observed the U.S.-ICC relationship from varied perspectives; indeed, a number of Task Force and Advisory Group members have themselves engaged on these policy issues while serving in the U.S. Government. We also attended academic and other convenings devoted to the U.S.-ICC relationship and the situations under consideration before the Court and reviewed contemporary and historical scholarship on the U.S.-ICC relationship.

The analysis and recommendations that follow are drawn from these rich interactions. In this Report, the Task Force has endeavored to reflect the multifaceted views of our many interlocutors on these issues and hopes that it will be a useful resource to a wide range of international and non-governmental actors in understanding the U.S. approach to, and relations with, the Court. That said, the primary mandate of the Task Force has been to recommend to the U.S. Government, including the Executive branch and Congress, a set of options for engagement with the ICC that will be viewed as pragmatic in light of the current climate and the many constraints under which it will inevitably be making relevant decisions. By design, this has necessitated balancing numerous considerations, including U.S. bilateral policy vis-à-vis ICC situation countries, competing equities within Executive branch agencies, longstanding congressional positions and commitments, the priorities of U.S. constituencies and civil society actors, and the history of U.S. engagement with the project of global justice writ large, including the ICC. These factors, which are often in tension with each other, have shaped our recommendations but have also led us to assume that certain options are effectively "off the table." With these political realities in mind, the next sections will outline the legal and political backdrop for the U.S.-ICC relationship and then address key developments involving the Court that will bear on pragmatic options going forward.

II. THE OPERATIVE LEGAL FRAMEWORK

This Section offers a brief discussion of the legislative framework governing U.S. Government interactions with the ICC under domestic law. Some of the relevant pieces of legislation are ICC-specific, whereas others are supportive of international justice efforts more broadly, including in ICC situation countries.

A. ICC-Specific Legislative Framework

The primary legislation governing U.S. relations with the ICC is the American Servicemembers' Protection Act (ASPA), which was enacted on August 2, 2002 with bipartisan support.[41] The focus of this legislation, as the name and the congressional findings make clear, was the protection of U.S. servicemembers from the exercise of jurisdiction by the Court.[42] Key provisions prohibit any extradition from the United States to the ICC or support for any transfer of a U.S. citizen or permanent resident to the ICC; prohibit any funding to assist in the investigation, arrest, detention, extradition, or prosecution of any U.S. citizens or permanent residents by the ICC; and authorize the President to use "all means necessary"—a phrase that is understood to include military force—to bring about the release of U.S. persons who might be detained by or on behalf of the Court.[43] Other provisions in ASPA impose restrictions on the United States' ability to support or cooperate with the ICC—including the provision of financial support, services, or law enforcement cooperation; the transfer of property or other material support; intelligence sharing; the training or detail of personnel; the arrest or detention of individuals; the ability of U.S. courts and state and local governmental entities to respond to ICC requests for cooperation; and ICC investigative activity in the United States (*See Text Box - ASPA – Key Restrictions*).

These restrictions are subject, however, to a significant exception introduced by then-Senator Christopher Dodd (D-CT), whose father was a prosecutor at Nuremberg. Specifically, under the plain language of the Dodd Amendment, nothing in ASPA prohibits the United States from assisting international efforts to bring to justice foreign nationals accused of genocide, crimes against humanity, and war crimes, including before the ICC.[44]

ASPA – *the Dodd Amendment*, § 7433

> *Nothing in* [ASPA] *shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic* [*sic*], *Osama bin Laden, other members of Al Queda* [*sic*], *leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.*

ASPA – *Key Provisions*

22 U.S.C. § 7423(*b*) PROHIBITION ON RESPONDING TO REQUESTS FOR COOPERATION.—*Notwithstanding section 1782 of title 28, United States Code, or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.*

22 U.S.C. § 7423(*d*) PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—*Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government may extradite any person from the United States to the International Criminal Court, nor support the transfer of any United States citizen or permanent resident alien to the International Criminal Court.*

22 U.S.C. § 7423(*e*) PROHIBITION ON PROVISION OF SUPPORT TO THE INTERNATIONAL CRIMINAL COURT.—*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.*

22 U.S.C. § 7423(*f*) PROHIBITION ON USE OF APPROPRIATED FUNDS TO ASSIST THE INTERNATIONAL CRIMINAL COURT.—*Notwithstanding any other provision of law, no funds appropriated under any provision of law may be used for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court.*

22 U.S.C. § 7423(*h*) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF AGENTS.—*No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.*

22 U.S.C. § 7432(12) SUPPORT.—*The term ''support" means assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals.*

The full legislation is available here.

The Dodd Amendment is capacious, but there are situations that it does not cover. For example, it does not apply to any assistance to prosecutions of U.S. nationals, to efforts to prosecute any defendant for the crime of aggression, and—at least arguably—to general institutional support to the ICC that is not sufficiently connected to efforts to bring particular *individuals* to justice (*e.g.*, general training or capacity building). That said, the identification in the text of the amendment of individuals who had not yet been indicted by any court[45] and the inclusion of categories of perpetrators (such as "other members of Al Queda [sic]" and "leaders of Islamic Jihad") at least suggest that a criminal case need not have been commenced in order for the Dodd Amendment to apply, and that it may include supporting efforts to investigate the responsibility of a group whose members are understood to be exclusively or predominantly not American with a view "to bring[ing them] to justice." Furthermore, there are questions whether this exception should be interpreted to overcome restrictions on the

ability of the ICC to conduct investigative activity in the United States in support of cases that would otherwise fall within the Dodd Amendment. Nevertheless, the Dodd Amendment creates significant flexibility for the United States to provide a range of forms of support for investigations or prosecutions for atrocity crimes of foreign nationals if it is so inclined.[46]

Changes made over time to ASPA highlight the United States' evolving relationship with the ICC and the multiple interests at play. For example, as originally enacted, ASPA contained restrictions on the provision of military assistance to states parties that did not enter into agreements pursuant to Article 98 of the Rome Statute to prevent the surrender of U.S. persons to the Court.[47] At least one hundred states ratified such agreements between late 2002 and 2007.[48] However, a number of states (including all NATO allies other than Turkey) refused to do so and the EU issued "Guiding Principles" that stated that "[e]ntering into US agreements as presently drafted would be inconsistent with ICC States Parties' obligations."[49] Over time, however, U.S. officials came to see these restrictions on military assistance as counter-productive, with the then-Commander of U.S. Southern Command, General Bantz Craddock, testifying that "loss of engagement prevents the development of long-term relationships with future [Latin American] military and civilian leaders."[50] In addition, there were concerns that the restrictions may enable foreign adversaries, including China, to step into the vacuum left by the United States and to build credibility and cooperative relationships with countries with which the United States traditionally had close relationships.[51] In May 2006, Secretary of State Condoleezza Rice memorably described prioritizing opposition to the ICC over other U.S. interests as amounting to "sort of the same as shooting ourselves in the foot."[52] As these concerns came to the fore, Congress repealed the restrictions and the Bush Administration discontinued its efforts to secure additional such Article 98 agreements.[53]

In addition to ASPA, an earlier statute has been interpreted as providing certain limitations on U.S. engagement with the Court that are not subject to the Dodd Amendment.[54] Section 705(b) of the FY2000–01 Foreign Relations Authorizations Act (FRAA) restricts any funding "for use by, or support of, the International Criminal Court" unless and until the United States ratifies the Rome Statute (*See Text Box - FRAA Restriction on Funding the ICC, § 705(b)*). More recently, Congress has included a provision in annual appropriations legislation that prohibits funds under the State Department Appropriations Act from being made available to the ICC, but which contains a proviso allowing funds to be used to support certain technical assistance training, assistance to victims and witness protection, law enforcement, and other activities.[55]

FRAA Restriction on Funding the ICC, § 705(b)

> *None of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the International Criminal Court unless the United States has become a party to the Court pursuant to a treaty made under Article II, section 2, clause 2 of the Constitution of the United States on or after the date of enactment of this Act.*

B. War Crimes Rewards Program

The State Department has long administered a number of rewards programs to incentivize assistance to justice efforts, including in connection with the defendants of the three *ad hoc* tribunals focused on the former Yugoslavia, Rwanda, and Sierra Leone. In 2013, Congress—with strong bipartisan support—expanded the authority of the Secretary of State to offer rewards up to $5 million under the War Crimes Rewards Program (WCRP). Specifically, the legislation authorized the Secretary to offer rewards for information that leads to the arrest, transfer to or conviction by any "international criminal tribunal," including the ICC, rather than only the three tribunals that had previously been eligible.[56] Soon thereafter, in May 2013, the State Department announced an offer of rewards of up to $5 million under the WCRP for information on four suspects, including three from the Lord's Resistance Army for whom the ICC had issued arrest warrants: Joseph Kony, Okot Odhiambo, and Dominic Ongwen.[57] The United States also approved a rewards offer for information on Bosco Ntaganda.[58] (Two of these suspects, Ongwen and Ntaganda, were subsequently surrendered to the Court with assistance of the United States, see Section III.D.2 below). The law was amended again in 2018 to cover potential defendants involved in international crimes in Syria.[59]

C. Other Atrocities Prevention and Response Legislation

There are other pieces of legislation that, while not directly affecting the ability of the United States to engage with the Court, are nevertheless relevant for a general understanding of the framework in which policy toward engagement with the Court is made, including laws sharpening the United States' commitment to preventing and responding to atrocity crimes and to supporting accountability when international crimes are committed. These include the Elie Wiesel Genocide and Atrocity Prevention Act,[60] the Global Fragility Act,[61] the Women, Peace, and Security Act of 2017;[62] the Syrian War Crimes Accountability Act of 2017;[63] and the Iraq & Syria Genocide Accountability Act of 2018.[64] The ICC is an important player in many of the states that are affected by these pieces of legislation. For example, the initial Executive Branch reports under the Elie Wiesel Act highlight U.S. support for documentation and accountability of atrocities in Burma (Myanmar), which are subject to an ICC investigation.[65] To the extent that existing or future legislation requires reporting on, or appropriates resources to support, documentation and accountability efforts, there will be additional overlap with the activities of the ICC.

The United States also maintains a range of programs that impose sanctions on individuals, both country-specific regimes and those addressed to particular types of deleterious conduct, including global terrorism, the proliferation of weapons of mass destruction (WMD), drug trafficking, and serious human rights abuses or corruption (exemplified by the Global Magnitsky Act sanctions regime).[66] The intersection of these authorities and the activities of the Court is not theoretical: the United States currently has country-specific sanctions regimes covering eight

situations in which the ICC is investigating or conducting a preliminary examination;[67] and has imposed sanctions against at least thirteen individuals who the ICC had charged with international crimes (six of whom remain at large).[68]

III. U.S. ENGAGEMENT WITH THE ICC

With an eye toward exploring options for the new administration, this Section outlines the history of U.S. engagement with the Court, including the provision of various forms of assistance and support over the years. The Section highlights that whatever the state of U.S. policy toward the ICC, there are multiple fora in which the United States will interface with the ICC and issues related to it, suggesting the need for a pragmatic approach that stays focused on core concerns and leaves space for the United States to advance international justice and other related efforts. This history, and the inventory below, reflect persistent U.S. support across administrations and suggests that there are low political risks associated with many forms of assistance that are consistent with other policy imperatives.

A. U.S. Interactions with the ICC in the United Nations

The ICC is involved in various ways in many states that also find themselves on the agenda of the UN Security Council or other UN bodies, because they are hosting UN peacekeeping missions, are subject to proposals for the Security Council to refer them to the Court or to defer investigations or prosecutions, or more generally in other contexts.

1. Peacekeeping

The ICC can interface with UN peacekeeping missions in a range of ways. One of the earliest interactions involved the United States' attempt to seek language in resolutions authorizing peacekeeping missions that would exempt the nationals of sending non-party states from the jurisdiction of the ICC. These efforts proved controversial and produced mixed results (*See Text Box - ICC and UN Peacekeeping Mandates* (2002–04)). In addition, the ICC also has jurisdiction over attacks on peacekeepers as a war crime.[69] However, the most frequent interaction between UN peacekeeping missions and the ICC arises from the fact that many such missions are, or have been, operating in ICC situation countries—notably in the eastern DRC (MONUC and MONUSCO), but also in CAR (MINURCAT and MINUSCA), Darfur (UNAMID), Côte d'Ivoire (UNOCI), and Mali (MINUSMA).[70] Such missions will almost inevitably have (or have access to) information and evidence that would be relevant to ICC investigations. They may also interact with persons the ICC is investigating or for whom it has issued arrest warrants, or may be in a position to assist with security or logistics for ICC investigators or witnesses. All of this raises inevitable questions about the proper role and authority of UN peacekeeping missions in collecting information and evidence of relevance to ICC investigations, or whether the Council should take other action supportive of the ICC.

In some cases, the United States helped frame UN peacekeeping mandates that affirmatively authorized the missions to cooperate with the ICC. For example, Security Council resolutions on

the DRC and CAR reiterated the need for accountability, noted that many of the crimes occurring in the country fell within the jurisdiction of the ICC, noted or welcomed the cooperation of national authorities with the Court, and highlighted the United Nations' policy restricting contacts with ICC fugitives.[71] In Mali, the Security Council authorized the UN peacekeeping force to support the efforts of local authorities to bring to justice those responsible for war crimes and crimes against humanity "taking into account the referral by the transitional authorities of Mali of the situation in their country since January 2012 to the International Criminal Court."[72]

ICC *and* UN *Peacekeeping Mandates* (2002–04)

In the months leading up to the Rome Statute's entry into force, the United States sought Security Council resolutions that would permanently prevent the ICC from asserting jurisdiction over acts of the nationals of non-party states involved in peacekeeping operations established or authorized by the Security Council.[73] *In pursuit of this goal, the United States went so far as to veto a June 2002 resolution that would have extended the peacekeeping operation in Bosnia-Herzegovina but would not have provided such protection.*[74] *Shortly thereafter, as part of a compromise, the Security Council adopted Resolution 1422, which invoked Article 16 of the Rome Statute and requested the Court to refrain from commencing or proceeding with an investigation or prosecution of any cases "involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation. . . ."* SC Res. 1422, *para. 1 (July 12, 2002). Although the provision applied for only one year, paragraph 2 expressed the Council's intent to renew the request annually "for further 12-month periods for as long as may be necessary", and the United States was able to include a further deferral in a resolution adopted by the Council the following year.*[75] *However, in 2004 against the background of revelations of U.S. detainee abuse from Abu Ghraib, support for renewing the provision crumbled and the U.S. delegation withdrew its proposal.* SC Res. 1487 *(June 12, 2003).*

Soon thereafter, in connection with the establishment of a multinational force in Liberia in which United States personnel would play an important role,[76] *the Security Council adopted a resolution under which personnel from a contributing state that was not a Rome Statute party would be "subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to" the new force. Unlike the earlier resolutions, this provision applied permanently, though only to the force in Liberia.* SC Res. 1497, *para. 7 (Aug. 1, 2003).*[77] *At the same time, as written, the Liberia resolution would prevent not just the ICC but other states (and other tribunals) from exercising any otherwise applicable jurisdiction. Given that Liberia itself was not a Rome Statute party at the time, the ICC would not in any case have had jurisdiction over conduct in the country by nationals of states that were not Rome Statute parties. This language proved controversial and it was excluded from subsequent peacekeeping resolutions but echoes appeared in Council referrals to the Court.*

2. Referrals of Situations to the ICC Prosecutor

Under Article 13(b) of the Rome Statute, the Court can exercise jurisdiction over a case if the Security Council, acting under Chapter VII of the United Nations Charter, refers the situation to the Prosecutor. Many observers initially believed that U.S. antagonism toward the Court would prevent the Council from exercising this authority. But a key turning point came with rising concern over the atrocities unfolding in Darfur, Sudan. The United States had become a vocal advocate for accountability in Darfur, particularly after the State Department deployed an interdisciplinary team into the field to investigate the nature of the atrocities. In light of the team's findings, Secretary of

State Colin Powell testified before the Senate Foreign Relations Committee in September 2004 that "genocide has occurred and may still be occurring in Darfur."[78] Not long thereafter, British, French, and other representatives of UN member states began advocating for a referral of the situation to the ICC Prosecutor. The United States initially worked to divert this possibility, proposing alternatives for a hybrid or *ad hoc* tribunal along the lines of the ICTY and ICTR.[79] However, when those proposals floundered, the Bush Administration was faced with a decision whether to deploy the U.S. veto in the Security Council to block the referral. At the end of the day, "the President was more concerned about the atrocities in Sudan than he was about the ICC,"[80] and the United States allowed the Council to effectuate the referral,[81] saying that "the need for the international community to work together in order to end the climate of impunity in the Sudan" outweighed its objections to the ICC.[82]

U.S. acquiescence to the Security Council referral came in the form of an abstention, rather than an affirmative vote for the resolution. This referral set precedents for subsequent Security Council referrals that were highly favorable to U.S. policy positions on the ICC. In order to obtain U.S. agreement to abstain, the resolution included language—which numerous countries considered controversial—under which officials and personnel from states not parties to the Rome Statute (including the United States) were subject to the exclusive jurisdiction of their state for acts related to the peacekeeping mission in Sudan (modeled on the Liberia resolution).[83] Expressing another U.S. policy priority, the resolution also included language that "recognizes" that none of the Court's expenses in the investigation or prosecutions would be borne by the United Nations (and thus by the United States, through its contributions to the United Nations), as contemplated by the Rome Statute, but would instead be funded by the ASP or voluntary contributions.[84]

The United States subsequently provided ongoing political support to the ICC investigation in Darfur through its stance in the Security Council. In 2007 and 2008, for example, the U.S. insisted that the government of Sudan "cooperate fully with the ICC," and made it clear that it "would not support deferral of the ICC's work in Darfur."[85] Notwithstanding U.S. support, there have been broader criticisms that the Security Council as a whole has not done enough to support the ICC's work in Darfur (or Libya for that matter).[86]

In 2011, the United States took a more proactive role when it co-sponsored a Security Council referral of the situation in Libya to the ICC.[87] In voting for the resolution, Ambassador Susan Rice stated, "[w]e are pleased to have supported this entire resolution and all of its measures including the referral to the ICC (International Criminal Court). We are happy to have the opportunity to co-sponsor this, and we think it is a very powerful message to the leadership of Libya that this heinous killing must stop and that individuals will be held personally accountable."[88] Likewise, in 2014, the United States voted in favor of a resolution to refer the situation in Syria to the ICC, a draft that was formally supported by sixty-five states by the time it went to a vote (almost a third of UN membership) and which contained many of the same provisions that had been included

in the earlier resolutions at the behest of the United States, including jurisdictional carveouts for personnel from states that were not Rome Statute parties.[89] The resolution garnered the support of thirteen Council members but, predictably, was vetoed by Russia and China.[90]

With respect to the two situations that the Council did refer to the Court, the ICC Prosecutor reports every six months to the Council on progress she has made and, consistent with general practice in the Council, the U.S. and other Council members are invited to make formal statements in response. In recent years, when the U.S. relationship with the Court has been antagonistic, the United States appears to have gone to great lengths to avoid praising the Court's work. For example, in response to 2020 briefings by the ICC Prosecutor on Libya and Sudan, the U.S. representative found himself in the unenviable position of lamenting the impunity enjoyed by individuals for whom the ICC had issued arrest warrants but unable to call for the surrender of these suspects to the Court.[91] In another example, the U.S. representative acknowledged that an individual who was finally surrendered to the Court after thirteen years "is in custody [and] must be held accountable for his alleged abuses," but conspicuously did not welcome this surrender or even mention the ICC.[92]

Meanwhile, the United States' anti-ICC posture also attracted sharp criticism and imposed political costs in other ways within the Council. For example, in recent briefings, a number of states—both adversaries and allies—addressed the imposition of sanctions, "deplor[ing] the application of sanctions against the Court, and in particular against its Prosecutor and the members of her Office, as well as the continued threats by United States authorities . . . [which] is an attack on our core values and interests;" "oppos[ing] unilateral sanctions . . . [which constitute] bullying practices and power politics, as they undermine the international order based on international law;" or "denounc[ing] the grave injustice against the world's first and only permanent international criminal court and its officials through unilateral coercive measures in the form of sanctions . . . [which] are unjustifiable and wrong . . . [and] flagrantly violate our international rules-based system. . . ."[93]

Excerpts of Criticism by China of U.S. *Sanctions on* ICC

China used the U.S. *sanctions as an opportunity to level criticism at the United States, even though it has not historically offered strong support for the Court: China noted "that the Prosecutor and other officials of the* ICC *are being subjected to unilateral sanctions that many countries are condemning. China always opposes unilateral sanctions, as they are inconsistent with international law. We also oppose bullying practices and power politics, as they undermine the international order based on international law."* UN Doc. S/2020/1108, *at* 8 (*Nov.* 13, 2020).

Later, China reiterated that "[m]any countries, including many members of the Security Council today, have condemned [the sanctions]. China has always opposed unilateral sanctions that are inconsistent with international law." UN Doc. S/2020/1192, *at* 8 (*Dec.* 21, 2020).

3. Proposals to Defer ICC Investigations or Cases

The U.S. record in responding to proposals for deferrals under Article 16 of the Rome Statute reflects the significant extent to which its interests in supporting accountability have been consistent with the ICC's work in specific cases. Under Article 16, the Security Council may request the deferral of any investigation or prosecution by the ICC in a resolution adopted under Chapter VII of the UN Charter. The most prominent calls for such deferrals came in response to concerns by some states regarding ICC efforts to prosecute then-Sudanese President Omar al-Bashir[94] and Kenyan President Uhuru Kenyatta and Vice President William Ruto.[95] The United States opposed such deferrals under both the Bush and Obama Administrations. Indeed, the United States abstained on a resolution extending the peacekeeping mission in Darfur in 2008 that included language that suggested that the Council would "consider" the African Union's Peace and Security Council's proposal to request a deferral for the Darfur investigation.[96] In its explanation of vote, the U.S. representative explained that the reference to Article 16 sent the wrong message to al-Bashir and others who might be brought to justice.[97]

4. Other UN Resolutions Referring to the ICC

U.S. constraints and concerns regarding the ICC have been a recurring point of discussion and disagreement with allies involved in negotiating the texts of resolutions and reports that refer to the Court. For example, each year the UN General Assembly passes a resolution on the ICC following the ICC's submission of its annual *Report of the International Criminal Court* to the United Nations.[98] Until 2000, the United States had joined consensus on this resolution,[99] but from 2001 to 2009 it dissociated from consensus—the only state to do so except in 2008 when it was in the company of Sudan.[100] In doing so, the United States typically highlighted its longstanding concerns about the Rome Statute, emphasized its commitment to justice (referring to its disagreements as being about means, not ends), and expressed its regret that, although it recognized the right of states to become party to the Statute, other states had been unwilling to acknowledge in the resolution the right of states to decide not to ratify the treaty.[101] This approach changed in 2010, when the United States again joined consensus on the resolution until 2018.[102] In 2017, the first year of the Trump Administration, the United States joined consensus while urging the ICC to respect "genuine domestic efforts to promote justice for atrocity crimes."[103] In his explanation of vote, the U.S. representative also articulated a long list of regional and internationalized justice efforts the United States was supporting, such as the Special Criminal Court in CAR and the Kosovo Specialist Chambers, and cited U.S. contributions to building a foundation for accountability through documentation efforts, such as UNITAD and the IIIM. In 2018 and thereafter, the United States once again dissociated from consensus (along with Israel), while reiterating its objection to the Court's assertion of jurisdiction over nationals of states that are not Rome Statute parties and about the then-proposed investigation of U.S. personnel in Afghanistan[104]—often in the company of states such as Myanmar, Russia, Sudan, and Syria.[105]

ICC issues arise in the General Assembly in other ways as well. This includes resolutions in support of the Rohingya Muslims in Myanmar; decrying trafficking in women and girls, extrajudicial killings, and torture; denouncing human rights violations in Syria and North Korea; supporting victims of armed conflict and the safety and security of humanitarian and UN personnel; and promoting the rights of the child and of internally displaced persons.[106] Likewise, in the UN Human Rights Council, the ICC came up in a number of contexts, including resolutions devoted to North Korea, Syria, Libya, Mali, Myanmar, the prevention of genocide, and extrajudicial killings.[107] During certain periods, the United States has opposed, abstained, or dissociated from consensus on such resolutions that it would otherwise support because of references to the ICC in the text. Many of our interlocutors told us that the net result had been to diminish U.S. credibility on issues of international justice generally and waste the expenditure of political capital on trifling text with little actual impact.

Similarly, beyond the direct referral or deferral of investigations and the mandates of peacekeeping missions, a range of other Security Council resolutions and statements intersect with the mandate of the ICC. Under the Bush Administration, the United States generally resisted the inclusion of references to the ICC.[108] Over time, however, the approach became more pragmatic, including for example in the support provided by the United States for Resolution 1688 in 2006, under which the Council facilitated—with affirmative U.S. support—efforts to have the trial of Charles Taylor held at the premises of the ICC in The Hague.[109] In later resolutions, the United States supported resolutions in which the Council made affirmative references to the ICC in resolutions addressing the rule of law and the fight against impunity;[110] women, peace, and security;[111] the protection of civilians, journalists, and children in and affected by conflict;[112] conflict prevention and peacekeeping;[113] and individual ICC situation countries.[114] The Trump Administration returned to the practice of objecting to mention of the ICC in some cases, including for example when it unsuccessfully attempted to delete ICC references from the resolution extending the MINUSCA mandate.[115]

B. U.S. Engagement on the Crime of Aggression and the Kampala Review Conference

As noted above, by the time that the Rome Statute entered into force in July 2002, the United States declined to exercise its right to participate as an observer in the Assembly of States Parties (ASP). It also eschewed meetings of the Special Working Group on the Crime of Aggression convened by the ASP to develop proposed amendments to the Rome Statute on the crime of aggression. Specifically, from 2003 to 2009, the Special Working Group periodically met and reported to the ASP on its progress on proposed amendments to be considered at a future Review Conference to define the crime of aggression and set out the conditions under which the Court would be able to exercise jurisdiction over the crime. In the absence of the United States, states eventually agreed on a package that, while ostensibly based on the principle that "nothing was

decided until everything was decided," in fact represented consensus on all but two issues: the role of the Security Council and how the amendments would enter into force.

When the Obama Administration took office, the United States reengaged on these issues. Obama Administration officials concluded that, in addition to its strong interests in the two pending issues, it saw deep flaws in the definition on which the Special Working Group had reached consensus. For their part, however, the participating states were understandably unwilling to reopen the text upon which they had agreed after seven years of painstaking negotiations from which the United States had absented itself. Those involved in the process believe there is little doubt that the definition would have avoided these flaws if the United States had participated in the negotiations and made its views known.[116]

The United States then embarked upon extensive diplomatic efforts to address its concerns, including by sending a large interagency delegation, with representatives from Congress as public members, to the Review Conference held in Kampala, Uganda, in 2010.[117] Despite the fact that the wording of the definition was treated as "locked," the United States persuaded the states parties to adopt a series of "Understandings" regarding how the definition would be interpreted, such as identifying thresholds for a finding of aggression. Even more importantly, the final package included provisions that prevent the Court from exercising jurisdiction over the crime of aggression with respect to United States nationals. In the end, the United States engagement resulted in the adoption of a set of amendments that were highly protective of United States interests.[118] As summarized in a bipartisan Senate Foreign Relations Committee staff report, active U.S. participation at the Kampala Conference played a crucial role in securing these protections:

> Absent U.S. participation and engagement before and during the Kampala Conference, it is unlikely that the conference would have specifically exempted non-ICC parties from key portions of the proposed aggression regime. It is also unlikely that the conference would have adopted understandings to address ambiguities in aspects of the definition of aggression.[119]

In addition, the United States participated actively at Kampala on other issues of significant concern to both the Defense and State Departments, and was able to secure language to ensure that amendments to the Rome Statute's definition of war crimes aligned with U.S. views on international humanitarian law and that U.S. nationals would not be subject to the Court's jurisdiction for conduct covered by the amendments.[120] The United States was also the only non-member state to engage in the pledging exercise conducted in connection with the Review Conference, with a pledge to, among other things, "support efforts to bring the [Lord's Resistance Army's] leadership to justice" along with rule of law and capacity-building projects to enhance states' abilities to hold accountable those responsible for international crimes.[121]

C. Other U.S. Interactions with the Assembly of States Parties

In addition to its involvement on finalizing the aggression amendments, the United States actively participated as an observer in the meetings of the Assembly of States Parties throughout the Obama Administration. Its interventions consistently noted those areas in which the United States had concerns, but did so in a manner that was widely perceived as constructive. For example, in the first meeting that the United States attended as an observer, Ambassador-at-Large for Global Criminal Justice Stephen Rapp noted U.S. concerns about the crime of aggression but at the same time said:

> [the United States has] a deep appreciation of the role that institutions of international justice can play in helping restore accountability and the rule of law to state struggling to emerge from lawless violence. Certainly, the U.S. Government places the greatest importance on assisting countries where the rule of law has been shattered to stand up their own system of protection and accountability—to enhance their capacity to ensure justice at home.
>
> At the same time, the United States recognizes that there are certain times when justice will be found only when the international community unites in ensuring it, and we have been steadfast in our encouragement for action when the situation demands it. . . .[122]

The U.S. posture changed significantly during the Trump Administration. For example, the United States did not avail itself of the opportunity to make a statement at any of the ASP's annual meetings after 2017.[123] In December 2019 (the most recent meeting of the ASP before the COVID-19 pandemic), the United States did not send a senior official and did not have a representative sit behind the U.S. placard. This stands in stark contrast with, for example, the Chinese delegation, which was led by their Deputy Director-General of the Department of Treaty and Law, who took the opportunity to promote Chinese positions, made formal statements that highlighted areas where the government had "common ground" with the ICC and had worked "in a constructive manner," and contrasted the Chinese approach with that of other states who were engaged in "unilateralism bullying."[124]

D. Support for ICC Investigations

As described above, and as confirmed by interlocutors involved at the time, the United States during the Bush Administration provided occasional support for ICC activities where United States and ICC interests aligned. For its part, the Obama Administration adopted a policy of providing support on a case-by-case basis where consistent with U.S. interests.[125] This Section describes in more detail some of the types of support and assistance that the United States provided under

this framework to identify areas where it has been determined that U.S. assistance is lawful and will further U.S. interests in justice.

We have already discussed the situation in Darfur, in which the United States during the Bush administration made a decision at the presidential level to permit the Security Council to refer the situation to the ICC Prosecutor. The United States provided strong political support in various forms thereafter, including publicly stating early on that the United States would cooperate with the Court if it requested information for its Darfur investigation, subsequently undertaking measures and making statements aimed at bringing about the arrest of the ICC's fugitives in this situation, and objecting to provisions of a resolution that hinted at possible support for a deferral of the Darfur investigation under Article 16 of the Rome Statute.[126]

1. Operational Field Support

In other cases, support to the Court was provided "in the field." Through all phases of the U.S.-ICC relationship, dating back to even before the Darfur referral, there was sharing of information between U.S. diplomatic and deployed defense personnel in the field and ICC actors (including investigators and victims' representatives) in countries where the ICC was investigating (or where indictees were present). This exchange of information reflected the imperatives of the situation on the ground, in often dangerous environments with limited information sources, and the recognition of a shared mission to pursue justice and accountability for the victims of atrocity crimes and limit the malign impact of perpetrators. In particular, according to one interlocutor, U.S. and ICC field personnel shared information on developments within the Lord's Resistance Army (LRA), and the United States helped to spread information in northern Uganda on the ICC's activities in order to reduce support for the LRA and induce defections. U.S. activity intensified thereafter, with efforts focused on the role of LRA Commander Joseph Kony, who had been subject to an ICC arrest warrant since 2005. The Lord's Resistance Army Disarmament and Northern Uganda Recovery Act, signed into law by President Obama in 2010, stated that it is the policy of the United States to "work vigorously" to:

> eliminat[e] the threat posed by the Lord's Resistance Army to civilians and regional stability through political, economic, military, and intelligence support for a comprehensive multilateral effort to protect civilians in affected areas, to apprehend or otherwise remove Joseph Kony and his top commanders from the battlefield, and to disarm and demobilize Lord's Resistance Army fighters; and . . . further support[] comprehensive reconstruction, transitional justice, and reconciliation efforts. . . .[127]

Indeed, in its pledge in Kampala, the United States "reaffirm[ed] President Obama's recognition . . . that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the [Lord's Resistance Army's] wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice."[128] In 2011, President Obama, with bipartisan

support, launched Operation Observant Compass and sent one hundred combat-equipped military advisors drawn from U.S. Special Operations Forces to assist the Ugandan Peoples Defense Forces and an African Union Regional Task Force (AU-RTF) in their efforts to track Kony and remove him and "his top commanders from the battlefield."[129] This was on top of the provision of substantial *matériel* (including communications equipment, logistical support, tactical equipment such as night vision goggles, and vehicles) to support this initiative.[130] This effort lasted several years, helped substantially diminish the group, and featured regional cooperation in the transfer of Ongwen to the Court.

2. Support in the Arrest and Surrender of Fugitives

As noted above, the United States extended its WCRP in 2013 to enable it to offer rewards for information leading to the transfer and conviction of specific foreign nationals to the ICC and offered such rewards for four ICC suspects. However, its support for the arrest and surrender of fugitives has gone beyond merely offering rewards. The most tangible U.S. contribution to the work of the Court has been its critical operational role in the surrender of two of the highest-profile fugitives to the ICC. The United States first facilitated the transfer of former Congolese militia leader Bosco Ntaganda, who had been subject to an outstanding ICC arrest warrant since 2006 (although it was not unsealed until 2008), to The Hague after he turned himself in at the U.S. Embassy in Kigali, Rwanda, in 2013, shortly after being added to the WCRP list.[131] In 2019, Ntaganda was convicted and sentenced to imprisonment for thirty years for crimes against humanity and war crimes, including murder, rape, sexual slavery, persecution, intentionally attacking civilians, and conscripting children into an armed group.[132]

Similarly, U.S. forces operating in Central Africa in 2015 facilitated the transfer to the ICC of Dominic Ongwen, one of the five LRA commanders subject to arrest warrants since 2005, who had surrendered himself to a Central African militia.[133] In February 2021, Ongwen was convicted of a similar litany of crimes against humanity and war crimes, including a number of gender-based crimes (forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy, and outrages upon personal dignity).[134] The United States welcomed the verdict, recalling its role in facilitating Ongwen's transfer and the outstanding reward for information leading to the arrest, transfer, or conviction of the LRA defendants under the War Crimes Rewards Program, and reiterated that it "stands with all the victims of Ongwen and the LRA."[135] All this was accomplished without a formal agreement on the surrender of indictees to the ICC, as it had with the ICTY and the ICTR[136] (although there has been a proposal for an ICC Arrest Procedures Protocol[137]).

3. Protection of Witnesses

The United States has also assisted in providing protection to vulnerable witnesses who are participating in ICC investigations or prosecutions. Ambassador Rapp highlighted the willingness of

the United States to provide such technical support on witness protection at the November 2012 meeting of the ICC Assembly of States Parties:

> On witness protection, we seek to focus international resources and attention on these challenges, both at the national and international level. As you may recall, last year, we co-hosted a side event at the ASP on this topic. We have offered assistance and training to states seeking to protect witnesses in their own cases. We have worked with the ICC to respond positively to its requests for assistance relating to witness protection issues. And various parts of the U.S. government, including the Departments of Justice and State, are currently seeking to strengthen and expand our capacity to assist courts and tribunals on the protection of witnesses and judicial personnel.[138]

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.[139] 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.

4. Support for Victims

The United States has provided extensive humanitarian assistance and other funding to support victim communities in a number of situation countries in which the ICC is investigating, including in the Central African Republic and to Rohingya victims who have fled to Bangladesh.[140] The United States has not in the past provided contributions to the Trust Fund for Victims established by the Assembly of States Parties under Article 79 of the Rome Statute; however—as discussed below in Section VI.B.15—this may well be something the new Administration will want to explore.

5. Evidence/Information to Support Investigations

During the second term of the Bush administration, the United States indicated that, at least with respect to the ICC investigation it supported in Darfur, the United States would provide help if requested by the ICC. Deputy Secretary of State Robert B. Zoellick stated in April 2006 that "if [the ICC] ask[s] for information and help, we try to provide that help," and that "we will fully cooperate with it and pursue those actions as related to the genocide in Darfur."[141] Subsequently, the United States publicly stated its openness to providing specific evidence to the ICC in support of other investigations or prosecutions of foreign nationals. For example, Ambassador Rapp noted that

"the United States has worked with the ICC to identify practical ways to advance our mutual goals, on a case-by-case basis and consistent with U.S. policy and laws,"[142] although there is no public record of the specifics of how or whether the United States has done so. More recently, even with the ICC investigation into the situation in Afghanistan pending, a State Department spokesperson reportedly stated that the United States may cooperate with the ICC in "exceptional cases."[143] As a practical matter, however, the ICC's case law on the disclosure of potentially exculpatory evidence makes sharing information on a confidential basis more complicated than it was in the U.S. relationship with other tribunals.[144]

6. Public and Diplomatic Statements

U.S. strategic messaging regarding the ICC has ranged from condemnations and threats against the Court, as part of efforts to undermine the institution, to statements of diplomatic support, at the level of both policy and with respect to specific activities. Public statements attacking the legitimacy of the ICC were common in the first term of the Bush Administration, although they diminished significantly thereafter until the Trump Administration took office.[145] Following the ICC Prosecutor's announcement that she would request authorization to investigate crimes committed in Afghanistan that would encompass allegations against U.S. personnel, National Security Advisor Bolton sharply criticized the Court in a September 2018 speech, saying among other things:

> We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.[146]

Meanwhile, in connection with the imposition of sanctions against the Prosecutor, Secretary of State Pompeo said "[w]e cannot, we will not stand by as our people are threatened by a kangaroo court,"[147] later referring to the ICC as "a thoroughly broken and corrupted institution."[148]

At other times, however, the United States offered diplomatic support for the Court. Often this was public: indeed, the Ambassador-at-Large for War Crimes Issues formally noted at one point that the United States had "expressed our support for each of the situations in which ICC investigations and prosecutions are underway."[149] In particular, the United States welcomed the work of the ICC in all the situation countries in which the Prosecutor was conducting investigations or prosecutions[150] and made specific statements regarding many of these including Kenya,[151] Darfur,[152] Libya,[153] the DRC,[154] and Mali.[155] Some of it was more *ad hoc*: for example, when Ambassador Rapp interceded with authorities in Libya on behalf of four ICC staff members detained in Zintan.[156] It has also articulated more generalized support for the overall mission of the Court,[157] including in a number of its National Security Strategies.[158] Most recently, in January 2021 the State Department reaffirmed that "[t]he United States shares the goals of the ICC in promoting accountability for the worst crimes known to humanity," while maintaining its longstanding

position that the Court's jurisdiction should be limited to states that consent or are referred by the Security Council.[159]

For its part, Congress has adopted a number of resolutions commending international justice endeavors and the role of the ICC in specific situations, including the potential investigation by the ICC in South Sudan;[160] an Organization of American States (OAS) review of whether human rights abuses in Venezuela warrant investigation by the ICC;[161] and a potential UN referral of those responsible for crimes against humanity committed by the Burmese military against the Rohingya to the ICC.[162]

IV. RECENT ICC DEVELOPMENTS RELEVANT TO ITS RELATIONSHIP WITH THE UNITED STATES

While the relationship between the United States and the ICC has often been in flux, critical recent developments have significantly altered the landscape in which the United States must assess its options for engagement with the Court. The most obvious is the Prosecutor's commencement of an investigation of the situation in Afghanistan, which could encompass the conduct of U.S. personnel (both in Afghanistan and on the territories of other ICC states parties if sufficiently connected with the conflict in Afghanistan). In addition, a Pre-Trial Chamber ruling in February 2021 about the Court's jurisdiction over the "situation in Palestine" has cleared the way for an investigation that might encompass those responsible for settlements policy in the West Bank as well as allegations in connection with violence in Gaza.

There has also been significant progress at the Court regarding other countries that are generally aligned with U.S. interests. Besides the Ntaganda and Ongwen judgments, trials are underway against a member of an Islamic militia group for crimes committed in Mali and against two militia leaders in the Central African Republic.[163] The Court has also commenced proceedings against the first suspect from the alliance of government forces and *Janjaweed* militia responsible for the majority of the atrocities in Darfur.[164] And on January 23, 2021, the Court took custody of Mahamat Said Abdel Kani, a Séléka militia commander alleged to be responsible for crimes against humanity and war crimes in the Central African Republic.[165] In each of these countries, U.S. policy has clearly emphasized the importance of accountability for atrocity crimes as part of its broader objectives.

There have been developments in other situations of interest as well. In October 2020, the Prosecutor declined to open an investigation into accusations against United Kingdom forces in Iraq, reasoning that despite the gravity of the alleged crimes, concerns over the United Kingdom's domestic investigations, and the fact that no one was prosecuted, "on the basis of the information available, the Office could not conclude that there was or had been an intent by the UK authorities to shield persons from criminal responsibility."[166] In September 2020, the Office of the Prosecutor finally closed its preliminary examination of Israel's actions in connection with the Gaza flotilla.[167] Some cite the fact that the OTP took so many years to close these preliminary examinations as reasons to be skeptical of the Court, while others cite the eventual closure as evidence that the Court's filtering system is working, even if slowly.

Meanwhile, at the end of 2020, the Prosecutor stated that she intended to open an investigation into crimes in Ukraine (which would likely include crimes committed by Russian forces and its proxies in Crimea and eastern Ukraine) and in Nigeria (which focuses on crimes committed

by Boko Haram and its splinter groups, as well as by Nigerian Security Forces). The Prosecutor is also examining a request that the Court investigate crimes committed by the Maduro regime in Venezuela, based on a referral from Canada and five South American states (Argentina, Colombia, Chile, Paraguay, and Peru).[168]

At the same time, the Court has experienced a number of setbacks, with just five convictions for core crimes in eighteen years of operation and a substantial number of cases (including high-profile prosecutions of current and formers heads of state) being dismissed under circumstances that raise questions about the Prosecution's investigation and trial strategies (see Section IV.C below). The Court's traditional supporters—sovereign and otherwise— have increasingly criticized the Court's operations and strategic direction, including by expressing concern that the Court is spreading itself too thin and failing to deliver on its core mandate. This upswell of criticism led states parties in 2019 to institute the Independent Expert Review (IER) process, which is being implemented in parallel with other efforts initiated by member states to address other critical issues in the Court's relations with states, including proposals that the Court needs to better prioritize the allocation of its limited resources to address the most important situations and cases and potentially reconsider the way in which complementarity operates. Many of these discussions echo concerns that the United States has raised over the years, particularly around the idea that the Court is taking on too much and is not focusing on the most acute situations of international concern.

All of these developments will bear on the next phase of the U.S.-ICC relationship. In particular, the decision to open an investigation of the situations in Afghanistan and Palestine frame the political context within which the new Administration will need to review its options. At the same time, the IER process creates an opening for U.S. engagement. The remainder of this Section will discuss these two situations of concern in greater depth as well as the way in which the IER process intersects with long-standing U.S. concerns vis-à-vis the Court.

A. The "Situation in Afghanistan"

Afghanistan ratified the Rome Statute in 2003. Soon afterward, the OTP began receiving communications about international crimes being committed in Afghan territory. The OTP commenced a preliminary examination of the situation in Afghanistan in 2006 but did not begin regularly making information public until it began publishing annual reports of its preliminary examinations in 2011. The OTP's early reports included references to "possibly abusive interrogation techniques"169 and "abusive techniques such as beatings, electric shocks, sleep deprivation, forced nudity and other forms of ill-treatment"170 against persons in the custody of international forces (as well as Afghan authorities); however, the references to detainee abuses grew more detailed with time.171 The early reports also noted allegations that military operations by international forces had resulted in civilian casualties, although they also highlighted

the predominance of Taliban responsibility for attacks on civilians and that reports of civilian casualties from the operations of international forces had decreased over time.172 Later, the OTP concluded that "the information available does not provide a reasonable basis to believe that the war crime of intentionally directing attacks against the civilian population . . . has been committed" by forces supporting the Afghan government (including U.S. and other international forces).[173]

Subsequent statements by the Prosecutor suggesting that she would move forward with an investigation of the Afghanistan situation generated significant concern within the Obama Administration. The matter remained under consideration until, shortly after the 2016 election in the United States, the Prosecutor announced that she would decide "imminently" whether to seek an authorization to proceed.[174] The Prosecutor nevertheless did not move forward with an application to the Pre-Trial Chamber—a prerequisite to proceeding in the absence of a state or Security Council referral—until November 2017.[175] The Prosecutor's request for authorization focused first on crimes against humanity and war crimes allegedly committed by members of the Taliban (and the affiliated Haqqani Network), with the Prosecutor referring to "50,802 civilian casualties (17,700 deaths and 33,032 injuries) [that] were attributed to anti-government armed groups" through attacks often "committed with particular cruelty or in order to instil terror and fear among the local civilian population [and involving] [v]ictims [who] were deliberately targeted on a discriminatory basis."[176] The request next addressed allegations of war crimes by members of the Afghan security forces, including intelligence and police agencies, with the Prosecutor alleging that such crimes (in particular systematic torture) were committed "on a large scale."[177]

The crimes alleged to have been committed by Department of Defense (DOD) and Central Intelligence Agency (CIA) personnel, while serious, are substantially more limited than those alleged to be committed by the Taliban.[178] Moreover, there are important differences in the Prosecutor's presentation of allegations against the personnel of these two different agencies and the types of defenses that might be raised by each agency in response to these allegations. As such, they will be dealt with separately below.

(i) The Allegations Against DOD Personnel. To the extent that the Prosecutor's request for authorization to investigate addresses DOD personnel, it is based on allegations of torture and other detainee abuse (principally in the period of 2003–2004)[179] and not on allegations regarding combat operations by U.S. armed forces.[180] And while any failure to adhere to the humane treatment requirements of international humanitarian law is serious, the scale of the alleged custodial crimes is self-evidently much smaller than the range of crimes alleged against the Taliban and Afghan security forces, with the Prosecutor contending that there was a reasonable basis to believe at least seventy-eight individuals (fifty-four by U.S. armed forces and twenty-four by CIA personnel) had been victims of potential war crimes.[181] In contrast to the widespread nature of allegations of detainee mistreatment by Afghan security forces and the systematic nature of the CIA's "enhanced interrogation" program, the Prosecutor acknowledged in respect of

DOD personnel that the alleged mistreatment was "inflicted on a relatively small percentage of all persons detained by US armed forces . . . [and] also appear[s] to have occurred during a limited time period, after which the use of all such techniques by US armed forces worldwide was formally rescinded."[182] The Prosecutor also acknowledged that there was no "headquarters level" policy to approve such abuses, although the Prosecutor alleged that some of the abuses were committed "pursuant to authorized interrogation policies adopted locally."[183]

(ii) The Allegations Against CIA Personnel. The allegations of CIA abuse are deeply troubling. The Prosecutor describes the range of torture and cruel, inhuman, and degrading treatment inflicted as part of the CIA's rendition and enhanced interrogation program in Afghanistan and so-called CIA "black sites" located on the territory of European states that have ratified the Rome Statute (*i.e.*, Poland, Romania, and Lithuania). This includes a list of thirteen "techniques" allegedly used individually or in combination and descriptions of their application in certain incidents in detail. And while the number of victims may have been small, the Prosecutor notes that the abuses were not isolated but were the product of a "policy to obtain actionable intelligence."[184] One need not be politically motivated to consider these crimes as deserving of investigation and accountability.[185]

Following the Prosecutor's submission of the application to commence an investigation, a Pentagon spokesman stated that an ICC investigation of U.S. personnel would be "unwarranted and unjustified" and that such an investigation would "not serve the interests of either peace or justice in Afghanistan."[186] In September 2018, then-National Security Advisor Bolton warned that the United States "will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court," and threatened a series of measures "if the Court comes after us," including denial of visas and potential criminal proceedings against ICC officials involved in the investigation or prosecution of Americans.[187] On March 15, 2019, Secretary Pompeo announced "a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel. This includes persons who take or have taken action to request or further such an investigation. These visa restrictions may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies' consent."[188] It has been reported that the United States revoked the visa of ICC Prosecutor Fatou Bensouda pursuant to this policy.[189]

On April 12, 2019, following an unusually long period of review, the Pre-Trial Chamber rejected the Prosecutor's request for authorization to investigate. While it agreed that "there is reasonable basis to believe the that the incidents underlying the Request have occurred," that they "may constitute crimes within the jurisdiction of the Court," and that the alleged crimes were of sufficient gravity, it determined that an investigation in Afghanistan would not be "in the interests of justice" as chances of a successful investigation and prosecution were "extremely limited" (in part because the Prosecutor had been unable to secure cooperation from relevant states, implicitly referring to the United States, and in part because of the "complexity and volatility of the political climate still surrounding the Afghanistan situation").[190]

After this surprising outcome, President Trump issued a statement that recalled "the threat [the Court] poses to American national sovereignty" and vowed that any attempt to target U.S. personnel for prosecution "will be met with a swift and vigorous response."[191] He called the Pre-Trial Chamber decision "a major international victory . . . for the rule of law," notwithstanding that the Court had in fact concluded that that there had been a sufficient showing that the crimes had been committed and that they had not been appropriately investigated or prosecuted. Declining to authorize an investigation because of the projected lack of cooperation from states implicated in the alleged crimes was controversial and had no precedent in the ICC's earlier work. But the widespread discomfort with this decision was amplified by the fact that it came in the wake of what was viewed as strident attacks on the Court and by the Trump Administration's subsequent triumphalism, with Secretary Pompeo explicitly linking the Court's decision not to authorize an investigation with the United States' imposition of visa restrictions on ICC personnel.[192]

In any event, the Prosecutor promptly appealed. The Appeals Chamber scheduled a three-day hearing for oral arguments, in which it invited interested states, academics, and organizations to participate as *amici*.[193] The United States was not represented, but President Trump's personal lawyer made an appearance in his capacity as counsel for an NGO and made arguments that in many respects mirrored U.S. objections.[194] For its part, the Government of Afghanistan opposed the investigation, essentially urging the Court to defer its own investigation.[195]

On March 5, 2020, the Appeals Chamber overturned the Pre-Trial Chamber's decision. The Appeals Chamber decided that it was not the role of the Pre-Trial Chamber to inquire into the Prosecutor's analysis of the "interests of justice" question and, indeed, that it was not even the Pre-Trial Chamber's role to inquire into the OTP's analysis of complementarity and gravity.[196] On this basis, the Appeals Chamber authorized the Prosecutor to conduct an investigation covering alleged crimes in Afghanistan since May 1, 2003, the date on which Afghanistan became a party to the Rome Statute, "as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation in Afghanistan and were committed on the territory of other States Parties since 1 July 2002."[197]

Secretary Pompeo criticized the decision on the day it was released, stating that the United States "will take all necessary measures to protect our citizens from this renegade, so-called court," and claiming that the decision was "all the more reckless for this ruling to come just days after the United States signed a historic peace deal on Afghanistan—the best chance for peace in a generation."[198] Two weeks later, he publicly identified two ICC staffers whom he claimed were "helping drive [the prosecutor's] effort to use this court to investigate Americans," and indicated that the next step could be to sanction them "and their family members"[199]—a step critics called an act of "raw intimidation."[200] On June 11, 2020, President Trump issued an Executive Order in which he determined that ICC investigations in Afghanistan (or involving U.S. allies that were not Rome Statute parties) constituted "an unusual and extraordinary threat to the national security

and foreign policy of the United States. . . ." On that basis, he authorized sanctions (financial and visa restrictions) on any person (including Court officials) designated as having directly engaged in, materially assisted, sponsored, or provided support for, the investigation of U.S. personnel (or of the personnel of any U.S. ally who is not a party to the Court and does not consent).[201] This latter language plainly suggested that the possibility of an investigation of the Palestinian situation (discussed below) provided an additional basis for these threats.

In a subsequent press event at which he was joined by the Secretary of Defense, the Attorney General, and the National Security Advisor—but not, notably, the Secretary of the Treasury—Secretary Pompeo stated that he was acting consistent with the request of more than three hundred members of Congress to support Israel against the ICC, labelled ICC action "a mockery of justice," attacked the ICC for "botched prosecutions," and insisted that the United States "cannot allow ICC officials and their families to come to the United States to shop and travel and otherwise enjoy American freedoms as these same officials seek to prosecute the defender of those very freedoms."[202] Many of these critiques were familiar, but the charges from the Administration officials went further and included assertions that "our adversaries are manipulating the ICC" by encouraging these allegations in a "blatant attempt to subvert justice and the mission of the ICC" (with Attorney General William Barr specifically mentioning Russia) and that the Justice Department had "credible information that raises serious concerns about a long history of financial corruption and malfeasance at the highest levels of the office of the prosecutor." No details for these allegations were ever publicly articulated; nor were they deemed credible by interlocutors who were briefed by U.S. Government sources.

States Support ICC Against U.S. Sanctions Threat

In a statement following the issuance of the Executive Order authorizing sanctions, ten current and three incoming members of the UN Security Council

"reiterate[d] our commitment to uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity and independence undeterred by any measures or threats against the Court, its officials and those cooperating with it. We note that sanctions are a tool to be used against those responsible for the most serious crimes, not against those seeking justice. Any attempt to undermine the independence of the Court should not be tolerated.

The International Criminal Court embodies our collective commitment to fight impunity for the most serious crimes under international law. By giving our full support to the Court and promoting its universal membership, we defend the progress we have made together towards an international rules-based order, of which international justice is an indispensable pillar."

Similarly, sixty-seven states parties to the Rome Statute submitted a letter that made similar points and added that they "remain committed to an international rules-based order. The ICC is an integral part of this order and a central institution in the fight against impunity and the pursuit of justice, which are essential components of sustainable peace, security and reconciliation."

The decision to authorize sanctions was subject to considerable criticism in various quarters in the United States,[203] including by an American Bar Association resolution[204] and a joint letter from 174 lawyers and legal scholars.[205] A former Treasury Department senior adviser raised concerns that the use of sanctions against the ICC and its officials would "further weaken the once-robust trans-Atlantic bond that has in the past effectively imposed multilateral sanctions against common adversaries, including Russia, terrorists, WMD proliferators, and more."[206] These steps also prompted numerous other states to reaffirm their support for the ICC[207] (including the United Kingdom,[208] which—as described in Section IV.C below—had led recent criticism of the Court and calls for its reform). Sixty-seven Rome Statute parties quickly issued a statement calling the ICC an integral part of the "the international rules-based order" and an "essential component of the multilateral architecture upholding the rule-of-law," and underscored their commitment "to preserve its integrity undeterred by any measures or threats against the Court, its officials and those cooperating with it."[209] In an op-ed in *Foreign Policy* magazine, General Wesley Clark called the move a "tragic mistake" that put the United States in the company of "rogue states like the Burundi and the Philippines, which have threatened United Nations investigators and international prosecutors." Said General Clark:

> Attacking international bodies like the ICC may feel like a cost-free way to score political points. But just as Americans benefit from the work of the World Health Organization and other multilateral institutions the Trump administration has turned against, the existence of tribunals to help enforce international law is an asset to U.S. security. Americans should continue to protect U.S. service members with a firm commitment to international law. And when Americans' actions are scrutinized, the U.S. government should have the confidence to react in a way that preserves the benefits of these institutions, protects U.S. personnel, and does justice to American values.[210]

On September 3, 2020, Secretary Pompeo announced the first sanctions under this Executive Order, freezing the assets of, and barring financial transactions with, ICC Prosecutor Bensouda and Phakiso Mochochoko, the head of the Prosecution's Jurisdiction, Complementarity and Cooperation Division.[211] International reaction was again sharply negative, with many arguing that this approach was counter-productive, undermines the effectiveness of U.S. arguments, alienates U.S. allies, shifts the international debate away from the ICC's deficits to the extreme U.S. reaction, and erodes the ability of U.S. friends to argue in favor of reforms that would be in the U.S. interest.[212] European Union High Representative Josep Borrell decried the measures as "unacceptable and unprecedented" and pledged that Europeans would "resolutely defend [the Court] from any attempts aimed at obstructing the course of justice . . . ."[213] A former State Department Sanctions Coordinator argued that "[i]t creates the reality, not just the impression, of the United States as a unilateralist bully with contempt for international law and norms."[214] Four prominent human rights professors who are dual U.S. nationals—and hence potentially exposed to sanctions themselves as well as

enforcement actions—and the Open Society Justice Initiative filed suit in the Southern District of New York alleging, among other things, that their First Amendment free speech rights were being abridged by the possibility of enforcement action if they provided support to the Prosecutor, even on cases unrelated to the United States.[215] In January 2021, the judge issued a partial temporary injunction enjoining the issuance of sanctions against the plaintiffs, a move the Biden administration did not appeal.[216] A second lawsuit was filed soon after on behalf of U.S. citizens who risk being penalized for working with the OTP.[217]

On April 1, 2021, following a thorough review that had been announced in the early days of the Administration,[218] President Biden revoked Executive Order 13928, under which the sanctions had been imposed, and the State Department terminated the policy on visa restrictions on ICC personnel.[219] In announcing these steps, Secretary of State Antony Blinken emphasized that the United States "continue[s] to disagree strongly with the ICC's actions relating to the Afghanistan and Palestinian situations [and] maintain[s] our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties . . . ." He went on to explain, however, that the Administration assessed the sanctions to be "inappropriate and ineffective" and that its concerns "would be better addressed through engagement with all stakeholders in the ICC process . . . ." He also noted the ongoing review and reform process:

> We are encouraged that States Parties to the Rome Statute are considering a broad range of reforms to help the Court prioritize its resources and to achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes. We think this reform is a worthwhile effort.[220]

For its part, the Government of Afghanistan took its own steps to respond to the opening of the investigation. On March 26, 2020, the government submitted a request under Article 18(2) of the Rome Statute for a deferral of the investigation, saying that it "is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts allegedly committed within the authorised parameters of the Situation in Afghanistan . . . ."[221] The OTP subsequently announced that, in view of its ongoing assessment of the request, in addition to practical restrictions owing to the global health crisis, the Prosecutor is not currently undertaking investigative activities in or about Afghanistan.[222] As at the time of writing, there has been no public indication that any further steps have been taken.

B. The "Situation in Palestine"

The ICC Prosecutor has indicated that her investigation of the situation in Palestine would encompass allegations of war crimes by Hamas and other Palestinian armed groups (and potentially Israeli Defense Forces[223]) in connection with the 2014 conflict in the Gaza Strip but also allegations against senior Israeli officials related to Israel's settlement policies in the West Bank,

including East Jerusalem. This last set of allegations is the most contentious as it involves official Israeli policy, making it difficult to argue that the conduct has been or is being investigated within the Israeli judicial system.

The possibility of ICC involvement in this situation first arose in 2009 when the Palestinians submitted a declaration under Article 12(3) that purported to accept the Court's jurisdiction.[224] Then-Prosecutor Luis Moreno-Ocampo kept the matter under review for several years but eventually concluded in 2012 that the ICC lacked jurisdiction. This was based not on an independent assessment of whether Palestine was a state, but rather invoked the competence of the UN Secretary-General as the treaty depository for the Rome Statute, whose practice in case of doubt about whether to treat an entity as a state is to defer to the guidance of the General Assembly.[225] Given that the General Assembly (and thus the Secretary-General) did not treat Palestine as a state at that point, the Prosecutor concluded that the Palestinians could not confer jurisdiction on the Court.[226]

The situation changed later that year when the General Assembly decided in Resolution 67/19 to accord the Palestinians "non-member observer state status in the United Nations."[227] When the Palestinians then submitted another Article 12(3) declaration (as well as their instrument purportedly acceding to the treaty) in January 2015,[228] the current Prosecutor took the position that, effective from the date of Resolution 67/19, the Palestinians were able to accept the Court's jurisdiction, and she opened a preliminary examination on January 16, 2015.[229] The Prosecutor eventually concluded that there was reasonable basis to proceed and that (because the Palestinians had referred the situation in 2018) there was no need to secure authorization from a Pre-Trial Chamber in order to commence an investigation. Nevertheless, on December 20, 2019, the Prosecutor—citing "the unique history and circumstances of the Occupied Palestinian Territory" which means that any "determination of the Court's jurisdiction may . . . touch on complex legal and factual issues"—requested a jurisdictional ruling to confirm "that the 'territory' over which the Court may exercise its jurisdiction . . . comprises . . . the West Bank, including East Jerusalem, and Gaza."[230]

Faced with this question, the Court solicited *amicus* briefs from states, organizations, and persons wishing to provide their views.[231] Israel chose not to formally submit a brief, but its Attorney General made available a "white paper" setting out Israeli views in considerable detail, which the Prosecutor brought to the attention of the Court.[232] For its part, the United States did not avail itself of the opportunity to participate as an *amicus*, but the two most recent former heads of the State Department's Office of Global Criminal Justice submitted an extensive brief that supported Israel's position and questioned the logic underlying the Prosecutor's conclusion that Palestine qualified as a state.[233]

On February 5, 2021, the Pre-Trial Chamber issued its decision by a vote of 2–1. Among other things, it concluded that Palestine was a "State Party to the Statute," that the Palestinian accession provided a basis for the Court to exercise jurisdiction, and that the area over which the Court could exercise jurisdiction encompassed the "territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem."[234] The United States criticized the decision, including in a statement in which Secretary Blinken said that the Palestinians to do not qualify as a sovereign state and therefore the Palestinians "are not qualified to obtain membership as a state in, participate as a state in, or delegate jurisdiction to the ICC."[235] On March 3, 2021, the Prosecutor announced that she was opening an investigation.[236]

For its part, over a number of years Congress has passed a number of restrictions in annual appropriations legislation related to these Palestinian efforts to involve the ICC, though in each case the target of the legislation has been the Palestinians rather than the Court itself. The version of the legislation for the current fiscal year contains restrictions on the eligibility of the Palestinian Authority for assistance under the Economic Support Fund, as well as restrictions on the Palestinians' ability to maintain the Palestine Liberation Organization (PLO) office in Washington unless the President certifies that the Palestinians have not "initiated or actively supported an ICC investigation against Israeli nationals for alleged crimes against Palestinians."[237] Indeed, it was in connection with this latter requirement that the previous Administration announced the closure of the PLO office in September 2018.[238]

More recently, numerous members of Congress have expressed significant concern about, and opposition to, ICC action against Israeli personnel. Of particular note, a May 13, 2020, letter led by Senators Ben Cardin (D-MD) and Rob Portman (R-OH) "urge[d] [Secretary Pompeo] to continue [his] vigorous support of Israel as it faces the growing possibility of investigations and prosecutions by the International Criminal Court," while also noting that the authors "support the ICC's stated goal of ensuring accountability for the gravest crimes of concern to the international community."[239] Indeed, in his June 2020 remarks, Secretary Pompeo justified the threat of sanctions with the fact that he was "gravely concerned about the threat the court poses to Israel" and noted that "[m]ore than 300 members of Congress—Republicans and Democrats alike—recently sent me letters asking that the United States support Israel in the face of the ICC's lawless, politicized attacks."[240] However, a number of members of Congress subsequently issued public statements criticizing the announcement of President Trump's Executive Order and the sanctions under it, with one Senator who had signed the Cardin/Portman letter calling the sanctions "misguided and counterproductive,"[241] and another describing the sanctions as "a slap in the face to victims of war crimes, crimes against humanity, and genocide the world over . . . [that] will surely be condemned by our law-abiding democratic allies. . . ."[242]

Although it is anticipated that any investigation by the Prosecutor into these matters will be on a slow trajectory,[243] there is no question that the U.S. relationship with the ICC will be

influenced by the degree to which members of Congress, and the U.S. public, are concerned about developments in this investigation.

C. ICC Performance, Review, and Potential Reforms

Critics of the ICC have long questioned the extent to which the institution has lived up to its ideals. These criticisms have intensified in recent years as the ICC has amassed a record that can be described as mixed, at best. States, commentators, and the Independent Expert Review have all identified a range of causal factors and potential solutions. To a certain degree, some of these solutions could implicate issues that have already been the subject of ICC jurisprudence, which may need to be revisited; others, however, may be addressed through other means, including the exercise of sound prosecutorial discretion or rules changes.

For its part, the OTP has achieved just five convictions for core crimes in the fifteen years since the first arrest warrants were issued.[244] A number of other prosecutions have resulted in dismissals or controversial acquittals—including the high-profile termination of the two cases against Kenyan President Uhuru Kenyatta and Vice President William Ruto,[245] the dismissal of the case mid-trial against former Côte d'Ivoire President Laurent Gbagbo and an associate on a no case to answer motion,[246] and the dramatic acquittal on appeal of former DRC Vice President Jean-Pierre Bemba[247]—suggesting problems with the OTP's investigative methods but also generating academic criticism of the judicial reasoning.[248] This record has led numerous states and commentators to criticize the OTP for investigations that are both too broad and too shallow, for litigating cases only against the most senior leaders without adequately laying the foundation for those cases by "building up" from investigations and convictions of lower-level perpetrators, for not spending sufficient time in country or developing situation-specific expertise, and for failing to secure sufficient concrete evidence to link those senior leaders to the crimes committed.[249] At the same time, the impact of the institution should not be measured by convictions alone, and the Court stands to make significant contributions through the catalyzation of domestic accountability processes, its enunciation of jurisprudential norms, its interactions with affected communities and empowerment of civil society justice advocates, and deterrence.[250]

Concerns regarding the working methods of the Office of the Prosecutor are not limited to the outcomes of specific cases. An early focus on African situations generated complaints that the OTP was "targeting" African suspects.[251] Several states threatened to withdraw from the Rome Statute, often after coming under scrutiny from the Prosecutor, although only two (Burundi and the Philippines) have followed through.[252] The large number of situations that the Prosecutor is investigating or that are under preliminary examination, as well as the length of time taken by the Prosecutor before concluding her preliminary examinations, has also drawn criticism. Specifically, the Prosecutor currently has investigations ongoing in fourteen situations, including the DRC, Northern Uganda, Darfur, two separate investigations in the Central African Republic, Kenya, Libya,

Côte d'Ivoire, Mali, Georgia, Burundi, Afghanistan, Palestine and Bangladesh/Myanmar.[253] At the same time, the Prosecutor is conducting substantive (Phase 2 and 3) preliminary examinations in six situations,[254] and has recently concluded that the criteria for commencing an investigation had been met to open new investigations in a further two (Ukraine and Nigeria).[255] Many of these situations have indeed seen massive atrocities and limited, if any, justice at the domestic level. But the existence of such a large number of ongoing prosecutions, investigations, and preliminary examinations in multiple regions of the world has led to criticism that the OTP is simply spread too thin. It also calls into question whether conducting simultaneous investigations in so many situations is consistent with the Court's mandate to focus on "the most serious crimes of concern to the international community as a whole." [256]

For her part, the Prosecutor has acknowledged the imbalance between the scope of the situations on which the OTP is working and the availability of resources to conduct this work, stating in December 2020 that "in the immediate period ahead, we will need to take several strategic and operational decisions on the prioritisation of the Office's workload. . . ."[257] Indeed, as a result of this, the Prosecutor indicated that she will not yet take steps to open investigations in Ukraine and Nigeria until she has consulted with the incoming Prosecutor "on the strategic and operational issues related to the prioritisation of the Office's workload . . . ."[258] The Prosecutor is also seeking input on criteria for closing investigations.[259] Remarkably, despite concerns over how thinly resources are spread, and how long the Prosecutor takes to conduct preliminary examinations, no investigation has yet been formally closed in the sixteen years since the OTP opened its first investigation in 2004,[260] although some investigations technically remain open despite a lack of active investigatory measures[261] and a number of preliminary examinations have concluded with a decision not to proceed.[262]

Criticism has not been limited to the Office of the Prosecutor. The quality of the judicial reasoning has varied considerably, and the Court has issued a number of fractured opinions that suggest a high degree of institutional discord.[263] Questions have been raised about the independence, collegiality, and professionalism of some of the judges, including an attempt by one judge to continue sitting in a trial while she simultaneously took up a post as Ambassador to a third state;[264] litigation by some of the judges against the Court seeking increased salaries notwithstanding a zero-growth budget and resource constraints;[265] statements by a judge that suggested he would ignore a procedural rule with which he disagreed;[266] and criticism by judges of the quality of their brethren's judicial reasoning.[267] Meanwhile, the capacity of the Registry to appropriately manage victim participation, witness intimidation, and the frozen assets of suspects has been questioned.[268]

Against this backdrop, the United Kingdom delivered a strongly worded intervention at the 2018 Assembly of States Parties, stating bluntly that the Court has fallen short of expectations and that "we cannot bury our heads in the sand and pretend everything is fine when it isn't."[269] Over

the following year, more traditional supporters of the Court voiced similar concerns. In April 2019, four former Presidents of the ICC Assembly of States Parties issued a critical letter that lamented the "growing gap between the unique vision captured in the Rome Statute . . . and some of the daily work of the Court," and stated that the authors were "disappointed by the quality of some of its judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies . . . ." The four former Presidents concluded that it was time to "make a new deal between the ICC and its states parties" and called for "an independent assessment of the Court's functioning . . . ."[270]

ICC states parties heeded this call by commissioning an Independent Expert Review (IER) to be carried out by a group of nine eminent experts chaired by Justice Richard Goldstone. The Independent Experts issued an extensive report in September 2020 containing searching critiques of how the Court has functioned and putting forward 384 recommendations aimed at states parties and all organs of the Court. The Report catalogues a range of observations, including about the Court's workplace culture (referring to fear, bullying, and harassment among the staff), organizational structure, the quality and consistency of judicial reasoning, and the lack of strategic planning. Of particular relevance for this Report, the Independent Experts noted that

> concern has been rising regarding the way in which the OTP handles the high volume of potential situations and cases, taking into account its limited resources . . . with regard to the selection or prioritisation of situations and cases, there is insufficient consideration given to the prospects of investigative and prosecutorial success. . . . Likewise, there is concern that the threshold of sufficient gravity is pitched too low. Furthermore, the Experts observed a lack of long-term planning for the life-cycle of PEs [preliminary examinations] and investigations, including their (de)prioritisation and eventual closure.[271]

The Experts proposed that the OTP investigate fewer situations, given that "the current situation is unsustainable," by raising the threshold of gravity in her operations.[272] The Experts also emphasized the need to prioritize between investigations, given the limited resources, and to prepare guidelines (in consultations with states) about when and on what basis the OTP would deprioritize, hibernate, or close investigations.[273]

In establishing the mandate of the IER, states had requested that the Assembly of States Parties (rather than the Independent Experts) address a handful of issues pertaining directly to the relationship between state parties and the Court, including "[c]omplementarity, and the relationship between national jurisdictions and the Court."[274] Through these discussions, states parties are pursuing a number of streams of work, including dialogue with the OTP on its existing and forthcoming policy papers on complementarity and completion strategies; "a possible ASP or States Parties' statement or resolution on the principle of complementarity;" and developing

"the structural role of the ASP as a forum for dialogue and cooperation on complementarity issues between the Court" and others, including non-party states.[275]

Meanwhile, states (and the Court) are continuing discussions of how to implement the recommendations of the IER Report. These discussions reflect a greater openness by states (and to some extent the Court itself) to consider critiques that might in previous years have been reflexively rejected: that the Court is currently trying to do too much; that it needs to focus more on its core mandate of addressing the most serious crimes of concern to the international community as a whole; that it should apply a higher threshold of gravity; that it should conduct deeper investigations into a smaller number of situations; that to do so it should take a more strategic approach to the cases that it selects within situations and should "hibernate" investigations that show low prospects for success, and be more willing to close investigations; and that the Court should give greater deference to good-faith, even if imperfect, efforts to pursue accountability and transitional justice under domestic law, particularly when it comes to non-party states. States are also exploring a range of ways to signal to the Court their expectations and the ways in which its various organs should revise their working methods, including through ASP resolutions, interpretative guidance, and amendments to the Rules of Procedure and Evidence and other instruments.

The increased openness to these kinds of discussions presents a clear opportunity for the United States to influence the manner in which states and the Court think about key issues that affect U.S. interests. Many of our consultations affirmed that states would welcome constructive engagement by the United States. The fact that a new Prosecutor—Karim Khan, a British barrister with extensive experience in international criminal proceedings who currently serves as Special Adviser and Head of UNITAD—was elected in February 2021 and will be assuming office in June underscores that this is an opportune moment to review, and provide input on, existing prosecutorial policies, strategies, and decisions on which investigations or cases to prioritize with the Office's limited resources. If nothing else, the new Prosecutor may be more willing to revisit past decisions with a fresh eye if provided with persuasive arguments or compelling evidence of the wisdom of reconsidering these prior approaches.

V. U.S. INTERESTS IMPLICATED BY THE WORK OF THE ICC

The ICC implicates a range of U.S. foreign policy interests—both regional and thematic. For example, the United States has manifested—in word and deed—longstanding, deep, and bipartisan commitments to atrocity prevention, accountability for international crimes, and support for the rule of law. These priorities suggest the merits of normalizing the U.S. relationship with the Court and thereby enhancing the ability of the United States to provide assistance to ongoing investigations in situation countries where the ICC presents the most promising, or in some cases only, option for providing some measure of accountability. Indeed, there are circumstances in which the Security Council has referred a matter for the Court, or where the Court is working in partnership with the territorial/nationality state, that do not trigger the traditional U.S. concerns about the ICC, and where ICC involvement would indeed further U.S. interests.

At the same time, recent activities by the Court in the situations in Afghanistan and Palestine have shone a spotlight on the potential for the Court to conflict with other U.S. interests. The opening of an investigation into the situation in Afghanistan has cast in sharper relief longstanding U.S. concerns about the exercise of international or foreign jurisdiction over its servicemembers or officials. And the potential investigation of Israeli officials in connection with the situation in Palestine raises concerns over both the ICC exercising jurisdiction over the nationals of non-party states (in this case a close U.S. ally) and the potential for the ICC to impede the peaceful resolution of longstanding conflicts (including by judicializing the resolution of matters such as the fate of settlements in the West Bank, which the U.S. has long insisted must be negotiated between the parties).

There is a risk that these areas of more acute concern could overshadow more diffuse U.S. commitments to justice and accountability. Specifically, the history of U.S. leadership on international justice grew out of a number of deeply held values that are aligned with the underlying mission of the ICC and many of its activities, as discussed below. Although the ICC occupies an important place in this system, it is not the only forum in which efforts toward justice and accountability are underway. Any U.S. approach should seek the most effective options to address the commission of international crimes, bring justice to victims, and promote the principle that those responsible for atrocities should be held to account. Recommending a course of action that will best advance these affirmative and defensive equities of the United States is the major challenge faced by this Task Force. To help map a path forward, this Section identifies the universe of interests implicated by the U.S. relationship with the Court—both those where the ICC's efforts may be in tension with U.S. interests and those where it may be well-aligned.

A. Jurisdiction Over U.S. Personnel

As described above, U.S. policymakers in both Republican and Democratic administrations have emphasized their desire to protect U.S. personnel from the jurisdiction of the ICC. For example, then-Senator Biden, in his explanation of vote on the American Servicemembers Protection Act in 2002, stated that

> I do support protecting American servicemen and women. The Court statute purports to provide jurisdiction over individuals from nations which have not become party to it. That is wrong as a matter of treaty law and of basic fairness. We can and must protect our servicemen from the jurisdiction of this tribunal.[276]

Such concerns about subjecting U.S. personnel to non-U.S. jurisdiction pre-date the promulgation of the Rome Statute. Indeed, they figured prominently in the ratification debates regarding the NATO Status of Forces Agreement (SOFA) in the early 1950s as well as in the negotiation of subsequent bilateral SOFAs modelled on the NATO agreement. The NATO SOFA provides for a system of shared jurisdiction between "sending" and "receiving" states when it comes to the U.S. military forces who would, for the first time, be stationed on the territory of European allies following World War II. When the NATO SOFA was submitted to the Senate for its advice and consent, strong criticism emerged that the United States was seeming to allow the exercise of foreign criminal jurisdiction over U.S. personnel deployed abroad, and there were calls—ultimately unsuccessful—to issue a reservation to the treaty under which U.S. military authorities would retain exclusive jurisdiction over their personnel stationed abroad.[277]

Although the Senate eventually provided its advice and consent to the NATO SOFA, the Defense Department and the U.S. Government have highlighted ever since the importance of maximizing legal protection for U.S. forces serving overseas. While events can sometimes supervene, longstanding U.S. policy has been "not to send military personnel to a foreign country without satisfactory status protections."[278] The traditional rationales in support of the need for such legal protections include the importance of enforcing U.S. military discipline through the chain of command and within the U.S. military justice system, as well as of ensuring that the individuals required under military orders to serve in foreign locations enjoy the full range of constitutional due process rights.[279] In addition, providing commanders with full control and disciplinary authority over their forces, including the potential for prosecutions under the Uniform Code of Military Justice (UCMJ), is seen as a necessary corollary of the fact that U.S. forces are deployed globally, the fact that superiors are accountable for the conduct of the forces under their command, and confidence in the overall integrity of its military and civilian judicial systems.[280]

The United States has sought to utilize the provisions of Article 98(2) of the Rome Statute to protect its personnel from ICC jurisdiction. By its terms, that provision contemplates agreements that would prevent the Court from seeking the surrender of a person to the ICC if doing so would

put it in violation of competing legal obligations under a SOFA. Under the Bush Administration, the United States thus sought free-standing Article 98 agreements with a number of states and language in Security Council resolutions exempting the personnel of non-member states contributing to peacekeeping missions from ICC jurisdiction in order to minimize the risk that the ICC could obtain jurisdiction over U.S. personnel.[281] The United States' effort to secure such agreements can be seen as responsive to the perceived need to protect U.S. servicemen and servicewomen from these kinds of risks, though the amount of practical protection afforded by such agreements was relatively small, and many believe that the real purpose of pursuing such agreements was political rather than practical. Separately, it is worth noting that many friends and allies objected to the Article 98 agreements not in principle, but because of what they saw as undue pressure by the United States to get them to sign these agreements, and because the agreements were drafted in a manner so as to cover persons—*e.g.*, private persons with no affiliation with the U.S. Government—that, in their view, were not permitted to be included under the terms of Article 98.[282]

With this goal of maintaining U.S. jurisdiction over servicemembers in mind, the United States has long objected to the ICC's assertion of jurisdiction over nationals of states that are not parties to the Rome Statute (absent consent by that state or a referral by the Security Council). The 2009 ASIL Task Force Report examined the *legal* arguments that the jurisdiction of the Court over non-party nationals in the circumstances prescribed in the Statute was inconsistent with international law, and it considered those arguments to be unfounded: "the Task Force does not consider the ICC's jurisdiction over nationals of non-party States to be in conflict with principles of international law."[283] Likewise, U.S. friends and allies have been virtually uniform in declining to support the arguments.

That said, concerns about the exposure of U.S. servicemembers to possible ICC jurisdiction continue to have great political resonance. Thus, when Secretary Pompeo announced the designation of the ICC Prosecutor and her staffer on June 11, 2020, he framed the threat to the sovereignty posed to the United States by the ICC by beginning his remarks as follows—

> Imagine an American soldier, sailor, airman, Marine, or an intelligence officer is on leave with his or her family, maybe on a beach in Europe. And over the course of two decades or more, this soldier honorably defended America in Anbar Province, in Kandahar, taking down terrorists. Then suddenly, that vacation turns into a nightmare. The European country's national police takes that soldier into custody, detaining him or her on politically motivated charges. A prison sentence abroad is a distinct possibility. A spouse behind bars for defending freedom. A son or daughter robbed of their mom or dad, all on the initiative of some prosecutor in the Netherlands.[284]

In reality, nothing the OTP is doing in Afghanistan and nothing the ICC has done in other cases suggests that this is a realistic scenario[285] And, even if such scenario were plausible, it would hardly seem to constitute an "assault" on American sovereignty. In general, a United States person on vacation in a foreign country is subject to the laws of that country, including the rules that implement that country's treaty obligations. Unlike U.S. personnel deployed to another country under military orders, an individual can avoid submitting himself or herself to those rules by simply refraining from entering that country's territory. Nevertheless, concern about possible jurisdiction over servicemen and servicewomen, on the one hand, and leaders, on the other, both play a role in shaping U.S. concerns about the Court, although the issues raised by the two sets of concern have important differences. It thus appears virtually inevitable that U.S. policymakers will continue to give high priority to protecting all U.S. personnel from the possibility of ICC investigation and prosecution.

It is worth noting that the risk of a non-U.S. tribunal asserting jurisdiction against U.S. personnel is not unique to the ICC. For example, during the 1999 Kosovo War, the ICTY Prosecutor examined the conduct of the U.S. military in determining whether charges should be brought against any U.S. personnel in connection with the NATO bombing campaign in the Federal Republic of Yugoslavia as part of Operation Allied Force.[286] As General Clark has noted, "[t]his kind of scrutiny is uncomfortable, especially when it touches on acts under one's own command, but the United States' commitment to complying with the law, its reliance on professional legal guidance, and the rigor of the U.S. justice system give Americans the tools to manage it."[287]

It is significant that the United States faces comparable risks in foreign domestic courts—*e.g.*, under the grave breaches provisions of the Geneva Conventions, which require states parties to bring persons alleged to have committed grave breaches "regardless of their nationality, before its own courts" or hand such persons over for trial to another state party.[288] Likewise, foreign states have occasionally exercised jurisdiction over U.S. personnel for other conduct that they allege is criminal.[289] In most cases, the United States has addressed situations diplomatically, often invoking an operative SOFA or demonstrating adequate domestic proceedings (effectively invoking a version of the principle of complementarity).

That said, the United States' insistence that foreign courts not exercise jurisdiction over U.S. personnel has not always been accompanied by its own investigations or prosecutions and the United States has occasionally resorting to heavy-handed means. For example, in the early 2000s, when efforts were initiated to bring war crimes charges against Secretary of Defense Donald Rumsfeld under universal jurisdiction legislation in Belgium, the United States pressed strongly in diplomatic channels—including by saying it would push to have NATO headquarters moved to another country—to persuade the Belgian authorities to take action to have the case withdrawn. The Belgian government ultimately amended its universal jurisdiction law, making it more difficult to bring such charges absent a tighter nexus to Belgium.[290]

In contrast to these bilateral situations, the ICC is by design structured to insulate against states seeking to address the initiation of legal actions against their personnel via political means. Whether one considers the possibility for such recourse to be good or bad depends on the facts and circumstances in the particular situation.

B. Peace Negotiations and Conflict Resolution

There have been concerns expressed that criminal investigations and prosecutions by international tribunals may in some contexts complicate diplomatic efforts to resolve ongoing conflicts, including because of fears that leaders may be less likely to compromise or relinquish power if they anticipate that doing so could lead to criminal prosecution for their past conduct. Placing the power to investigate and prosecute in the hands of an international institution—particularly one that ostensibly makes decisions based solely on legal factors, rather than considering the larger political aspects of any negotiated settlement—can limit options for international negotiators and local communities trying to break cycles of violence or implement non-penal transitional justice programs.[291]

For example, in the period following the statement in the Prosecutor's annual report on preliminary examinations that a decision on whether to pursue an investigation in Afghanistan was imminent, the Afghan government argued that, by moving forward with an investigation, the OTP could harm the then-ongoing peace process with Hezb-e Islami and its leader, Gulbuddin Hekmatyar.[292] Hekmatyar was implicated in heinous war crimes, yet he and other Hezb commanders and fighters had been offered a blanket amnesty as part of the negotiations for joining the peace process (with Hekmatyar's name having been removed from the UN sanctions list and formally welcomed to the presidential palace).[293] Indeed, a condition of the peace talks with the Taliban that were conducted following agreement with the United States in February 2020 was the release of up to 5,000 Taliban prisoners. This strongly suggests a tolerance for some measure of impunity to bring over forty years of conflict in Afghanistan to a close that is in tension with the Rome Statute principle that atrocity crimes "must not go unpunished."[294] Yet the international community has strongly supported this effort at peacemaking. Indeed, the *communiqué* adhered to by participants from sixty-six countries and thirty-two international organizations in connection with the Afghanistan Conference in Geneva in November 2020 welcomed developments in the peace process with no mention of the need for investigation or prosecution of those responsible for the war crimes that have been endemic in Afghanistan or of any need for Afghanistan to cooperate with the ICC.[295]

The Rome Statute includes two provisions that could be invoked to help manage clashes between potential ICC investigations or prosecutions and the imperative of negotiating resolutions of conflicts around the globe. First, the Rome Statute authorizes the ICC Prosecutor to consider whether she should decline to proceed with an investigation or prosecution because such an

investigation or prosecution would not be in the "interests of justice."[296] Second, the Security Council is empowered by Article 16 to defer any investigation or prosecution for twelve months (renewable) by a resolution adopted under Chapter VII of the UN Charter on the premise that such a deferral would contribute to international peace and security.[297] While they provide mechanisms to manage a conflict between the perceived interests of peace and justice, neither of these provisions fully addresses the concerns that may arise in particular cases given that those involved in peacemaking processes may well lack control over how these mechanisms will be used.

With respect to the "interests of justice," an early Office of the Prosecutor policy paper interpreted the phrase in a way that vastly limits—some might say eliminates—the extent to which political considerations, including non-penal transitional justice mechanisms such as truth commissions or conditional amnesties as seen in South Africa and elsewhere, can be taken into account in a decision by the Prosecutor not to proceed with an investigation or prosecution.[298] Even if such factors could be taken into account, however, there would be no assurance that the Prosecutor would assess the risk to political negotiations in the same way as those involved in the negotiations, and no *a priori* reason to believe that the OTP's assessment would be more accurate. That said, the Prosecutor has substantial discretion here and the relevant policy paper could be withdrawn or amended by the incoming Prosecutor. With respect to Article 16 deferrals, the fact that any of the permanent members of the Security Council could block a deferral means that those involved in negotiations cannot count on the Council taking the action that they consider necessary. Moreover, the fact that the Rome Statute contemplates such deferrals for periods of no more than twelve months at a time would make it even harder to assure the relevant parties that they could rely on the Council taking future action each year.

On the other hand, while some raise concerns that the ICC may be an impediment to peace deals in certain circumstances, many have argued that criminal accountability is a necessary ingredient for durable peace settlements, and the U.S. Government has recognized this in a range of cases.[299] There will be situations in which an external mechanism for justice such as the ICC can lead to more durable peace settlements, by ensuring that some measure of accountability does take place and removing the trials of senior individuals from fragile post-conflict environments.[300] The point here is not to decide which side of this debate has the better argument, only to show that this is an issue that can be of understandable concern to policymakers.

C. The Prevention of Atrocities

The U.S. Government, under both Democratic and Republican administrations, has recognized a strong interest in the prevention of mass atrocities. This is driven in part by long-standing U.S. principles and values, including a deep-seated consensus formed following the Holocaust that genocide and the deliberate targeting of civilians cannot be tolerated. In addition to these moral considerations, there is also widespread recognition that mass atrocities can threaten

international peace and security in a number of ways, including by destabilizing entire regions through conflict diffusion; generating uncontrolled migration, internal displacement, and refugee flows; emboldening perpetrators and creating openings for violent extremism to flourish; creating grievances that extremists can exploit; disrupting economic relations and undermining progress on economic development; contributing to state fragility; necessitating costly *ex post* interventions; and undermining the credibility of international norms, especially when the international community is perceived to be standing idly by while violence unfolds.[301] In creating an interagency Atrocities Prevention Board (APB), President Obama was the first U.S. President to link the moral obligation to prevent harm with the national interests inherent to doing so when he announced: "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States."[302] All told, it is axiomatic that it is "morally, politically, financially, and prudentially better to prevent atrocity crimes than to react to stop them once under way."[303]

The interest in atrocity prevention has also been strongly tied to an emphasis on the importance of accountability for perpetrators. For example, President Obama's 2015 National Security Strategy stated:

> The mass killing of civilians is an affront to our common humanity and a threat to our common security. It destabilizes countries and regions, pushes refugees across borders, and creates grievances that extremists exploit. We have a strong interest in leading an international response to genocide and mass atrocities when they arise. . . . We will work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent with U.S. law and our commitment to protecting our personnel.[304]

Though lacking the specific reference to the ICC, the Bush and Trump Administrations also underscored their commitment to the underlying principle. In President Trump's 2017 National Security Strategy, for example, one of the "Priority Actions" under "Champion American Values" was the commitment that "[w]e will hold perpetrators of genocide and mass atrocities accountable."[305] (*See Text box for extracts from other National Security Strategies*).

Such statements about accountability have been backed with resources. In 2020, the Executive branch reported to Congress that in "Fiscal Year 2019, State and [the US Agency for International Development (USAID)] allocated approximately $10.5 million towards atrocity prevention programming globally . . . ."306

Nonetheless, when faced with unfolding violence, the international community often mobilizes too late, when opportunities for lower cost actions have been missed and more robust interventions are required. Indeed, the commission of war crimes and crimes against humanity

References to Atrocity Prevention and Accountability in National Security Strategies

President George W. Bush's second National Security Strategy, Mar. 2006, at 17:

> *It is a moral imperative that states take action to prevent and punish genocide. History teaches that sometimes other states will not act unless America does its part. We must refine United States Government efforts—economic, diplomatic, and law-enforcement—so that they target those individuals responsible for genocide and not the innocent citizens they rule. Where perpetrators of mass killing defy all attempts at peaceful intervention, armed intervention may be required, preferably by the forces of several nations working together under appropriate regional or international auspices.*
>
> *We must not allow the legal debate over the technical definition of "genocide" to excuse inaction. The world must act in cases of mass atrocities and mass killing that will eventually lead to genocide even if the local parties are not prepared for peace."*

President Obama's first National Security Strategy, May 2010, at 48:

> *The United States is committed to working with our allies, and to strengthening our own internal capabilities, in order to ensure that the United States and the international community are proactively engaged in a strategic effort to prevent mass atrocities and genocide. . . .*
>
> *From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. The United States is thus working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts. Those who intentionally target innocent civilians must be held accountable, and we will continue to support institutions and prosecutions that advance this important interest. Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.*

President Obama's second National Security Strategy, Feb. 2015, at 22:

> *The mass killing of civilians is an affront to our common humanity and a threat to our common security. It destabilizes countries and regions, pushes refugees across borders, and creates grievances that extremists exploit. We have a strong interest in leading an international response to genocide and mass atrocities when they arise, recognizing options are more extensive and less costly when we act preventively before situations reach crisis proportions. We know the risk of mass atrocities escalates when citizens are denied basic rights and freedoms, are unable to hold accountable the institutions of government, or face unrelenting poverty and conflict. We affirm our support for the international consensus that governments have the responsibility to protect civilians from mass atrocities and that this responsibility passes to the broader international community when those governments manifestly fail to protect their populations. We will work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent with U.S. law and our commitment to protecting our personnel. Moreover, we will continue to mobilize allies and partners to strengthen our collective efforts to prevent and respond to mass atrocities using all our instruments of national power.*

President Trump's National Security Strategy, Dec. 2017, p. 42:

> *We will not remain silent in the face of evil. We will hold perpetrators of genocide and mass atrocities accountable.*

in the former Yugoslavia drew the United States into extended military and peacekeeping commitments. And the prolonged conflicts and associated atrocities in Syria and Northern Iraq prompted similar deployments of U.S. forces to counter, and reduce the space for, terrorist groups that emerged out of the instability and governance vacuum.

Congress too has underscored the importance of atrocity prevention and response. For example, the 2018 Elie Wiesel Genocide and Atrocity Prevention Act institutionalized the process of interagency coordination first instantiated within the APB and continued by President Trump's Atrocity Early Warning Task Force, and specifically highlighted criminal accountability for past atrocities as a necessary component of a government-wide strategy to identify, prevent, and respond to the risk of atrocities.[307] Enacted in December 2019, the Global Fragility Act mandates a similar coordinated approach across government to address the wider problems of instability and state fragility that frequently establish the preconditions for mass violence and atrocity. And the FY2021 National Defense Authorization Act includes language that requires the State Department, in coordination with DOD and USAID, to incorporate the prevention of atrocities and the mitigation of fragility into security assistance and cooperation planning and implementation and to ensure that the Department of State's Atrocity Assessment Framework is factored into the Integrated Country Strategy and the Country Development Cooperation Strategy for countries at risk of mass atrocities.[308]

Whatever one may think of the effectiveness of the ICC in practice when it comes to promoting deterrence and reconciliation—and the literature is mixed[309]—the Rome Statute embodies these same ideals. Its preamble poignantly invokes the memory of past atrocities, the threat that such atrocities pose to security and stability, and a determination that ending impunity for atrocities will "contribute to the prevention of such crimes."[310] The ICC's concerns about the importance of preventing atrocities, but prosecuting those responsible when this proves impossible, are shared by the United States and are among long-standing U.S. foreign policy priorities.

D. Accountability for International Crimes

As with its bipartisan dedication to atrocity prevention, the U.S. commitment to accountability for those responsible for atrocity crimes has long been seen as a matter of both promoting U.S. values and advancing national security interests. Indeed, the principle that those responsible for atrocities should be held to account has been repeatedly included in United States' National Security Strategies[311] and endorsed in congressional resolutions.[312] The United States has thus been a strong supporter of numerous international justice mechanisms. From Nuremberg and Tokyo, to the *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda, to a range of hybrid courts and tribunals convened to address other atrocity crimes, to the newest generation of investigative mechanisms,[313] to non-governmental organizations dedicated to the careful documentation of international crimes,[314] the United States has been instrumental in

creating and providing financial and other forms of in-kind support to these entities. As recently as March 2021, the Secretary of State joined four counterparts to reiterate in the context of Syria that "[i]mpunity is unacceptable and we will firmly continue to press for accountability for the most serious crimes."[315]

The U.S. commitment to accountability for international crimes extends beyond its support for the establishment and operation of specific justice mechanisms and is reflected in a range of steps that prioritize justice and accountability for international crimes in its foreign relations. It has also invested significantly in countries wracked by violence in multiple ways, including by conducting empirical fieldwork on genocide in Darfur and against the Rohingya;[316] deploying special forces to help track the Lord's Resistance Army in Northern Uganda and *environs*;[317] funding mobile courts and legal clinics in eastern Democratic Republic of Congo to prosecute sexual and gender-based crimes;[318] and establishing peacekeeping missions with robust civilian protection and justice components.[319] The first report under the Elie Wiesel Act further notes that:

> The United States Government uses foreign assistance as a critical tool to prevent, mitigate, and respond to atrocities. The Department of State and USAID fund atrocity prevention programs globally. The Department of State's programming includes . . . documenting and preserving evidence of human rights violations and abuses to bolster current and future efforts to pursue truth, justice, and accountability. Department of State programming also funds efforts to increase the capacity of criminal-justice institutions and actors to mitigate violence and hold perpetrators accountable. . . . USAID integrates atrocity prevention into programs that advance the rule of law and human rights . . . .[320]

Recent legislation underscores the bipartisan commitment to accountability, including the Women, Peace, and Security Act of 2017, which mandates the full inclusion of women's experiences in designing and implementing transitional justice and accountability efforts;[321] the Syrian War Crimes Accountability Act of 2017, which mandates reporting and technical assistance around transitional justice and accountability in Syria;[322] the Iraq & Syria Genocide Accountability Act of 2018, which mandates a range of assistance to justice efforts, including training in war crimes investigations and the collection of evidence;[323] and the Caesar Syria Civilian Protection Act of 2019, which amplified the Syrian sanctions.[324]

During the Clinton administration, the United States created an unprecedented post of Ambassador-at-Large for War Crimes Issues (later changed to Global Criminal Justice during the Obama administration), and a functional office dedicated to liaising with international justice efforts and promoting transitional justice in states emerging from repression or armed conflict. The United States has invested substantial resources to hold accountable those who commit atrocity crimes. Among other initiatives, the United States created the War Crimes Rewards

Program, offering substantial rewards (up to $5 million) for information leading to the arrest, transfer, or conviction of designated individuals accused of crimes against humanity, genocide, or war crimes. Most recently, the 2021 Consolidated Appropriations Act underscored the importance of accountability by committing not less than $10 million to the Office of Global Criminal Justice for "programs to promote accountability for genocide, crimes against humanity, and war crimes. . . ."[325] And the United States has implemented numerous other measures to encourage accountability for violations of international crimes, including a suite of international crimes statutes,[326] the Torture Victims' Protection Act,[327] exceptions for certain international crimes to state immunity under the Foreign Sovereign Immunities Act,[328] and the issuance of sanctions for serious human rights abuses under the Global Magnitsky Act and Executive Order 13818.[329]

This litany of U.S. initiatives reveals a considerable investment by the United States in international justice efforts. In this regard, the ICC is an institution that is devoted to the same end and whose mission is aligned with U.S. values and interests. The role of the ICC in providing some measure of justice and accountability for communities that have been victimized by the most serious atrocity crimes has been specifically highlighted by the U.S. Commission on International Religious Freedom (USCIRF), which recommended in 2015 that the U.S. Government support the referral of the situations in Iraq and Syria to the ICC,[330] and in 2020 that the U.S. Government "cooperate with and support efforts to collect, preserve, and analyze evidence of the international crimes committed against the Rohingya" and "support for these legal processes" which include the ICC investigation.[331] The ICC's investigations are also frequently focused on countries where justice is a high priority for the United States. As discussed above, the ICC recently concluded its first trial against a commander of the Lord's Resistance Army and secured custody of the first government-backed militia leader charged with atrocities in Darfur—both situations in which the United States has invested heavily in peace and accountability. Multiple U.S. allies in the Western hemisphere referred the situation in Venezuela to the ICC, calling on it to investigate the Maduro regime for abuses committed against its own population and mirroring U.S. calls for accountability for perpetrators within this illegitimate regime.[332] And the ICC Prosecutor has announced that she intends to open an investigation into crimes committed in the Ukraine, which will likely include those committed by Russian forces in Crimea and its proxies in eastern Ukraine. Many close U.S. allies see the ICC as an important component of a larger international system to protect civilians, strengthen deterrence, advance accountability, and rehabilitate the survivors of international crimes.

E. Compliance with International Humanitarian Law

The United States has been deeply committed to promoting the norms of International Humanitarian Law (IHL). As with its support for accountability and justice, this commitment has long historical roots, dating back to the issuance of the Lieber Code governing Union forces in 1863—one of the first codifications of what we now call IHL.[333] In recent times, the scale and

breadth of U.S. military deployments and engagements amplifies the critical significance of IHL and the imperative that all conflict parties comply, which serves to protect U.S. personnel and civilians. The United States invests heavily in compliance and in training its own military forces in IHL and human rights law.[334] The reasons for this are pragmatic as well as principled. The U.S. Law of War Manual identifies "strong self-interest [in compliance with IHL] of everyone subject to the law of war," including by reinforcing military effectiveness, supporting military discipline, encouraging reciprocal compliance by adversaries, and maintaining public support.[335] Compliance with IHL by U.S. actors serves "not only to protect innocent civilians but also to protect its own military forces. American men and women in uniform benefit from the expectation that all parties to a conflict will respect the Geneva Conventions and customary international law . . . . When the United States holds itself to these rules, allies that share the same values have greater confidence to work with the United States . . . ."[336]

Foreword to the U.S. *Law of War Manual*

> *The law of war is a part of our military heritage, and obeying it is the right thing to do. But we also know that the law of war poses no obstacle to fighting well and prevailing. Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. For example, the self-control needed to refrain from violations of the law of war under the stresses of combat is the same good order and discipline necessary to operate cohesively and victoriously in battle. Similarly, the law of war's prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission. . . . Understanding our duties imposed by the law of war and our rights under it is essential to our service in the nation's defense.*

Through various assistance programs, the United States similarly supports training and compliance initiatives with the armed forces of other nations—including military exchanges, bringing foreign military lawyers to participate in courses at the U.S. Army JAG School, and State Department-funded training and capacity building programs—which ensures norm diffusion, interoperability, and the protection of the reputation of the U.S. military when conducting joint operations. The United States also recognizes the importance of compliance with IHL in promoting stability and preventing atrocity, viewing "compliance with international law, including humanitarian law and principles" as a facet of its stabilization goal under the 2020 Strategy to Prevent Conflict and Promote Stability,[337] and noting that the Department of Defense capacity building programs for foreign security forces[338] "help partner countries more effectively prevent and respond to atrocities . . . includ[ing] training on respecting the law of armed conflict [and] . . . the rule of law."[339] Its commitment to these issues has also been demonstrated in other ways, such as extensive vetting of partner forces (so-called "Leahy vetting") to ensure that U.S. funds do not underwrite individuals or groups with a history of engaging in violations.[340] While the United States' record is far from perfect in this

regard, these initiatives evidence a commitment by the United States to prevent violations of IHL as well as provide accountability when they do occur.

The Rome Statute is intended to reinforce compliance with IHL and accountability for violations[341] The majority of the war crimes cases that the Court has prosecuted or issued arrest warrants involve acts that are criminal under U.S. law as well, such as the deliberate targeting of civilians as a military strategy or tactic; the commission of rape or other acts of sexual violence during conflicts; the conscription of child soldiers; and deliberate attacks on peacekeepers or precious cultural property.[342]

F. Interpretation and Development of International Law (Including IHL)

The ways in which IHL, and states' understanding of their obligations under IHL, evolve and develop is also critical to the United States, and the ICC shapes and is being shaped by those developments. The United States has recognized that international criminal tribunals will inevitably influence the development of international law; for example, it submitted *amicus* briefs to the ICTY when important questions of law arose to help shape the development of the law and it has hailed the work of the ICTY as "establish[ing] key precedents in international criminal law."[343] Given its mandate, the ICC will inevitably address a range of IHL issues in which the United States has an interest. For example, the judgment of the Appeals Chamber in P*rosecutor v.* B*emba* addressed questions of superior responsibility, especially in the context of delegated and remote command over troops in coalition actions,[344] and questions of conflict classification (between government forces and an armed group receiving varying levels of foreign support) arose repeatedly in P*rosecutor v.* L*ubanga*.[345] The ICC's decisions may also bear on other important international law issues—for example, the obligation to investigate and prosecute crimes associated with armed conflict, the grounds on which officials may enjoy immunity for conduct that allegedly constitutes international crimes, the reach of various forms of responsibility, and the circumstances in which a state may be held responsible for the conduct of armed groups to which it may wish to provide support. These issues touch on core U.S. foreign policy priorities, such as potential assistance to members of the moderate armed opposition in Syria and arms sales to the parties to the conflict in Yemen. The Court's approach to these issues will inevitably influence the views of other members of the international community, particularly given that many states have updated their penal codes to include international crimes as defined by the Rome Statute and will inevitably look to the Court's jurisprudence for interpretive guidance.

Separately, the ICC Assembly of States Parties may take actions that affect the views states have of their obligations under customary international law. For example, U.S. participation in the negotiations around amendments to the Court's subject matter jurisdiction—adding the crime of aggression and several new war crimes in non-international armed conflicts—was in fact critical for helping to ensure that the outcome was compatible with U.S. positions. Future ASP discussions

could well be expected to address such important emerging issues as cyberattacks and the responsibility for large-scale environmental damage under international law. The United States thus has a strong interest in ensuring that its voice and perspectives are present in these discussions, and that it does not cede this forum to other states whose interests or interpretations of the law may not be aligned with those of the United States.

G. Promoting the Rule of Law

As a pillar of its foreign policy, the United States encourages the promotion of the rule of law globally as an essential part of free, open, prosperous, and stable societies. These principles align strongly with the objectives of the Rome Statute. The Court represents an effort by the international community to encourage sovereign national authorities to provide accountability when there have been violations of core norms and reflects a commitment by states to provide judicial accountability (not just political sanctions) when that fails. The foundational principle of the ICC—"that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and that the ICC "shall be complementary to national criminal jurisdictions"—also encourages domestic legal systems to take responsibility for investigating and, where warranted, prosecuting criminal conduct over which they have jurisdiction. To the extent that the Court encourages prosecutions of international crimes in domestic courts, and accountability more generally, its activities align with United States interests in promoting democratic, prosperous, and stable societies.

This commitment and contribution to supporting the rule of law is often most important in the very situations where the ICC is most likely to be active—in countries that recently experienced conflict or mass atrocity, that are emerging from periods of repression and authoritarianism, and in which domestic institutions or commitment to the rule of law may be weak or poorly instantiated. Indeed, at the 2010 Kampala Review Conference, the United States "renew[ed] its commitment to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide."[346] The United States has provided substantial support to strengthen the rule of law, including in countries where the ICC is conducting investigations,[347] and this support has frequently included or been linked with accountability efforts.[348] Congress has also noted the importance of this assistance, in certain contexts, in strengthening the mutual interests of the United States and counties recovering from conflict, and in combating foreign (including Russian) influence.[349]

H. Effective U.S. Diplomacy and "Soft Power"

As noted above, the United States' relationship with the ICC is both affected by, and is a part of, its wider approach to multilateral engagement and other international organizations. The great majority of U.S. friends and allies—including nearly every member of NATO and longstanding U.S.

partners in Latin America, Africa, and the Asia-Pacific region—are Rome Statute parties and are committed to the realization of the Court's mission. In the Task Force's consultations, foreign interlocutors repeatedly noted that the manner in which the United States addresses ICC-related issues frames their perceptions of the U.S. commitment on broader issues of accountability, human rights, and the rule of law, and the extent to which they can and should work cooperatively with the United States on such issues. It also affects their views of the United States as a responsible international partner in other contexts. In addition, U.S. attacks on the Court have been seen as empowering despots keen on undermining justice and rule of law efforts in their own countries.[350] This all remains true even in the face of doubts increasingly being expressed by ICC supporters about the Court's performance.[351]

To be sure, the diplomatic costs of opposing the ICC are not as high now as they were in the early days of the Court as traditional Court supporters have themselves come to have greater concerns about the Court's performance. However, the uniform rejection of the U.S. sanctions show that allies will defend the Court in the face of an attack that is deemed unwarranted or unfair. Many of our interlocutors contended that the bellicose stance of the Trump Administration made it more difficult to push for the kinds of reforms that the Court desperately needs as part of the IER and other reform efforts. They also noted that, at a minimum, the EO had forced traditional U.S. allies to distance themselves from the U.S. position.

In addition, the reality is that the United States is often engaged on the ground in many countries where the ICC is operating in one capacity or another. Active hostility toward the ICC deprives the United States of the opportunity to develop goodwill through positive engagement with ICC efforts in countries where investigations have broad popular support or are seen as important (and in some cases the only realistic) efforts to provide accountability for serious violations of international law and justice for victims. One interlocutor contrasted the current U.S. approach to the ICC with the ways in which U.S. support for the ICTY generated goodwill for U.S. forces on the ground in Bosnia-Herzegovina, where the tribunal was seen as an important venue to pursue justice. Another raised concerns that undifferentiated attacks by the United States on the Court risks alienating those parts of a country's population that are seeking justice for atrocities.

All told, the U.S. relationship with the ICC, and the way in which the U.S. pursues and expresses that relationship, indelibly affects the reputation of the United States as a supporter of accountability, human rights, and rule of law—important components of its "soft power." It is, quite simply, impossible to separate the U.S. approach to the ICC from other questions of international justice and accountability.

I. Conclusion

This discussion reveals that an array of U.S. interests intersects with the Court's activities. To be sure, developments in the Afghanistan and Palestine situations loom large in the recent responses of some policymakers and figured prominently in the Task Force's discussions. However, our consultations also highlighted that these are not the only U.S. interests implicated by the ICC and its activities, particularly given that the United States has over the years been broadly supportive of accountability in most of the other situation countries in which the ICC is involved. In addition, the U.S. relationship with the ICC does not exist in a vacuum. It is inevitably influenced by, and is a part of, the broader U.S. approach to working with, and within, international institutions. For the incoming Administration, this suggests that it will need to find a way forward that fits with, and contributes to, its more general approach to multilateralism, which by all accounts is intended to be based on a willingness to engage constructively on global challenges (including contentious issues), be respectful of the reasonable views of allies and friends, and place significant emphasis on advancing accountability, human rights, and rule of law. Any assessment of the options for pragmatic engagement by the United States with the ICC must thus take into account, and balance, a broad range of important interests.

VI. POLICY OPTIONS FOR PRAGMATIC ENGAGEMENT

Although the U.S.-ICC relationship has evolved over the years, driven largely by the salience and potency of competing considerations, the objectives and work of the Court implicate core commitments to justice and accountability that are foundational to U.S. foreign policy in many situations around the world. This brings into stark relief the need to chart a course that best balances the United States' ability to advance these interests and the desire to address countervailing risks. This diversity of perspectives on what is desirable when it comes to U.S. engagement with the Court, along with the pragmatic reality that different forms of engagement may be more or less feasible depending on relevant developments at different points in time, suggested to the Task Force that it should disaggregate the different forms of engagement that the United States could undertake. With this in mind, the recommendations that follow are broken into four categories:

(A) *Clearing the Air*: Steps that the new Administration should take immediately so as to reinforce its overall approach to multilateralism and international institutions; to underscore that the United States shares the goals of the ICC; and to help strengthen the credibility of the United States as a dependable voice on issues of accountability, human rights, and the rule of law.

(B) *Promoting Justice Regardless of Concerns About the* ICC: Actions that are independently constructive and consistent with longstanding U.S. values that should be undertaken regardless of the general state of its relations with the ICC at any given time.

(C) *Approaches for Dealing with the Three Biggest Issues*: Recommendations for how the United States could approach the situations in Afghanistan and Palestine, and the opportunities presented by the review and reform process being undertaken by Rome Statute Parties—which the Task Force sees as closely correlated.

(D) *Possibilities for Support for* ICC *Efforts in Particular Situation Countries*: Finally, a set of considerations for providing support to organs of the ICC for particular investigations and prosecutions in appropriate circumstances.

In developing these recommendations, the Task Force was mindful of its mandate to recommend options that are "pragmatic." The Task Force did not, for example, envision ratification of the Rome Statute by the United States as something that the new Administration would plausibly pursue. Indeed, almost none of the interlocutors with whom the Task Force spoke expected the United States to ratify the Statute (at least in the foreseeable future), although many would support it and some identified advantages to membership (including the benefits of participating in the work of the ICC as a state party). The Task Force has, however, considered

a range of options in light of the various positions adopted by U.S. agencies over the years, the historical engagement by the United States with the ICC and other international criminal tribunals, the lines of reasoning that have or have not proven persuasive with U.S. interlocutors and stakeholders in the past, and how elements the international community have reacted to past approaches. In short, we have been guided by the goal of recommending particular approaches that the Task Force believes could be expected to be effective at advancing U.S. interests.

A. "Clearing the Air" and Recasting the Tone

As noted above, the relationship of the United States with the ICC does not, and cannot, exist in a vacuum. In this connection, the Task Force believes it will be important for the new Administration to speak about the Court and its personnel in a manner that comports with its overall approach to multilateralism, international institutions, and working with friends and allies. This would entail maintaining a measured tone with which the United States speaks about the ICC and its personnel.

There will be many advantages of this general approach. In particular, U.S. attacks on the Court over the last four years—including President Trump's Executive Order determining that the ICC's work was an "unusual and extraordinary threat" to national security and Secretary Pompeo's imposition of economic sanctions on the ICC Prosecutor and one of her staff—have come at significant cost to the U.S. reputation and to this country's ability to be an effective voice on issues of importance to it (see Section IV.A). Numerous interlocutors with whom the Task Force spoke viewed the imposition of such sanctions—which are normally deployed against terrorists, weapons of mass destruction proliferators, narcotics traffickers, and perpetrators of heinous atrocities—as an affront, and told us that the net effect was to prompt numerous states, including many that had been expressing concerns about the Court's performance and the need for reform, to rally in defense of the Court. Statements that the Administration's goal was to dissolve the Court unless the Rome Statute is amended to eliminate jurisdiction over nationals of states that are not Rome Statute parties,[352] allegations for which no evidence was provided that the Court had been corrupted, references to the ICC as a "kangaroo court," and other consistently disdainful public rhetoric about the Court and its officials added to the feeling that the Court needed to be defended. Many of our interlocutors also believed that the Administration's approach made it more difficult to pursue reforms that would have been in the interests of the United States.

The Task Force believes that the revocation of Executive Order 13928 on April 1, 2021, and the associated lifting of the sanctions and visa restrictions was an essential first step. In an accompanying announcement, Secretary Blinken characterized the measures being revoked as "inappropriate and ineffective" and the Task Force agrees with Secretary Blinken that U.S. concerns are better addressed through engagement with stakeholders in the ICC process.[353]

However, there are also a number of further steps that the United States should take in the immediate term to reposition itself as a reliable, constructive, and respectful ally and partner in multilateral engagements. Perhaps most importantly: the Administration should publicly and decisively disavow any impression that its goal is the dissolution of the Court. Neither the actual termination of the Court's existence, nor the United States being seen as favoring such an outcome, is in the United States' interest. Too much of what the Court actually does serves U.S. interests, too many U.S. friends remain supportive of the Court and dedicated to its improvement, and—for all its flaws—there is no institution that could take its place. Attacks by the United States on the Court create a climate that make sympathy and receptivity for U.S. concerns less likely. In addition, a hostile U.S. posture provides cover for autocratic rulers to undermine the rule of law, attack domestic checks on their power, and resist international efforts to promote accountability.

The new Administration should also make clear that it will cease the vitriolic rhetoric that has marked the last four years. In particular, the Administration should avoid *ad hominem* allegations about corruption or bad faith, at least unless it is prepared to come forward with persuasive evidence to back up its claims if particular situations arise. In addition, the Administration should also clearly repudiate the approach to pardons and commutations of sentences granted to U.S. servicemembers and military contractors accused or convicted of war crimes, which numerous interlocutors believed "did great damage" to U.S. credibility on accountability and the willingness of other states or organs of the ICC to defer to U.S. investigations.[354] None of this requires the United States to abandon its concerns about the Court, but there is no reason that it cannot put forward its concerns in a reasoned manner that is respectful of the good faith views of the numerous friends and allies of the United States that are Court supporters. Similarly, while the United States should not proceed on the hope that the Rome Statute may be amended to eliminate jurisdiction over nationals of states that are not parties to the treaty, given the broad resistance to this within the ASP and the statutory barriers to any treaty amendment, there are other opportunities for the United States to seek to address a number of its concerns with the Court.[355]

B. Steps for Promoting Justice Regardless of Concerns About the ICC

There are a number of steps that the Task Force believes that the United States should undertake no matter the state of the relationship between the United States and the ICC. While they may be supportive of the Court's goals, these measures advance U.S. interests that exist independent of the ICC and should be pursued as a matter of course.

1. Enhance General Support for International Justice Efforts

The United States has a longstanding commitment to the project of global criminal justice. This promotion of accountability for international crimes has continued through periods in which the United States was more engaged with the ICC as well as periods in which it was more skeptical

or hostile. Even during the last administration when relations with the Court reached a new low, Congress passed a number of important pieces of legislation aimed at advancing international justice in a number of ICC situation countries, generating more information about the risk of mass violence around the globe, and sharpening the United States' atrocities prevention and response tools. Likewise, U.S. officials pressed for cooperation with the Kosovo Specialist Chambers, the only *ad hoc* justice institution still in full operation. Interlocutors from across the political spectrum stressed that the United States should continue to manifest in word and deed its principled determination that those responsible for atrocities should be held to account. Indeed, a number of our interlocutors from foreign governments led by reiterating that they want the United States to be an ally in the global fight against impunity.

The interests of the United States in accountability and the rule of law extend beyond the ICC. The United States has devoted considerable energy and resources to promoting the principle of accountability, and it should continue to do so. While the ICC looms large in many discussions of international accountability, even the Court's strongest supporters recognize the importance of delivering justice at or closer to the local level. The ICC can only ever be one small part of a larger global accountability effort, which includes hybrid institutions, national courts, and any number of locally tailored efforts. The Rome Statute itself its predicated on the primary "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and that accountability for international crimes "must be ensured by taking measures at the national level and by enhancing international cooperation." The United States should not let its views on that one component (whatever they may be at any point in time) overshadow or compromise its commitment to the whole.

Indeed, the United States has a commendable track record of supporting local, mobile, and hybrid courts in the DRC and CAR as well as international investigative mechanisms, such as those for Iraq, Syria, Myanmar, and Guatemala, and funding civil society groups in a wide range of countries to enable vital work documenting atrocity crimes and advocating for accountability. The Task Force recommends that the United States continue its longstanding support for such efforts to promote accountability for international crimes, including local investigations, documentation, and victim rehabilitation by domestic, hybrid, and other international institutions. Such support should proceed regardless of the state of U.S.-ICC relations and regardless of whether the ICC is also operating in a particular situation country.

2. Build Accountability into the President's National Security Strategy

As noted above, prior National Security Strategies have stressed the threat that mass atrocities pose to U.S. national security and affirmed that the prevention of atrocities and accountability for the perpetrators of international crimes are squarely in the U.S. national interest (see Section V.C, *Text Box - References to Atrocity Prevention and Accountability in National Security Strategies*, above). The new Administration should explicitly maintain and strengthen this focus when it produces its first

National Security Strategy. Reiterating this commitment at the presidential level would reinforce the U.S. commitment to global justice and stability, and would encourage interagency coordination and empower the functional offices whose mandates involve the promotion of international justice.

3. Attend and Participate in the ASP and Other Relevant Meetings and Conferences

The Task Force recommends that the United States participate fully in the annual meetings of the ICC Assembly of States Parties and other ICC-related international meetings and conferences. The meetings present a clear opportunity to represent the views of the United States and to understand the views being expressed by other states, and by Court actors, so as to best position itself to formulate and articulate policies and positions in a manner that will advance the interests of the United States. As exemplified by the outcome of U.S. engagement on the crime of aggression, the Task Force believes it makes little sense for the United States to deny itself the opportunity to understand the views of others and to explain its positions in ways most likely to be influential simply because it has concerns—even serious ones—about the Court's activities.

At these gatherings, the United States should be represented by an official at an appropriately senior level (*e.g.*, the Ambassador-at-Large for Global Criminal Justice and/or the State Department Legal Adviser) to be able to share U.S. views, speak credibly on the importance the United States places on accountability, highlight matters of common interest, articulate U.S. priorities regarding global criminal justice, and voice any concerns. Such activities are not inherently "supportive" of the Court, but they position the United States to better advance its views and interests and avoid ceding a forum in which other states may assert or pursue their interests unopposed. Time and again, we have seen that there are opportunity costs to not attending those gatherings. As Secretary of State Blinken has said, "if [the United States is] not in there and present . . . helping to write the rules and shape [international norms], . . . then either someone else is going to do it in our place, or maybe just as bad, no one does it and you have chaos."[356]

4. Preserve Political Capital When It Comes to Diplomatic References to the ICC

The United States should rationalize its posture toward references to the ICC in resolutions in the United Nations and other multilateral fora. The Task Force recommends that the United States should not withhold support for resolutions or declarations supporting international justice simply because those resolutions mention the ICC. Nor should it insist on the deletion of all references to the ICC in resolutions that are devoted to issues that the United States cares about, such as preventing the recruitment and use of child soldiers or ensuring documentation for international crimes being considered by the Court. Doing so wastes U.S. political capital, which can be better used to pursue concrete U.S. national interests. Such semantic battles too often divide the United States from its allies and align it with states that are hostile to U.S. values of justice, accountability, and the rule of law. To be sure, there may be circumstances in which a reference to the ICC would be inappropriate or counter-productive, but more generalized references in connection with

resolutions devoted to the imperatives of justice and accountability, or the use of long-agreed language in contexts in which the ICC's role is not controversial or is otherwise in U.S. interests, should not provoke U.S. ire.

5. Actively Follow the Court's Substantive Jurisprudence

Whatever its views about the Court, the United States has a strong interest in monitoring the ICC's substantive jurisprudence. There is no question that the Court's caselaw is highly influential and considered authoritative by a number of states. In the past several years, as mentioned above in Section V.F, the Court has issued numerous decisions that bear on the interpretation and application of international humanitarian law. The Court's decisions inevitably affect the way at least some countries, including allies with whom the United States cooperates militarily, view such substantive legal issues and their understanding of their legal obligations. It is plainly in the interests of the United States to follow the caselaw closely, and to be in a position to react as appropriate. This would include engaging with legal counterparts in other states on issues with the potential to affect the United States or with respect to which the United States may have a strong interest.

6. Pursue Possibility of Sanctions Against Persons Sought by the ICC

The United States should support the imposition of sanctions in appropriate cases against individuals indicted by the ICC. Many of these individuals are likely to be persons whom the United States would support sanctioning for their role in the commission of international crimes. Indeed, the United States has sanctioned at least thirteen individuals for whom the ICC had issued arrest warrants. The United States should certainly not be in the position of declining to impose sanctions against persons that would otherwise be deserving of them simply because they have been subject to charges before the ICC. Depending on the circumstances, the United States could work to impose such sanctions on a multilateral basis through the Security Council, or under domestic authorities, *e.g.*, in connection with the Global Magnitsky program and similar authorities.[357] In cases in which it imposes sanctions under domestic authorities, the United States should to the extent feasible work with friends and allies to impose similar sanctions to magnify their impact.[358]

7. Implement a No Contacts or Restricted Contacts Policy

Similarly, the United States should consider developing a no, or restricted, contacts policy with respect to individuals subject to an ICC arrest warrant (and perhaps a summons to appear as well). A number of allied states, including the United Kingdom and the European Union, have such policies,[359] as does the United Nations.[360] These guidelines reflect that the indictment of a person by the Court is based on a finding that "there are reasonable grounds to believe that the person has committed" Rome Statute crimes, and is therefore normally a good indication that the United States should at least consider eliminating or restricting contacts. There would, of course, need to

be appropriate exceptions—*e.g.*, for essential contacts or other situations in which application of the policy would be unwarranted.

8. Task U.S. Diplomatic Missions to Report on Relevant ICC Developments and Views of Host States About the Court

The ICC is likely to be a politically significant actor in any country where it operates, and the U.S. Government thus has an interest in understanding its activities. The Task Force accordingly recommends that the State Department consider tasking relevant U.S. diplomatic missions to report on developments related to ICC activities. This could include reporting from missions in countries that are under investigation or preliminary examination (or whose nationals are implicated in such proceedings) on the reaction of host state governments and members of the public and on related accountability and transitional justice initiatives underway in the national judicial systems, including the rehabilitation of survivors. It could also include conveying the views of U.S. partners and allies on the ICC's activities and on the ongoing process of review and reform.

Similarly, the Task Force recommends that the United States should be actively gathering information from countries that are undergoing, or are at risk of, mass violence and may fall within the jurisdiction of the Court. As manifested by legislation mandating greater information sharing with Congress, such information will be critical as the new Administration develops and articulates its policy toward the ICC as well as toward atrocities prevention and accountability more generally.

9. Provide Reporting to Congress on Activities Undertaken by ICC in Other Situations and Enhance Opportunities for Engagement Between the U.S. Government and the ICC

The same is true for other reporting and briefings that the State Department provides regarding developments in countries in which the ICC is playing or considering playing an active role. The State Department should be straightforward in its assessments of these developments, and relevant congressional committees should encourage the Department to provide briefings on the role being played by the ICC and its effect on the broader situation in that country. The United States can maintain any concerns about particular Court actions while still recognizing that the ICC plays a valuable role in many of the places in which it operates, and indeed is often welcomed by the governments of, and by survivors in, states with which the United States is partnering.

In this connection, the U.S. Government should also fully implement the Elie Wiesel Genocide and Atrocities Prevention Act and related legislation aimed at atrocities prevention and response. This innovative legislation was signed into law in 2019 to reflect Congress' recognition of the critical importance of U.S. Government efforts at atrocity prevention. Among other things, the legislation requires annual reports from the Executive branch on efforts to prevent and respond to atrocities, a description of countries considered to be at risk, and a consideration of analyses, reporting, and policy recommendations produced by civil society, academics, and other non-governmental organizations and institutions. Past reports under this legislation have noted

the importance of efforts to hold accountable those responsible for atrocities in a number of countries in which the ICC has been pursuing investigations and prosecutions, but have not mentioned the ICC.

The Task Force believes it would be beneficial for the State Department, in preparing future reports, to take a straightforward approach to mentioning the role of the ICC in its reports under the legislation and other communications with Congress. This could both help provide a fuller understanding to the public and to the congressional committees for which the reports are intended of the landscape of efforts to prevent and punish international crimes, and could also help bring greater focus to the question of the extent to which ICC involvement in various countries aligns with United States policy objectives in promoting accountability. All this could be undertaken irrespective of the extent to which the United States supports or opposes the ICC's work as a general matter.

More generally, the Administration and relevant congressional committees should consider encouraging greater contacts between Executive branch agencies and congressional members and staff, on the one hand, and ICC representatives (from across the Court's organs) on the other. Such contacts—at the principal and working levels—could play a useful role in demystifying the ICC's work and build greater appreciation for the contributions that it is making to advancing the cause of justice in the great majority of situations in which the Court is operating. In a similar way, the Administration and congressional committees could consider the desirability of inviting relevant congressional staff to attend the annual meeting of the Assembly of States Parties (as was done for the 2010 ICC Review Conference in Kampala).

10. Accept Information and Evidence from ICC

Article 93(10)(c) of the Rome Statute authorizes the Court to provide assistance to non-member states that are investigating or prosecuting international or other serious crimes. Interlocutors who have worked in other international criminal tribunals report that their institutions provided assistance to U.S. authorities, including in connection with Immigration and Customs Enforcement actions (*e.g.*, charges of immigration fraud when the individual denied involvement in atrocities when receiving an immigration benefit) and Treasury Department sanctions. Given the range of situations that the ICC is investigating, it may well be in a position at some point to provide similar information and evidence to support a range of U.S. enforcement actions, including Department of Justice prosecutions for human trafficking, terrorism, torture, war crimes, piracy, or other international crimes. In principle, the United States should stand ready to receive such assistance if a case arises in which the Court is able and willing to provide such assistance.

11. Maintain the Office of Global Criminal Justice and the Position of Ambassador-at-Large

The Task Force recommends that the United States continue to support and empower the State Department's Office of Global Criminal Justice, including by the expeditious appointment

and confirmation of a new Ambassador-at-Large for Global Criminal Justice. In 2017, there was speculation that the Trump Administration would shutter the office.[361] This prospect received significant negative press and expressions of concern from counterparts responsible for atrocity prevention and accountability issues in the foreign ministries of numerous friendly states; it also sparked a critical countermovement within civil society and in Congress.[362] In the face of such considerable blowback, then-Secretary of State Rex Tillerson announced his decision to maintain the Office.[363]

The Office should retain its autonomy within the Undersecretariat for Civilian Security, Democracy, and Human Rights (the "J" Undersecretariat) given that its mandate and perspective are unique and highly specialized. The U.S. Government needs an empowered Ambassador-at-Large, with her or his own voice to speak forcefully and effectively on behalf of the United States on accountability issues and, internally, to brief and communicate with the Secretary as a peer to other Assistant Secretaries and equivalents.[364] The fact that the United States is the only country with a dedicated ambassadorial-level position enables the United States to address these issues in a manner that ensures the attention of other governments, victims and survivors, and the general public.

The Office should also ensure its personnel have the requisite technical expertise and also a regularized employment status to ensure continuity and efficacy within the interagency and multilateral fora. Maintaining adequate personnel is particularly important given that Congress has provided increased programming funds to advance the mandate of the Office. The Office of Global Criminal Justice will remain an important liaison point for such programming funds and U.S. policy in atrocity prevention and response more generally.

12. Assure Steady and Predictable Funding for Ad Hoc and Hybrid Tribunals and Other Local and International Justice Efforts

The United States has regularly funded international justice efforts, as discussed above (see Sections I and V.D), and should continue to do so. Past efforts include the Extraordinary African Chambers, which prosecuted Hissène Habré of Chad for the commission of grave international crimes while he was President of Chad.[365] The United States provided direct funding to the Special Court for Sierra Leone[366] and Extraordinary Chambers in the Courts of Cambodia[367] and supported the disbursement of UN subvention grants for both institutions when voluntary contributions ran short.[368] The United States has also funded local efforts, including mobile courts and other transitional justice mechanisms. The United States should continue to capacitate such efforts, perhaps out of a standing justice fund that could be accessed as needed. In 2020, for example, Congress directed $10 million to the State Department's Office of Global Criminal Justice (GCJ) for programming, a positive development given difficulties the United States has faced in the past in ensuring a consistent flow of funding for otherwise cost-effective alternatives to big, expensive

international courts.[369] The Task Force recommends that Congress continue and build upon this line of funding.

In addition, the new Administration should consider the impact of recent appropriations legislation devoted to funding international justice efforts.[370] If events unfold in a manner that would make use of funds in connection with the work of the ICC an attractive option, the new Administration may want to review this legislation or any further legislation that may be needed.

13. Support Domestic Proceedings Involving International Crimes

Relatedly, the United States should continue to support domestic legal proceedings, criminal and civil, against persons credibly accused of the commission of international crimes, including through principles of complicity and command responsibility. The United States has long been committed to strengthening states' domestic capacity to undertake trials for genocide, crimes against humanity, and war crimes.[371] Continuing to support such domestic initiatives will help ensure that legal action proceeds at the local level where possible, with all the attendant benefits, including logistical advantages (such as proximity to witnesses and other evidence), enhancing the accessibility of justice, capturing the expressive function of the law, and fostering the rule of law.[372] Support for such initiatives will also advance the "complementarity" norm on which the ICC is premised, namely that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and that "their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[373]

14. Continue to Issue Rewards Under the War Crimes Rewards Program

The United States should also maintain and expand its War Crimes Rewards Program. The program has time and again served as a key U.S. contribution to ensuring that those credibly accused of the most serious international crimes face justice. It is a high-profile and tangible signal of the United States commitment to accountability, and its continuation helps underscore that support within the United States for the underlying principle of accountability is deeply bipartisan. Thus, when the program was extended in 2013 to enable rewards to be offered for information leading to the arrest, transfer, or conviction of individuals to any international criminal tribunal, including the ICC, members of the House of Representatives described this as "a critical tool," "a responsible, bipartisan bill that will significantly enhance our ability to fight transnational organized crime and grave human rights abuses," and "a technique that works."[374] Then-Secretary of State John Kerry attested to the practical impact of the Program:

> Can it work? You bet it can. Two weeks ago, one of the most notorious and brutal rebels in the DRC voluntarily surrendered to our Embassy in Rwanda shortly after being named to the War Crimes Reward Programs list. Now Bosco Ntaganda is charged by the International Criminal Court with war crimes and crimes against

humanity. I would have been announcing a reward for him today, but instead, he is sitting in a cell at The Hague.[375]

Especially in light of the bipartisan support for this initiative, the United States should continue to fund and implement this program. In this connection, the United States should review all suspects for whom the ICC has issued arrest warrants and who remain at large to determine whether to offer rewards for information leading to their arrest, transfer, or conviction. This is particularly appropriate in cases in which the United States does not object to the basis on which the ICC is exercising its jurisdiction, such as those involving nationals of a state party or whose arrest is sought in connection with a situation referred by the UN Security Council.

15. Support Victims and Survivors of International Crimes

Support for the victims and survivors of atrocity crimes, like accountability for perpetrators, enjoys broad bipartisan support in the United States (see Sections II.C, III.D.3–4, and V.C above). The United States should remain committed to this work, including by looking for opportunities to provide in-country assistance and rehabilitation for victims of atrocity crimes and supporting organizations and legal representatives that assist victims in seeking justice.

Giving voice to survivors featured prominently in the negotiations of the Rome Statute, and is reflected in a range of provisions, including its Victims and Witnesses Unit, provisions providing for the participation of victims in proceedings, the power of the Court to order reparations against convicted persons, and the contemplation of a Trust Fund for Victims (TFV) "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."[376]

The United States' ability to support numerous ICC initiatives is limited by the FRAA, which prevents the United States from providing funds directly to the ICC.[377] However, under the Rome Statute, the Trust Fund for Victims is an entity that is distinct from the organs of the Court. Unlike the ICC, it was established by a decision of the Assembly of States Parties, rather than directly by the Rome Statute.[378] Further, the TFV is governed by an independent five-member Board of Directors and not by the Court personnel.[379] The Trust Fund has two distinct functions: managing reparations orders issued by the judges and providing separate assistance programs in victimized communities in ICC situation countries. The reparations orders are linked to, and dependent on, an ICC guilty verdict and reparations award, but the assistance programs are independent of any Court (and, in particular, any prosecutorial) activity. In other words, while any assistance provided must go to victims of crimes that are within the jurisdiction of the Court, the TFV's assistance programs are not contingent upon any one investigation or prosecution. To the contrary, the assistance mandate was designed to be both more responsive to survivors' needs and more expansive than the prosecutorial and judicial processes.[380]

The focus of the TFV's assistance programs is providing physical and psychological rehabilitation, and material support, to individuals and communities that have suffered from atrocity crimes.[381] This assistance dimension is entirely consistent with U.S. interests and its past practice in supporting the rights of victims and survivors. A number of the TFV's implementing partners are (or have been) U.S. entities, including the Center for Victims of Torture, Health Right International, and World Relief. And the United States does not object to the basis for the Court's jurisdiction in any of the countries in which the Trust Fund is operating. To the contrary, the situations in which the TFV has assistance programs underway are amongst those where the United States has been heavily engaged in supporting accountability, the rule of law, and support for victims: the DRC, Uganda, and the Central African Republic.[382] For example, in Uganda, the TFV priorities include psychological and material support for ex-child soldiers, abducted persons, and victims of sexual and gender-based violence. In addition, it is helping to provide prosthetic limbs for individuals who suffered amputations in LRA attacks. In the CAR, the TFV's current pilot project is focused on the long-term impact of sexual and gender-based crimes, including providing medical care for those with HIV/AIDS and education for the children of victims and survivors.

Making a contribution to the Trust Fund for Victims, as called for by the G-8 in 2013,[383] provides the United States with an opportunity to send a tangible signal of its dedication to the underlying goals of the ICC and to confirm that any concerns that it has with the Court do not detract from its whole-hearted commitment to victim and survivor communities. The United States can make such a donation without supporting, providing funds to, or even engaging directly with the Court itself. Contributions to the Trust Fund can also be earmarked for specific projects, issues, or communities, thus ensuring that they are used in situations that the United States prioritizes.[384] As such, the United States could provide funding for assistance that is closely aligned with other U.S. projects, for example support to survivors of sexual and gender-based violence[385] in the eastern DRC. Or it could encourage the Trust Fund to provide resources to expand its assistance programs into other areas where the United States sees a particular need, for example in Darfur to take advantage of, and advance, the political developments in Sudan.

As such, the Task Force recommends that the United States review the operative legal authorities to determine whether it can lawfully provide contributions to the Trust Fund for Victims, and actively consider doing so to the extent possible. In the event that direct funding is foreclosed for whatever reason, the United States should continue to empower and capacitate the TFV's implementing partners that are focused on the psycho-social and economic rehabilitation of communities wracked by violence.

16. Contribute to Witness Protection Measures

The United States should continue to offer protection to vulnerable witnesses who are at risk as a result of their willingness to assist in the investigation and prosecution of atrocity crimes, including in appropriate cases in which those investigations and prosecutions are conducted by

the ICC. Many interlocutors from across the U.S. Government observed that regardless of the U.S. stance toward the Court, protecting such vulnerable individuals presents an independent moral imperative. Witnesses are the soft underbelly of the international justice system and are frequently the subject of intimidation, threats, and even violence. It takes great courage to speak truth to power, and such individuals deserve U.S. support and protection. The United States should also review the content and interpretation of the legislation restricting U.S. cooperation with the ICC, so that by offering protection the United States does not impede the very investigations or prosecutions to which the witnesses contribute, for example by preventing witnesses from being interviewed in, or providing remote testimony from, U.S. territory.

17. Enact Crimes Against Humanity and Other Atrocity Crimes Legislation

The Executive Branch and the Congress should strongly consider adopting legislation that would permit the prosecution of persons within the jurisdictional reach of the United States who stand accused of committing crimes against humanity.[386] The United States has legislation providing a basis for criminal prosecution of war crimes, the use of child soldiers, torture, a range of terrorism crimes, trafficking, slavery and forced labor, piracy, and genocide, but not crimes against humanity. Indeed, at the time of Under Secretary Grossman's May 2002 speech comprehensively setting out the Bush Administration's objections to the ICC, the Administration stated emphatically that it would "take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice" (see Section I, *Text Box - Excerpt from Speech by Under Secretary of State Marc Grossman* (May 6, 2002), above).[387] Enactment of such legislation would help vindicate this promise, serve as a powerful reaffirmation of the United States' support for accountability, strengthen the ability of the United States to assert the primacy of its domestic jurisdiction over any attempts by the ICC or foreign courts to investigate or prosecute cases that may arise, and guard against the United States being used as a safe haven by persons alleged to have committed crimes against humanity. Along the lines of the recently adopted European Union human rights sanctions regime,[388] Congress should also consider explicitly including in legislation responsibility for all atrocity crimes, regardless of the status of the victims, among the grounds on which the President can impose sanctions, possibly in connection with the anticipated reauthorization of the Global Magnitsky Human Rights Accountability Act.[389]

In addition, the United States should consider revising its war crimes statutes to better reflect the grave breaches regime set forth in the 1949 Geneva Conventions, which require states to exercise criminal jurisdiction regardless of the nationality of the perpetrator or victim. The existing legislation only allows for the assertion of criminal jurisdiction when the victim or perpetrator is a U.S. national, thus raising questions about whether the United States is compliant with its obligations under the Conventions. Amending the War Crimes Act would also bring it into line with other U.S. international crimes legislation, which allows for the exercise of jurisdiction when the perpetrator is found or present in the United States.[390] Finally, Congress should ensure that

appropriate legislation is in place so that U.S. courts can adjudicate the doctrine of superior responsibility, which at the moment is only applicable before U.S. military commissions.[391]

Together, these gaps hinder the reach of the United States' prosecutorial authorities and have led to instances of impunity and incomplete accountability. For example, some perpetrators have faced prosecution not for their substantive crimes but for violations of immigration law—a distant second-best option when crimes against humanity are at issue.[392] Given the strong and bipartisan record of recent congressional action supporting accountability for international crimes and the prevention of atrocities (see Section II.C above), these proposed enactments may well find fertile ground on the Hill. The Task Force therefore recommends that both the Executive branch and the Congress actively pursue appropriate legislation to achieve these objectives.

In addition to these domestic enactments, and notwithstanding the difficulties experienced by the United States in ratifying multilateral treaties, the United States should give serious consideration to and, ideally, promote the adoption of a treaty on the prevention and punishment of crimes against humanity, along the lines of the draft articles produced by the International Law Commission and currently under consideration before the General Assembly.[393] In addition, the United States should likewise contribute to diplomatic processes to produce a proposed treaty on Mutual Legal Assistance for all atrocity crimes under consideration by some states.[394] Both of these treaty efforts can play an important role in plugging significant gaps in the global treaty framework around atrocities crimes. As such, the United States should support these efforts even if domestic ratification may not occur or may take significant time.[395]

18. Prosecute International Crimes Domestically

As discussed, Congress has enacted a suite of statutes criminalizing a variety of crimes of international concern.[396] In many cases, some foreign nationals who are present in the United States and are credibly accused of international crimes are prosecuted for immigration offenses and/or deported, often due to the limitations of U.S. law discussed above. This includes instances when it might have been possible to hold them accountable for their underlying crimes rather than returning them to a national system that lacks the legal framework, juridical capacity, or political will to prosecute for the substantive crime or where the suspect's reintroduction could exert a destabilizing effect or result in the intimidation or retraumatization of victims. The Task Force recommends that when individuals accused of international crimes are found on U.S. territory, the Department of Justice endeavor to prosecute them for their substantive crimes rather than relying exclusively on immigration remedies.

C. Dealing with the Biggest Issues: Afghanistan, Palestine, and Issues Implicated by the Review and Reform Process

This Section includes recommendations by the Task Force regarding what it considers to be the most salient issues on the current horizon for the United States-ICC relationship, all of which are in some ways interrelated. Potential investigations into the situations in Afghanistan and Palestine obviously present complex considerations for the Biden administration and Congress, but the United States should treat these situations as opportunities to emphasize both that the United States cares about accountability and that the Court will have a better chance of succeeding if the OTP and the judges focus the Court's resources where they stand to do the most good.

1. The Situation in Afghanistan

In considering how the United States should respond to the Court's investigation in Afghanistan, the Task Force believes that it is important to bear three points in mind.

First, at the time of writing this Report, no case has been commenced against U.S. personnel linked to the Afghanistan situation, which covers an enormous crime base implicating the Taliban, Afghan national forces, and other non-state armed groups, such as the Haqqani Network—crimes that the Prosecutor's own submission recognizes are ongoing and far more extensive in scale than the allegations of torture against U.S. personnel during the early 2000s (see Section IV.A). In the Task Force's opinion, the United States should not treat the situation as if actual cases against U.S. personnel are underway or a *fait accompli*. Accordingly, the Report includes recommendations on how the United States might make a persuasive case that the OTP and other Court actors should not expend their investigative, prosecutorial, or judicial resources on cases against U.S. personnel, building on opportunities presented by the current openness among Rome Statute parties and within the Court to constructive ideas for reform, and doing so in a manner that addresses not only the current situations but the risk of the ICC investigating or prosecuting U.S. personnel in the future.

Second, at least some of the conduct that is at issue constituted torture or other war crimes under international law. President Obama bluntly conceded as much in August 2014:

> [W]hen we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line. And that needs to be . . . understood and accepted.[397]

This inevitably frames the way in which many observers see the situation now. At the same time, the new Administration, like each of its predecessors, has already stated its strong opposition to an ICC investigation of these activities,[398] and there are a range of good-faith arguments that the United States can put forward to support its position that the ICC should not investigate or prosecute U.S. personnel in this situation. This Report recommends principled steps to address

the possibility of the Court proceeding with a case against a U.S. person in connection with the Afghanistan situation. However, in doing so, the Task Force recognizes that it is important not to minimize or trivialize the abuses that occurred.

Third, the nature of and reaction to the Trump Administration's critiques of the ICC following the Court's steps to open an investigation of Afghanistan fell into three categories—

(a) the ICC Prosecutor and her staff are corrupt and politicized;

(b) the ICC should not assert jurisdiction over nationals of states, like the United States, that are not party to the ICC treaty; and

(c) the United States takes appropriate steps to investigate and prosecute its own.

With respect to the first category, given the serious nature of the abuses and the substantial evidence, the fact that the ICC Prosecutor has concluded there is a basis for investigating the events is hardly proof that she is corrupt or politically motivated against the United States. If anything, *ad hominem* attacks of this nature are likely to obscure better-reasoned defenses that are expressed in a non-polemic manner, or to lead listeners to conclude that the United States lacks a reasoned defense, unless it can back up its claims. Absent actual evidence of the prosecutor's corruption—which the previous Administration claimed existed but never made available—this type of messaging has proved unpersuasive with other states, places the United States in an unflattering light, and should not be pursued. Indeed, maintaining civil relations with Court actors and a constructive posture toward issues of accountability generally will be crucial in fostering an environment in which there is a receptivity to arguments such as those that the Report proposes and is critical to the United States' larger commitment to effective multilateralism and working with friends and allies on shared challenges.

The second category described above encompasses arguments—put forward by each Administration, since Rome, including now the new Biden Administration[399]—that it is impermissible, or just wrong, for the ICC to assert jurisdiction over the nationals of states, like the United States, that are not parties to the Rome Statute.[400] It is often unclear whether the United States is putting this forward as a legal argument (*i.e.*, it would be unlawful under international law for the ICC to assert jurisdiction over such nationals) or as a policy argument.[401] Either way, such arguments have consistently proven to be unpersuasive, even to the United States' closest allies. The Rome Statute clearly provides that the Court can exercise jurisdiction over such persons if the conduct in question occurred in the territory of a state party, and Afghanistan became a party in May 2003. To be sure, as a non-party, the United States is entitled to contest the Rome Statute's jurisdictional regime. The problem, however, is that the United States has never deployed a persuasive argument as to why states, which under international law indisputably have general authority to exercise jurisdiction with respect to conduct in their territory,[402] are precluded from becoming party to a treaty under which they essentially delegate that authority to the ICC. For its part, the 2009 Task Force reviewed a range of

arguments and provisions, and concluded that it "does not consider the ICC's jurisdiction over nationals of non-party States to be in conflict with principles of international law."[403] Even if the Administration decides—as the Task Force assumes is likely—to continue to assert arguments against the ICC's exercise of jurisdiction over nationals of non-parties, it is certain that the Court will disagree and all-but-certain that U.S. allies will not help U.S. diplomats or lawyers advance this as a line of legal reasoning. Thus, if the goal is to be persuasive, the Administration needs to develop and articulate the other reasons that it believes the Court should not pursue investigations of U.S. personnel in Afghanistan.

This brings us to the third category: that the United States has done enough to address allegations of detainee abuse.[404] The Task Force's recommendations build on this line of argument, as the United States can contend that, particularly considering the totality of the steps that it has taken to address the allegations and prevent their recurrence, together with the scale of the abuses and the other challenges facing the ICC, these are not matters that the ICC should pursue or prioritize. Many of our interlocutors offered that the easiest way to avoid the ICC's jurisdiction is to address allegations against U.S. personnel in domestic proceedings. Assuming the new Administration concludes that the cons of reopening the Justice Department investigations that were conducted during the Obama Administration outweigh the pros, it should consider articulating the reasons for such a conclusion.

Given the very different circumstances surrounding the allegations against DOD personnel and CIA personnel, we address the two sets of allegations separately in this Section.

(1) Allegations Related to DOD. With respect to the allegations against DOD personnel, the Prosecutor's submission states that there is a reasonable basis to believe that "at least 54" persons were subject to detainee abuse by DOD personnel in Afghanistan.[405] Thus, the evidence that the Prosecutor relied on in seeking authorization to investigate implicitly reflects that the abuses alleged to have been committed by DOD personnel are relatively limited. At the same time, many of the "techniques" that the Prosecutor says there is reasonable basis to believe were used (including some of the most severe measures employed) rely on evidence that actually relates to the CIA.[406] In addition, the Prosecutor's conclusion that the use of torture and other prohibited detainee abuse reflected a plan or policy within DOD is not at all self-evident, and even the Prosecutor's own assessment is that any such policy appears to have emerged at a much lower level and that the abuses were "inflicted on a relatively small percentage of all persons detained by US armed forces . . . during a limited time period . . . ."[407] Indeed, while noting that "'[t]here is both institutional and personal responsibility at higher levels,'"[408] the sources of information upon which much of the Prosecutor's conclusions are based—the independent Church Report and Schlesinger Report—both concluded that abuses occurred but that the DOD had not promulgated an abusive interrogation policy (*See Text Box - The Church and Schlesinger Reports*).

The Church and Schlesinger Reports.

The Navy Inspector General, Vice Admiral Albert T. Church, had a mandate to "[i]dentify and report 'on all DoD interrogation techniques, including those considered, authorized, prohibited and employed, identified with, or related to'" a series of operations, including Operation Enduring Freedom in Afghanistan. The Church Report stated that:

> *"An early focus of our investigation was to determine whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees. We found that this was not the case. . . . We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible."*
>
> *Review of DoD Detention Operations and Detainee Interrogation Techniques ("Church Report"), at 3 (Mar. 2005).*

An independent panel chaired by former Secretary of Defense James Schlesinger had a mandate to "provide independent professional advice on detainee abuses, what caused them and what actions should be taken to preclude their repetition." The panel found:

> *"Abuses of varying severity occurred at differing locations under differing circumstances and context. They were widespread and, though inflicted on only a small percentage of those detained, they were serious both in number and in effect. No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities. Still, the abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels."*
>
> *Independent Panel to Review DOD Detention Operations, Final Report of the Independent Panel to Review DOD Detention Operations ("Schlesinger Report"), at 5 (Aug. 2004).*

These two investigations and reports are amongst a series of at least "13 senior-level reviews and investigations related to detention and interrogation operations or training in the Global War on Terrorism" which were directed or conducted by the Department of Defense in addition to the congressional investigations and reports by the Senate Select Intelligence Committee and the Senate Armed Services Committee. Office of the Inspector General of the Department of Defense, Review of DoD-Directed Investigations of Detainee Abuse, Appendix B, at 32 (Aug. 25, 2006).

The Prosecutor's application itself cites to reports of a range of DOD investigations and disciplinary proceedings, including over six hundred criminal investigations (covering Iraq and Afghanistan), over seventy investigations of detainee abuse by military personnel in Afghanistan leading to trials by courts-martial, and at least fifty-four persons convicted by courts-martial for detainee abuse in U.S. custody in Afghanistan, Iraq, and Guantánamo Bay.[409] The Prosecutor appears to have discounted some or all of these for the purposes of her admissibility assessment, arguing that the United States did not provide sufficient detail regarding these actions to discharge what the Prosecutor considers to be the United States' burden of proof to show that a case is inadmissible.[410] The Prosecutor also avers that—"[t]o the extent discernible"—the investigations and prosecutions "appear to have focused on alleged acts committed by direct physical

perpetrators and/or their immediate superiors" rather than on "those who developed, authorized, or bore oversight responsibility."[411]

Because there is to date no indication that any such DOD policy was affirmatively approved or adopted in Washington, as acknowledged by the OTP,[412] those "most responsible" for the abuses alleged would not likely occupy leadership positions or be able to prevent genuine investigations. This distinguishes DOD detention practices from the activities of the CIA, which were approved at the highest levels of government. In light of the above, it may be possible at the appropriate time to secure an indication from the OTP reflecting the unlikelihood of the OTP pursuing charges in these cases involving the DOD, based on practical realities—*e.g.*, the Prosecutor's acknowledgment that any DOD policy (if it existed at all) was not approved at senior levels; that it did not involve some of the more severe abuses, such as waterboarding; that the number of cases alleged would (even if proven) constitute only a very small portion of the number of detainees held in total by DOD personnel (which numbered in the tens of thousands); and that there are reliable accounts of numerous internal investigations in the same reports upon which the OTP relies in drawing its conclusions that detainee abuse occurred in the first place.

(2) Allegations Related to CIA. The allegations against the CIA cover torture and other abuses that were part of a program of enhanced interrogation techniques that was approved at the senior levels of government. Both the acts of torture and abuse, and any failure to submit credible allegations to competent U.S. authorities for the purpose of prosecution, would violate the United States' obligations including under the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.[413] Yet no one was prosecuted for their role in conceptualizing, authorizing, or implementing the CIA program. Given the seriousness of these allegations, it would be in the interests of the United States to go beyond simple assertions that the United States does everything appropriate to investigate and prosecute and to articulate a tailored explanation of why it believes the ICC should not investigate or prosecute cases arising from the CIA program.

As has already been seen, Trump Administration officials did put forward a complementarity rationale in their public statements about the Afghanistan situation, but only in the most general terms. It would clearly be helpful for the United States to look for ways to bolster its defensive posture "on the merits." There are several basic ways in which such a set of arguments could be strengthened.

First, the Administration could work to better explain the facts and circumstances surrounding the investigation undertaken by John Durham and the subsequent decision by the Department of Justice not to pursue prosecutions. Durham's mandate (*see Text Boxes - Durham Investigation*) did not extend to recommending the prosecution of individuals "who acted in good faith and within the scope of the legal guidance" provided by the Department of Justice regarding the legality of the

interrogation techniques that were authorized.[414] The Prosecutor appears to rely on the existence of this carve-out in concluding that the United States did not genuinely investigate individuals. In fact, at least some of the conduct cited—such as the allegations of rape and sexual assault—were not authorized at all and thus would clearly have fallen within Durham's mandate to investigate. With respect to the authorized techniques, however, the United States could well take the position that the recognition of such a carve-out for good faith reliance on formally approved legal advice from the Department of Justice was not unreasonable—*i.e.*, that it would not be inappropriate for the Justice Department to decline to pursue prosecutions against individuals who had relied in good faith on legal advice from those within the Department who were authorized to dispense it under applicable U.S. law.[415] As such, the fact that a national prosecutor would make such a decision is hardly proof that his or her efforts were not "genuine," or were made for the purposes of shielding an accused, which is the test that the ICC would apply in determining whether an appropriate basis may exist for the ICC Prosecutor to pursue an investigation.

In practice, such arguments could be more persuasive if the United States makes available additional information about what investigative and analytical efforts Durham and other U.S.

Durham Investigation–Excerpts from Statements of Attorney General Eric Holder

Upon appointment of John Durham to investigate CIA mistreatment of detainees: "I have concluded that the information known to me warrants opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations." Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009).

Upon receipt of Durham's recommendation to conduct a full investigation regarding the deaths in custody of two individuals: "On Aug. 24, 2009, based on information the Department received pertaining to alleged CIA mistreatment of detainees, Attorney General Eric Holder announced that he had expanded Mr. Durham's mandate to conduct a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations. Attorney General Holder made clear at that time, that the Department would not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. . . . During the course of his preliminary review and subsequent investigations, Mr. Durham examined any possible CIA involvement with the interrogation and detention of 101 detainees who were alleged to have been in United States custody subsequent to the terrorist attacks of September 11, 2001. He determined that a number of the detainees were never in CIA custody." Statement of Attorney General Eric Holder Regarding Investigation into the Interrogation of Certain Detainees (June 30, 2011).

Upon receipt of Durham's recommendation not to initiate criminal charges: "AUSA John Durham has now completed his investigations, and the Department has decided not to initiate criminal charges in these matters. In reaching this determination, Mr. Durham considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes. Mr. Durham and his team reviewed a tremendous volume of information pertaining to the detainees. . . . Based on the fully developed factual record concerning the two deaths, the Department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt." Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012).

Government actors in fact undertook and the grounds on which they reached their conclusion that a criminal prosecution would be inappropriate "because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."[416] That said, it may well be difficult for the United States to disclose relevant information in light of generally applicable rules and procedures limiting the extent to which grand jury and other investigative information may be divulged, whether to the ICC or other recipients.[417] In addition, unlike states that are parties to the Rome Statute, the United States has no responsibility—and could not reasonably be expected—to modify its longstanding laws and procedures with respect to cases in which the ICC might be interested. It could thus fairly argue that it would be inappropriate in such circumstances for the ICC Prosecutor to draw a negative inference that no genuine investigation occurred simply because the United States is not in a position to provide such information, even if such inferences might be warranted with respect to a situation in which a state party—obliged as it would be to conform its domestic legal framework to its cooperation obligations toward the Court—declined to provide such information.[418]

Durham Investigation – Excerpts from Affidavit of John Durham

14. *As the preliminary review unfolded, I generated two interim reports advising the Attorney General and Deputy Attorney General of preliminary reviews that had been completed and closed. Ultimately I provided a final report dated May 26, 2011. Among other things, these reports discussed the strengths and weaknesses of the facts and evidence uncovered in the course of the preliminary reviews, the potential applicability of various criminal statutes against that evidence, and ultimately why no full criminal investigations should be pursued with the exception of the two matters described in paragraph 15 below. The reports also discussed limitations on the evidence available to my team, and reviewed previous investigations conducted by other government entities.*

15. *On December 14, 2010, and May 26, 2011, respectively, I submitted two reports that provided additional detail to support my recommendation that full criminal investigations be opened to further examine the circumstances surrounding the deaths of two individuals who were in United States custody overseas at the time they died. . . .*

16. *On June 30, 2011, the Attorney General announced that he accepted my recommendations to open two full criminal investigations.*

17. *With respect to the two full criminal investigations that the investigative team subsequently conducted, both of which involved extensive grand jury proceedings, I ultimately determined that no criminal charges should be filed. . . . On August 30, 2012, the Attorney General announced that the two full criminal investigations were closed.*

18. *[My reports to the Attorney General regarding these two full criminal investigations] traced the path of our investigations into the two detainee deaths, highlighting critical investigative steps, and analyzed the substantial volume of evidence gathered during the investigations. Beyond evaluating facts, statements and testimony of witnesses, and other evidence as they related to the criminal investigations, these reports assessed the admissibility of the evidence in judicial proceedings and identified other strengths and weaknesses associated with the evidence. In addition, in light of our assessment of the evidence, the reports thoroughly analyzed the type and nature of criminal charges that could be brought against suspected wrongdoers, along with various defenses that could be raised in opposition to any such charges. . . (internal citations omitted).*

There has been extensive criticism that the United States did not sufficiently investigate or prosecute those responsible for these events from human rights groups, human rights treaty bodies, and others. For example, in its Concluding Observations in 2014, the UN Committee Against Torture expressed concern about "the ongoing failure on the part of the State party to fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad . . . ."[419] Others have proffered that the decision not to go further in pursuing prosecutions represented a tacit political bargain based on considerations that included:[420] (1) the fact that the prosecution of the leaders of a predecessor government of a competing political party is likely to be perceived as politically motivated, no matter how warranted the prosecution; (2) given such perceptions, the prohibition of torture itself could become a partisan issue, and Republicans may have felt the need to defend, or even advocate for, the practice of torture; and (3) the ensuing polarization of torture as a partisan issue could have ended up preventing Congress from enacting the further statutory prohibitions on torture under the McCain-Feinstein legislation.[421]

In terms of the situation facing the new Administration, reports such as this highlight that, given the great controversy about the prospect of prosecutions during this Administration for potentially unlawful conduct by members of the Trump Administration, it seems highly unlikely at this point that there would be an appetite to reopen allegations against Bush Administration officials—particularly investigations that the Obama Administration had already decided not to pursue. At the same time, a lack of persuasive explanations as to the basis of the decisions not to further pursue the possibility of criminal prosecutions has been a significant barrier to domestic and international acceptance of the lack of criminal accountability for U.S. custodial abuses. In this connection, the Task Force recommends that the Administration follow former Attorney General Eric Holder's 2015 recommendation to publicly release more information about the Justice Department's criminal investigation into the abuses in Afghanistan, which Holder has said publicly "would show the world how hard his prosecutors tried to bring Bush-era torturers to justice."[422]

In addition, in light of the "carve out" in Durham's investigation that excluded individuals "who acted in good faith and within the scope of the legal guidance," several interlocutors raised questions about the lack of accountability for the Department of Justice lawyers responsible for dispensing that consequential legal advice, which has generated pervasive public criticism.[423] For these Office of Legal Counsel lawyers, there were investigations undertaken during the Obama Administration by the Justice Department's Office of Professional Responsibility (OPR) focused on whether those lawyers should be referred for professional disciplinary proceedings. The OPR issued a report on July 29, 2009, concluding that the authors engaged in professional misconduct by failing to provide "thorough, objective, and candid legal advice" and indicated its intent to refer its finding of misconduct to relevant state bar disciplinary authorities.[424] Ultimately, however, the senior Department of Justice official who reviewed OPR's conclusions, the late Associate Deputy Attorney General David Margolis, decided not to adopt that Office's findings. Notwithstanding what he determined were significant flaws in the torture memoranda, Margolis concluded in a sixty-

nine-page analysis that the episode did not constitute professional misconduct.[425] For its part, the Justice Department, during the Obama Administration, concluded that, in light of the Margolis memorandum, there existed no basis for criminal prosecution of the lawyers.[426] Later, various steps were taken with a view to safeguarding the independence of OLC's legal advice.[427]

To be sure, this outcome remains controversial.[428] However, under the Rome Statute, the relevant test for the Prosecutor and the Court to apply in determining admissibility in a case against the lawyers would not be whether the advice that they provided in fact was wrong, or was given in bad faith, or even amounted to a war crime. Nor would the test be whether Margolis's conclusion that the matter did not amount to professional misconduct, or the decision not to pursue criminal proceedings in light of that conclusion, was correct. Rather, in order for the ICC to proceed, the determination would need to be made that the investigation of the matter conducted within the Justice Department was not conducted genuinely—*i.e.*, that it was made to shield the person from responsibility.[429] In other words, it need not be established that the Justice Department's responses were ideal, just that the Durham process together with the OPR investigation—and the many other steps taken as outlined below—provide an appropriate basis for the Prosecutor not to pursue investigations of the U.S. persons involved.

There are other lines of argument touching upon complementarity that might also be pursued. When considering a state's response to the potential commission of international crimes within its jurisdiction, it is true that the Court's jurisprudence suggests that, once an ICC case has been commenced, nothing short of investigations that entail the possibility of criminal prosecutions will satisfy its view of the Rome Statute's rules on complementarity when there is a challenge to the Court's jurisdiction over a particular individual. That said, particularly at the stage at which the overall situation—rather than cases against specific individuals—is being reviewed, there is increasing receptivity to the view that the Court's traditional approach to complementarity is too narrow, and that responses that do not involve traditional criminal prosecutions should "count" in determining whether a state's response is so inadequate that an ICC investigation of the situation should be pursued.[430] In this connection, the Administration should highlight multifaceted responses within the U.S. system that did not involve traditional criminal prosecutions but that did address allegations of mistreatment and put in place important measures to guard against repetition. This would include doing what it can to demonstrate the rigor and output of various internal and independent investigative bodies[431] and highlighting other steps that it took aimed at preventing recurrence, including legal and policy reforms (notably the enactment of the Detainee Treatment Act and the McCain-Feinstein amendment) and the repudiation and withdrawal of controversial legal advice.[432] Such views might arguably carry even greater weight when it comes to states that are not parties to the Rome Statute and have not consented to the complementarity regime or accepted its implementation over time.

Putting forward arguments along the lines suggested—and particularly regarding the Court's admissibility criteria—in a principled and transparent manner could add to the credibility of the United States' position domestically and with diplomatic partners and could even help elicit their support. They could also be a factor that the Prosecutor could take into account in discretionary decisions regarding the extent to which any cases should or should not be prioritized. Once again, the argument need not be that responses of this type are ideal, or even that they satisfy obligations or responsibilities that the United States may have separate from the Rome Statute to pursue criminal investigations or prosecutions, but rather that the existence of these steps are sufficient to warrant the Prosecutor not prioritizing these cases. The fact that so much of the Prosecutor's information derives in the first place from the results of U.S. investigations, hearings, and reports could be argued to further bolster a decision not to pursue such cases, on the basis that doing so may disincentivize states from undertaking similar non-criminal efforts in the future to bring past abuses to light.[433] That said, it was appropriate for the United States to pursue those inquiries into how these policies and practices occurred and to declassify and release portions of the reports in the interests of good governance and of coming to terms with what had happened.

There are further arguments that the Administration could consider related to other admissibility criteria. For example, the United States could put forward an argument that the portion of the Afghanistan investigation that relates to the United States lacks sufficient gravity, particularly as compared with the innumerable international crimes committed by other armed groups in Afghanistan, to warrant the Prosecutor prioritizing these allegations in her investigation. Such an approach would not diminish the seriousness of the allegations, but rather would aim to encourage that they be considered in relation to other alleged crimes and perpetrators within this and other situations.[434] This could include not only the comparative scale of the abuses, but also contrast the steps that the United States has taken to prevent recurrence of abuses against the ongoing nature of crimes by other armed groups ("the impact of investigations and prosecutions on ongoing criminality" being one factor that the Prosecutor has already recognized as important in prioritizing cases).[435] To be sure, under its jurisprudence and practice, Court actors generally look at "the situation as a whole" in determining whether the crimes in question are sufficiently grave to justify the Court's involvement. There is no doubt that the scale of the crimes allegedly committed by the Taliban, Afghan security forces, and other armed actors are sufficient to satisfy the gravity test under the "situation as a whole" approach; as such, no separate inquiry would be required into the scale of the crimes allegedly committed by CIA personnel.[436] The logic of the Court's approach is not beyond debate, however. Even assuming this approach is maintained, however, the fact that the Prosecutor concludes that there is sufficient gravity to initiate an investigation into the situation as a whole does not necessarily mean that, as a matter of discretion, the Prosecutor should devote resources to actively pursuing allegations against a party to the conflict whose alleged conduct did not, if considered independently, meet the Court's gravity threshold.

All that said, the United States should also continue to look for ways to further strengthen the anti-torture norm, internationally and domestically;[437] to address prior policies and practices with honesty and transparency vis-à-vis the public and the international community; and to consider other reparative steps it might undertake with respect to detainee abuse in appropriate circumstances.[438]

2. The Situation in Palestine

The Court's efforts to investigate the situation in Palestine will also require attention. The Court's recent conclusions, in a divided decision issued by a Pre-Trial Chamber, that Palestine is a state for purposes of the Rome Statute's jurisdictional provisions, that there is jurisdiction over the situation in Palestine, and that jurisdiction extends to "Gaza and the West Bank, including East Jerusalem"[439] are all inconsistent with the views of the United States under the Bush, Obama, and Trump Administrations. For its part, the Biden Administration has already put itself on record to the same effect, with Secretary of State Blinken stating that "[t]he Palestinians do not qualify as a sovereign state and therefore, are not qualified to obtain membership as a state in, participate as a state in, or delegate jurisdiction to the ICC" and that the Administration disagrees strongly with the ICC's actions on the Palestinian situation.[440] In the wake of the Pre-Trial Chamber decision, expressions of congressional support for the Israeli position have continued.[441] Most recently, in March 2021, fifty-seven Senators signed onto another bipartisan letter led by Senators Cardin and Portman that called the Court's decision "a dangerous politicization of the Court," called on the Administration "to stand in full force against" the decision, and urged it to work with like-minded partners "to steer the ICC away from further actions that could damage the Court's credibility."[442]

Beyond this issue of the scope of the Court's territorial jurisdiction,[443] the Task Force notes that a number of other legal questions have been raised. These include questions regarding the circumstances in which transfers of population qualify as war crimes (particularly under customary international law) and the implications of the fact that both borders and settlements are treated by various international instruments—including General Assembly Resolution 67/19, upon which the Court has relied in determining that it has jurisdiction—as "outstanding issues" to be resolved as part of a just, lasting, and comprehensive peace settlement between the Israelis and the Palestinians.[444]

There are two important points to note about Israel's particular concerns about the ICC. First, the fact that Israel views its settlements as permissible under international law greatly complicates its ability to challenge admissibility on the basis of complementarity. Second, Israel's political cost/benefit analysis on the risks it faces with the ICC is different than that of the United States. For example, even if one puts aside the uncertain risk of an official actually being apprehended on a trip abroad, other states may become reluctant to receive Israeli officials because of the possibility of being asked to execute a warrant during an official visit.

It is of course beyond the mandate of this Task Force to make recommendations for pragmatic options for Israeli engagement, but the United States plainly has a keen interest in these issues. Insofar as the Israeli reaction to the Court's decision is concerned, there have already been strong public statements by senior Israeli officials, including for example statements by Prime Minister Netanyahu saying that "[w]e will fight this perversion of justice with all our might," and by Israel's Defense Minister that hundreds of Israelis could be subject to war crimes probes.[445] At the same time, however, it appears that an important Israeli goal has been to work toward persuading the ICC Prosecutor to deprioritize these cases.[446] This would seem consistent with statements in other press reports suggesting that Israeli officials do not in fact currently anticipate any immediate threats to senior Israeli political or military figures.[447]

If working toward deprioritization is in fact part of the Israeli strategy toward the Court, it would align with the general approach that the Task Force is recommending that the United States take with respect to the Afghanistan situation, and could thereby offer opportunities to proceed in ways that are mutually supportive. At the end of the day, the U.S. posture on the situation in Palestine will almost inevitably be more of a function of the direction of the Administration's policy toward the Middle East peace process than of its ICC policy. Nevertheless, an approach based on prioritization would entail opportunities for the United States and Israel to work together constructively, of which the new Administration should avail itself.

3. Contributing to the Ongoing ICC Reform Process

Against the backdrop of its particular concerns about the OTP's investigations into the situations in Afghanistan and Palestine, the United States should view the ongoing discussions about reform of the Court as an opening. Although this process commenced independent of U.S. concerns, Secretary Blinken has already expressed the Administration's encouragement that Rome Statute parties are considering a broad range of reforms, recognizing this as a worthwhile effort and underscoring the importance of "engagement with all stakeholders in the ICC process" as a better path for addressing U.S. concerns.[448]

More specifically, the ongoing discussions around the recently completed Independent Expert Review provide an opportunity to propose and implement changes that could both put the Court on firmer footing—a goal that the current administration appears to have recognized as desirable by indicating support for reforms "to help the court better achieve its core mission of punishing and deterring atrocity crimes"[449]—and to reduce the prospect of future clashes between the ICC and the United States. In short, these discussions present an opportunity to put forward credible arguments regarding how the various admissibility criteria should be interpreted and applied under the Rome Statute that differ from the way they have been applied until now, and to do so in a manner that echoes the reasons that the United States believes pursuing an investigation of U.S. personnel in Afghanistan would be inappropriate.

Numerous interlocutors from foreign states emphasized that they would welcome U.S. engagement in these discussions, both to benefit from the United States' technical expertise and to incorporate its perspective. That said, they also cautioned that such engagement would be most effective if provided in a constructive manner and in the spirit of helping the Court to fulfill its core mandate; by contrast, any engagement that was perceived as undermining, strongarming, or instrumentalizing the Court could backfire and make desirable reforms harder to achieve. U.S. engagement in this regard could focus on three main areas: tightening the Court's admissibility criteria; revitalizing the concept of the "interests of justice;" and disaggregating the consideration of situations involving multiple armed actors that are not all involved in serious or ongoing abuses.

a. Contribute to Work to Tighten the Court's Admissibility Criteria

The IER Report invites a conversation regarding ways in which the admissibility criteria could and should be applied more tightly. In particular, the Independent Experts identified the need for the Court to "focus on a narrower range of situations, and limit its interventions to the extent possible," saying that the Court's current approach "is unsustainable having regard to the limited resources" that the states parties make available to it in their annual decisions on the Court's budget.[450] Further, the IER Report points to the need to resolve the different views between states parties, on the one hand, and the Prosecutor, on the other, as to the concrete expectations regarding what should be seen to be falling within the Court's ambit. The Experts go on to highlight the need for "bringing all stakeholders on the same page on issues such as the type of cases the Court would look into . . . ."[451]

The pressure on the Prosecutor to find ways to better identify the situations and cases to which she should channel her finite energy and resources broke further to the fore in connection with the release of the Prosecutor's latest report on Preliminary Examinations, in which the Prosecutor conveyed her conclusion that the standards for initiating an investigation in two countries—Nigeria and Ukraine—had been met but forewent actually commencing the investigation in view of "strategic and operational issues related to the prioritization of the Office's workload . . . ."[452]

As an obvious example of a step in this direction, the Experts recommend that the Prosecutor consider a posture in which she would investigate only those situations where alleged atrocity crimes reach a threshold of gravity higher than the current standard and that she do so as part of a process of "allocating the limited resources of the OTP to the situations that are the most serious . . . ."[453] Unavoidably, the ICC is an institution with finite resources and must inevitably make decisions about where to direct, and where not to direct, those resources. As set out in the recommendations of the Experts, a higher threshold is needed in view of their conclusion that "the current situation is unsustainable having regard to the limited resources available."[454]

But a higher gravity threshold is not the only way that the Prosecutor could narrow her "aperture" in her decisions about which cases and situations to prioritize and pursue.[455] For example, separate and apart from the IER, there are ongoing, state-led discussions to take stock of, strengthen, and revise the principle of complementarity. States are exploring concrete options for how to assert greater oversight and ownership of this issue in their relations with the Court. This discussion is being conducted outside of the Assembly of States Parties itself, through a Working Group on Complementarity that makes it easier for non-party states such as the United States to engage. As such, a wide range of participants are providing input as states seek creative ideas on how to strike the appropriate balance between respecting the investigative efforts of states and preventing impunity.[456] The United States should contribute to this process and encourage states parties and the Court to reimagine the approach to complementarity so that, without conceding that it would be legally precluded from doing so, the Prosecutor would as a matter of prosecutorial discretion deprioritize investigations and prosecutions in situations in which the relevant state or states had pursued non-criminal forms of accountability, undertaken substantial efforts to bring abuses to light, or implemented genuine measures to prevent recurrence. Such a response might be particularly appropriate with respect to non-member states that are under no obligations to cooperate with the Court or submit their domestic policies to ICC scrutiny. U.S. officials would need to carefully think through the manner in which they may want to bring their points forward. Much of this could be done in bilateral consultations or the many *ad hoc* groupings in which U.S. Government lawyers and global criminal justice experts routinely meet with counterparts.

b. Encourage Court Actors to Revitalize the Interests of Justice Inquiry

As another example, one might reimagine the way that the OTP analyzes the "interests of justice" test in making decisions—whether under Article 53 on commencing an investigation or in connection with decisions thereafter regarding prioritization—in situations in which societies have made decisions not to pursue criminal investigations that are reasonable under the circumstances even if, from the point of view of the ICC, less than ideal. For its part, the Office of the Prosecutor published a policy paper in 2007 on the "interests of justice." The policy paper did recognize the role that a range of measures—including truth seeking, reparations programs, institutional reform, and traditional or community-based justice mechanisms—may play a role in a society's overall efforts to deal with large numbers of offenders in addressing the impunity gap. However, by emphasizing the "exceptional nature" of any inquiry under the "interests of justice," the paper takes a narrow view of what this phrase might cover that virtually eliminates it as a basis for a decision for it not to pursue a particular investigation.[457]

It is not at all clear that such an approach to the "interests of justice" test is in line with the understanding of the Rome Statute negotiators or best for the system as a whole. Thus, there appears to have been no meeting of the minds on whether it might be considered not to be in the interests of justice to pursue investigations and prosecutions in situations where—as in the then-

recent case of the Truth and Reconciliation Commission (TRC) in South Africa—a society made a conscious decision to utilize alternatives to traditional modes of criminal accountability, such a truth-telling process or reparations, in order to come to terms with its past. Indeed, speaking in 1998, it seemed self-evident to then-UN Secretary-General Kofi Annan that "[i]t is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future."[458] The United States could well argue that genuine transitional justice measures undertaken by states to address the commission of international crimes should also be considered holistically as part of that determination of the adequacy of the state's response.

c. Moving the Court Away from the "Situation as a Whole" Principle

One of the most important possibilities for narrowing the aperture is related to the principle, adopted by both the OTP and the Court, that any investigation should be of the "situation as a whole."[459] For example, when the Government of Uganda referred the situation "concerning the Lord's Resistance Army" in northern Uganda to the ICC Prosecutor in 2003, the then-Prosecutor notified Uganda that the referral would be interpreted as covering "all crimes under the Statute committed in northern Uganda, and that [its] investigation would be impartial."[460] This approach was intended to prevent a sitting government from instrumentalizing the OTP by empowering it to proceed only against the forces of the government's adversaries and not those of the government.

While there is an undeniable logic to this principle, it is not the only defensible approach, particularly as it applies to *proprio motu* investigations in situations involving multiple armed actors. Normally in *proprio motu* situations, the Prosecutor must make a showing to persuade an ICC Pre-Trial Chamber that the jurisdictional requirements are met and that an evidentiary threshold has been reached. If the Prosecutor makes that showing with respect to the conduct of the forces of one of the parties, should the Prosecutor be authorized automatically to investigate the conduct of the other party's forces, as to which no such showing has been made? Indeed, a state may consider it fundamentally unfair if it becomes subject to the burdens and possible political taint that often accompanies the commencement of a formal ICC investigation based solely on allegations about the conduct of an adversary. In the negotiations around the Rome Statute, at least some states relied on assurances that the treaty contained a built-in check that protected states from the risk of being subject to the burden of an investigation absent a conclusion that the standards set out in the Rome Statute had been met. The idea was that this would help protect states in situations where there was an insufficient basis to investigate the conduct of their personnel. At least arguably, the fact that a state can—under the "situation as a whole" principle—be enmeshed in an investigation based on the conduct of other parties erodes the value of such assurances. This issue is potentially important to the United States because, as the state with forces deployed in the largest number of states, the prospect of its forces being swept up in a "situation as a whole" is relatively high. In light of all this, the United States should

look for opportunities to expand upon these arguments in its interactions with Court actors, ASP members, and others.

4. The United States' Overall Approach to These Issues

To close out this Section of the Report, we offer the following overarching advice for the United States as it charts its course: stay focused on the multiplicity of interests at stake; capitalize upon this moment in time when states parties are focused on the reform of the Court; maintain a sense of perspective on the risks presented by the two situations of concern; and be open to different visions of success.

a. Recognizing the Multiplicity of Interests that the United States Has at Stake

Each of the issues described in this Section of the Report is important but also complex. On the one hand, a narrower "aperture" that results in the ICC pursuing a smaller range of situations and cases would in principle lessen the prospects for the ICC to end up confronting the United States in future circumstances. At the same time, because the United States retains a strong interest in accountability, deterrence, and atrocity prevention, diminishing the role that the ICC can play in support of these goals could come into tension with efforts to promote accountability in future situations of mass violence. It is worth noting that, at least in the Bush and Obama administrations, the United States in key cases looked to the ICC Prosecutor for action and public statements to highlight the possibility of punishment by the ICC as a way to deter would-be perpetrators from committing further atrocities. The genocide in Darfur during the Bush Administration and widespread atrocities in the Central African Republic during the Obama Administration are two cases that come quickly to mind. Thus, while there undeniably are reasons that, as the Independent Experts recommend, the Court's aperture should be narrowed, narrowing can come at great cost. Careful thought—and a hard-nosed assessment of both the pros and the cons—needs to be given to each of the possible ways in which such narrowing might occur. All that said, the broader point is clear: an atmosphere exists in which these issues can be put forward in a constructive manner and in which partner states can be expected to engage in a collegial and respectful manner.

b. Capturing the Current Opening to Raise Issues of Concern

It is important to bear in mind that the audience for the kind of mature engagement that the Task Force recommends with the ongoing review and reform process is not solely the Court, but also the international community more generally and particularly U.S. friends and allies. The IER process has not, by its terms, involved the United States, but the United States needs to present itself as motivated to engage, wanting to provide leadership and good ideas, and having a stake in the Court's foundational objectives—around justice, deterrence, and norm enunciation—being achieved. Indeed, separate from whether the United States is successful in persuading friendly countries of its genuineness in this regard, there is a profound benefit simply in demonstrating

that it is putting forth coherent arguments—that in itself is a show of respect to the sensibilities of U.S. friends and allies and the international order and a break from the past four years. The Biden Administration should approach its policy toward the Court with the same equanimity and respect that it approaches multilateral institutions generally: it will seek to defend and advance U.S. interests, but will do so in ways that are principled, that advance the rule of law, and that reflect core U.S. values.

c. Keeping Perspective

In all its interactions with the Court, and in the way it considers issues internally, the United States should eschew dogma and avoid making the perfect the enemy of the good. Perhaps most importantly, the United States should not exaggerate the threat that the Afghanistan investigation will actually lead to any trials of U.S. personnel. This is especially so in relation to allegations against Department of Defense personnel (for the reasons articulated above). In particular, the risk that a rank-and-file servicemember might be arrested on a European beach, invoked in some attacks on the Court,[461] is *de minimis*. Nothing the ICC is doing in Afghanistan could plausibly lead to this result, and nothing the ICC has done in other cases suggests that this is a realistic scenario. Indeed, Former U.S. Legal Adviser John Bellinger has gone further and argued that in practical terms that "there is no possibility that any U.S. official will ever be arrested and prosecuted in the Hague. . . . [T]he likelihood of prosecutions is zero . . . ."[462]

d. Visions of "Success"

In practical terms, the United States needs to be open to different visions of success. Insofar as Afghanistan is concerned, and as stated above, the view of the Task Force is that the *actual* risk of any American being tried is, in fact, remote. The likelihood of eventually achieving successful prosecutions will no doubt be seen by the new Prosecutor as an important factor in the process of selecting the cases to which he should channel his limited investigative and prosecutorial resources. But even if the new Prosecutor does not intend to focus on allegations against U.S. personnel it may nevertheless be hard for him to publicly offer an assurance to that effect rather than simply not pursuing such an investigation in a tangible way. Inaction can thus be a form of success, at least if such inaction becomes stable over time. The new Administration can increase the likelihood of success in this regard by taking steps that restore U.S. credibility more generally—*e.g.*, by engaging on issues in a constructive manner, communicating respectfully with Court personnel, defending itself "on the merits" and within the rule of law, speaking forthrightly about the Administration's unrelenting opposition to torture, committing to be respectful of the discipline meted out by the military justice system in the aftermath of any misconduct, and disavowing the disdainful rhetoric that accompanied President Trump's pardons for Eddie Gallagher and others. Indeed, these are policies that the United States should be adopting anyway, and are consistent with President Biden's commitment that the United States will lead "by the power of our example."[463] All this will help create space for dialogue with Court actors and for

U.S. friends and allies to give serious weight to U.S. views on these issues, thus adding to their credibility internationally.

To be sure, the perception—even if incorrect—that the ICC might, with a sealed arrest warrant, ambush a former U.S. official while transiting through or visiting a Rome Statute country has tremendous potential for destabilizing any prospects for a constructive relationship. To address this issue, the United States, as part of its engagement with the new Prosecutor, should consider coming to an understanding with the Prosecutor pursuant to which the Prosecutor would commit not to seek sealed arrest warrants against U.S. persons, at least without some subsequent notification that the Prosecutor has moved to a later stage and making clear that this commitment no longer applies.

D. Support for Particular ICC Cases

The final question that this Report will address is the extent to which the United States can and should support the ICC's work in particular situation countries in light of the concerns generated by the Afghanistan and Palestine situations. In the past, the United States has provided a range of valuable (and often crucial) support to other international criminal tribunals—including diplomatic support for the institution and its activities, personnel and funding, and tangible assistance with specific investigations or cases. Indeed, the U.S. approach in the past (in particular the Obama Administration's case-by-case approach) resulted in the provision of many comparable forms of support to the ICC at various points. This included diplomatic support (*e.g.*, in the UN Security Council); support for tracking, capture, surrender, and transfer of fugitives (who may also be destabilizing influences in their region) to The Hague; providing input into security assessments for investigative missions; and providing expertise in the analysis of evidence that the ICC has already gathered (*e.g.*, the provenance of particular munitions) (see Section III.D above).

For its part, the new Administration has already indicated that, while the United States will "vigorously protect current and former United States personnel" from attempts to exercise ICC jurisdiction,[464] there may be "exceptional cases where we consider cooperating with the court as we sometimes have in the past," and that the Administration "will weigh the interests at stake on a case-by-case basis when cooperation may be consistent with U.S. law and policy."[465] In practice, words like "case-by-case" and "exceptional circumstances" tend to be placeholders, the more precise content of which only becoming apparent only over time. Despite the conflicting interests in potential investigations in Afghanistan and Palestine, there remain a number of ICC investigations and prosecutions that are directly aligned with concrete U.S. interests and policy positions (*e.g.*, in Myanmar, Georgia, Ukraine, and Darfur). Likewise, there are ICC cases underway in situations in which the United States has already made significant U.S. investments in accountability and stability (*e.g.*, in Northern Uganda, DRC, and CAR).

The Task Force thus believes that the new Administration should remain open to supporting the ICC in appropriate cases, even as it recognizes that the political "space" for doing so will depend on wider circumstances, including most importantly the direction of ICC investigations or prosecutions in Afghanistan and Palestine. The Task Force recognizes the simple political truth that ongoing activity on these two situations has already created great resistance to the provision of such support. It is also true, however, that the strength of that resistance will fluctuate as circumstances change over time, with resistance increasing if those two investigations appear to move forward in ways that implicate U.S. (or Israeli) personnel, but relenting if the investigations do not move forward in a tangible way. At the same time, the likelihood of that resistance—however strong it might be—being overcome may turn on events in particular atrocity situations, and conclusions about whether U.S. support for the ICC action will or will not advance the range of important U.S. interests in international justice.

Indeed, this is the lesson of Darfur—even the Bush Administration's acute concerns about the ICC eventually gave way to the overwhelming conviction that it needed to stand up against a particular set of unfolding atrocities. Can the conclusion really be that President Bush should have blocked the Darfur referral to the Court in 2005? Or that the Obama Administration should have refused to work with the ICC when Bosco Ntaganda walked into the U.S. Embassy in Kigali, Rwanda, in 2013? Or that U.S. military forces should not have facilitated the surrender of Lord's Resistance Army Commander Dominic Ongwen in 2015? It is inevitable that situations like these will arise again in which the imperatives of pursuing accountability for massive crimes will outweigh concerns with the ICC as an institution and that dogmatic opposition to the ICC in the face of mass atrocities may impose unacceptable costs on other U.S. interests.

The Task Force also recommends that the United States consider with fresh eyes how it will address questions of funding in the event of a future Security Council referral that it supports.[466] The language included in the two previous Security Council referrals, and in the vetoed referral resolution on Syria, all contained language "recognizing" that none of the expenses would be borne by the United Nations. This stance is a departure from what many drafters of the Rome Statute anticipated, as reflected in the fact that Article 115 of the Statute contemplates the possibility of funding from the United Nations in relation to costs incurred due to Security Council referrals, subject to the approval of the General Assembly.[467] It also is arguably in tension with the statement of the U.S. delegation at Rome that "it would be appropriate" to cover "part of the costs of referrals,"[468] but is in line with the general U.S. approach to opposing the use of the assessed UN budget to fund the expenses of independent organizations and avoided legal concerns about whether the statutory restrictions on U.S. funding for the ICC would prohibit the United States from contributing its portion of the assessed UN budget that would be used for this purpose.[469] All that said, there has been increasing opposition to the notion of further Security Council referrals for which the United Nations would not provide funding, with some states arguing that it is unfair to leave the Rome Statute parties bearing the costs for work that the Security Council wants the

Court to carry out. Thus, assuming that a future case may arise in which the United States wants to support a Security Council referral, there will very likely be significant pressure on the United States to reconsider its opposition to such funding, and the United States should be prepared to consider creative ways to meet these concerns.

Finally, in connection with the general recommendation that the new Administration remain open to providing support for particular cases, it would be advisable for the new Administration to give thought in advance to categories of situations in which it would make sense to be alert to the possibility of providing assistance. Categories for which the case for U.S. support might be particularly strong could include situations referred to the Court by the Security Council (like Darfur itself) or that might be appropriate for a Council referral, situations in which a state has referred itself to the ICC (like the Central African Republic), situations involving particularly egregious or notorious perpetrators (like Myanmar or the LRA cases in northern Uganda), matters where the Obama administration was previously involved or invested in the pursuit of justice, and situations in which the alignment with U.S. political interests is particularly strong (as seen in the referral of the situation in Venezuela by Canada and five other Rio Treaty allies).

VII. CONCLUSION

This Report is premised on the recognition that any assessment of the Biden administration's options for pragmatic engagement moving forward must build upon prior experience. In addition, decisions on whether and how to interact with the Court must also account for the reality that the United States' role in the world—including as a permanent member of the UN Security Council, a pillar of the global security architecture with a wide and valued network of alliances and military deployments, and an actor that is present in various ways in many ICC situation countries—means that there will be circumstances in which engagement with the Court in some form or fora or another will be inevitable. As such, it will be necessary for the new Administration to find a "sweet spot" that is both consistent with the perceived need to protect U.S. personnel from external jurisdiction while also projecting a renewed emphasis on working with friends and allies, international cooperation, acting "respectfully" even in the face of disagreements, positioning the United States to be an effective voice in multilateral diplomacy, and presenting the United States as motivated to engage, wanting to provide leadership, and having a stake in the Court's objectives—around justice, deterrence, and norm enunciation—being achieved.

In addition, the United States' commitment to advancing justice and accountability is one of the United States' most treasured national attributes. The imperative of addressing the genocide in Darfur, notwithstanding U.S. hesitations around the Court, is a cogent reminder that the United States will want to act when crimes against humanity are underway, when civilians are targeted, and when a genocide is unfolding, and sometimes the ICC will be the only option for justice. The Report has thus endeavored to identify principles and recommend options that can guide this ongoing relationship with the Court, to allow policy makers to calibrate their engagement depending on the Court's actions in Afghanistan and Palestine and the progress of the current efforts toward reforming and refocusing the Court, and to enable officials to manage those unavoidable engagements with the ICC in a way that support, rather than conflicts with, affirmative U.S. interests in accountability and the rule of law.

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An endeavor such as that undertaken by this Task Force is necessarily a collective one, drawing on the talents and time of many people, without whom we could not have accomplished a fraction of what we did and to all of whom we owe great thanks.

As Co-Chairs of this Task Force, we were privileged to work with a talented and dedicated group of individuals on this project. Thanks must start with our fellow members of the Task Force: David Bosco, Sandy Hodgkinson, Saira Mohamed, and Alex Whiting. Each brought a different perspective and set of experiences to our discussions of how the United States could best engage with the International Criminal Court, against fluid and sometimes challenging circumstances. The resulting Report is richer and more rigorous for that diversity of perspective, and we are grateful for the constructive spirit in which they addressed these issues. Our thanks likewise go to the members of our esteemed Advisory Group, who provided critical feedback and guidance at key stages of the Task Force's work. We drew heavily upon their collective wisdom in recounting the history of U.S. engagement with the ICC and recommending a course forward. Finally, Ben Batros provided consistently excellent project management, from conceptualizing arguments, to outreach to interlocutors, to shepherding the draft to completion.

We are also deeply grateful to the more than one hundred individuals across government service, legal practice, academia, and civil society with whom the Task Force spoke over the past fifteen months—for generously offering their time, insights, and expertise. For the vast majority, the COVID-19 pandemic meant that we were unable to meet in person. But the enforced reliance of virtual meetings enabled the Task Force to benefit from the perspective of a wider cross-section of interlocutors, who were willing to engage critically, candidly, and creatively with us; their contributions have enriched this Report immeasurably.

A number of staff and officers at the American Society of International Law assisted and facilitated the work of the Task Force. Thanks are due in particular to President Catherine Amirfar, former President Sean D. Murphy, Executive Director Mark Agrast, and Deputy Executive Director Wes Rist.

The Report, and the discussions of the Task Force, also benefited from the dedication and talents of our research assistant, Chris Moxley; from additional research support provided by Arthur Traldi, Molly Norburg, Schuyler Atkins, Michael Rover, Kevan Christensen, and Adib Milani; and from the exceptional editing assistance of Erin Lovall.

Finally, we would like to dedicate this Report to the memory of John Kim, our dear colleague in the State Department and at the United States Embassy in The Hague, a rare gentleman with one of the finest minds, kindest hearts, and most decent souls with whom it was ever our privilege to work and to call a friend.

TASK FORCE MEMBERS

Todd F. Buchwald (Co-Chair) served as Special Coordinator for the State Department's Office of Global Criminal Justice from 2015–2017, and was conferred the rank of Ambassador by President Obama in 2016. Prior to assuming this position, he served as a career lawyer in the Department's Office of the Legal Adviser, including as the Assistant Legal Adviser for Political-Military Affairs during the Clinton and Bush Administrations, and the Assistant Legal Adviser for United Nations Affairs during the Bush and Obama Administrations. After leaving the State Department, Mr. Buchwald was appointed as the inaugural Tom A. Bernstein Genocide Prevention Fellow at the Simon-Skjodt Center for the Prevention of Genocide of the U.S. Holocaust Memorial Museum, served as a Fellow at the Woodrow Wilson International Center for Scholars, and is currently a Professorial Lecturer in Law at George Washington University Law School.

Beth Van Schaack (Co-Chair) is the Leah Kaplan Visiting Professor in Human Rights at Stanford Law School and a Faculty Fellow with Stanford's Center for Human Rights & International Justice. She previously served as Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice of the U.S. Department of State. In that capacity, she helped to advise the Secretary of State and the Under Secretary for Civilian Security, Democracy and Human Rights on the formulation of U.S. policy regarding the prevention of and accountability for mass atrocities, such as war crimes, crimes against humanity, and genocide. She also served on the U.S. interagency delegation to the Kampala Review Conference in 2010.

David Bosco is an associate professor at Indiana University's School of Global and International Studies, and a contributing editor at *Foreign Policy*. His research focuses on the political dynamics of international organizations and international law, including the International Criminal Court, which was the subject of his book *Rough Justice: The International Criminal Court in a World of Power Politics*. Mr. Bosco previously worked on repatriating refugees to post-war Bosnia, including as deputy director of a United Nations and NATO joint project in Sarajevo.

Sandra Lynn Hodgkinson is senior vice president for Strategy and Corporate Development at Leonardo DRS, and a retired officer in the United States Navy JAG Corps with twenty-two years of combined active and reserve service. She previously worked in a range of government positions relating to defense and international justice across the Department of Defense, United States Department of State, and the White House (during the George W. Bush and Barack Obama administrations), including as Special Assistant (Chief of Staff) to Deputy Secretary of Defense, Deputy Assistant Secretary of Defense, Deputy to the Ambassador-at-Large for War Crimes Issues, and Director for International Justice at the National Security Council.

Saira Mohamed is Professor of Law at the UC Berkeley School of Law, where her research and teaching focus on criminal law, human rights, and responses to mass atrocities. She previously served as Senior Adviser in the Office of the U.S. Special Envoy for Sudan, where her work included addressing legal and policy issues regarding the International Criminal Court investigation in Darfur, and as an Attorney-Adviser for human rights and refugees in the State Department's Office of the Legal Adviser.

Alex Whiting is a Professor of Practice at Harvard Law School and currently serves as Deputy Prosecutor at the Kosovo Specialist Prosecutor's Office. He previously worked in the Office of the Prosecutor at the International Criminal Court (as Investigation Coordinator and then Prosecution Coordinator) and at the International Criminal Tribunal for the Former Yugoslavia (as lead prosecution counsel in three war crimes and crimes against humanity trials). He also has ten years' experience as a Federal Prosecutor in the United States.

ADVISORY GROUP MEMBERS

John B. Bellinger III, Partner at Arnold & Porter LLP, former State Department Legal Adviser (2005 to 2009) and National Security Council Legal Adviser (2001 to 2005).

Elizabeth Evenson, Associate Director of the International Justice Program, Human Rights Watch.

Charles C. Jalloh, Professor of Law at Florida International University, member of the UN International Law Commission, founder of the Center for International Law and Policy in Africa, former international criminal law practitioner at the ICTR, SCSL, Canadian Department of Justice, and visiting professional at the ICC.

Tod Lindberg, Senior Fellow at the Hudson Institute.

Elisa Massimino, Robert F. Drinan, S.J., Chair in Human Rights at Georgetown University Law Center, Senior Fellow at the Center for American Progress, and former President and CEO of Human Rights First.

Stephen Rapp, Senior Fellow at the U.S. Holocaust Memorial Museum's Center for Prevention of Genocide and at Oxford University's Blavatnik School of Government, former Ambassador-at-Large for War Crimes Issues (2009 to 2015), Senior Trial Attorney and Chief of Prosecutions at the ICTR (2001 to 2007) and Chief Prosecutor at the SCSL (2007 to 2009).

Natalie Reid, Partner at Debevoise & Plimpton LLP, former Associate Legal Officer at the ICTY.

David Scheffer, Clinical Professor Emeritus at Northwestern Pritzker School of Law, former Ambassador at Large for War Crimes Issues (1997 to 2001) and head of U.S. delegation to negotiations of the Rome Statute of the International Criminal Court.

Jane Stromseth, Francis Cabell Brown Professor of International Law at Georgetown University Law Center, former Deputy to the Ambassador-at-Large for Global Criminal Justice (2013 to 2015) and acting head of the Office of Global Criminal Justice (2015).

William H. Taft IV, former State Department Legal Adviser (2001 to 2005) and former U.S. Ambassador to NATO (1989 to 1992).

Clint Williamson, Senior Director for International Rule of Law and National Security at the McCain Institute for International Leadership and Distinguished Professor of Practice at the Arizona State University College of Law, former Lead Prosecutor for the European Union Special Investigative Task Force (2011 to 2014) and Ambassador-at-Large for War Crimes Issues (2006 to 2009).

In the initial stages of the Task Force's work, it also benefited from the participation of **Ashley Deeks** (then Professor of Law at University of Virginia School of Law and former State Department assistant legal adviser for political-military affairs), **Harold Hongju Koh** (Sterling Professor of International Law at Yale Law School and former State Department Legal Adviser, 2009 to 2013), and **William K. Lietzau** (former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy) in its Advisory Group, prior to their reappointment to government posts.

The Report and its Recommendations do not necessarily reflect the views of the Advisory Group members.

ENDNOTES

1 *See* Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir 30–31 (2013).

2 *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *in* II Y.B. Int'l L. Comm'n, para. 97 (1950).

3 Secretary Lawrence Eagleburger, *The Need to Respond to War Crimes in the Former Yugoslavia*, 3 U.S. Dep't State Dispatch 923 (1992); Elaine Sciolino, U.S. *Names Figures It Wants Charged with War Crimes*, N.Y. Times, Dec. 17, 1992, at A-1.

4 President William J. Clinton, *Remarks at the University of Connecticut in Storrs (Oct. 15, 1995)*, *in* Papers of the Presidents, Administration of William J. Clinton, Book II, at 1597 (1996).

5 *See, e.g.*, Richard Goldstone, *Historical Evolution—From Nuremberg to the International Criminal Court*, 25 Penn. St. Int'l L. Rev. 763, 765. Among other things, Goldstone noted, "Personnel, financial assistance, computer technicians, you name it—the United States provided crucial assistance." *Id.* at 765.

6 For example, President Clinton included this statement in his final 2000 National Security Strategy: "We and our European allies have made clear to President Kostunica his obligation to cooperate with the ICTY and our expectation that all indicted war criminals, including former President Milosevic, will be held accountable." A National Security Strategy for a Global Age, at 61 (Dec. 2000).

7 Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 St. Louis U. L.J. 953, 963, 973–74 (2011).

8 Prior to its 2013 expansion, the United States' War Crimes Rewards Program was limited to offering rewards for information leading to the arrest or conviction of individuals sought by the ICTY, ICTR, and Special Court for Sierra Leone (SCSL). U.S. Dep't of State, War Crimes Rewards Program. *See* Section II.B on the War Crimes Rewards Program.

9 Gregory Townsend, *Structure and Management*, *in* International Prosecutors 236 (Luc Reydams, Jan Wouters & Cedric Ryngaert eds., 2012); David Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals 34 (2011); Carla Del Ponte & Chuck Sudetic, Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity 123–24 (2011).

10 UN International Residual Mechanism for Criminal Tribunals Office of the Prosecutor Press Release, Mechanism Fugitive Félicien Kabuga Arrested Today (May 16, 2020).

11 UN International Criminal Tribunal for the Former Yugoslavia, Investigations; Mark Tran, *Spy Pictures "Show Bosnia Massacre,"* Guardian (Aug. 11, 1995).

12 *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Amicus Curiae Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadić (Int'l Crim. Trib. for the Former Yugoslavia July 17, 1995); National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1342.

13 National Security Strategy, at 48 (May 2010) [hereinafter 2010 National Security Strategy].

14 This includes the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD); the International, Impartial and Independent Mechanism for Syria (IIIM); and the Independent Investigative Mechanism for Myanmar (IIMM).

15 The United States has supported domestic international crimes investigations in the Democratic Republic of Congo (DRC), the Central African Republic (CAR), and Guatemala, among other places.

16 The list is a long one and includes, but is not limited to, Theodor Meron, Patricia Wald, and Gabrielle Kirk McDonald as ICTY judges; David Crane and Stephen Rapp as Chief Prosecutors of the SCSL, with the latter serving as the second Ambassador-at-Large for War Crimes Issues; David Tolbert at the ICTY; Brenda Hollis, who has served at the SCSL and now the ECCC; James Johnson, who was chief of prosecutions at the SCSL and is now Chief Prosecutor of the SCSL Residual Mechanism; Nicholas Koumjian, who has worked at the SCSL, ECCC, and is now head of the IIMM; Mark Harmon, a prosecutor at the ICTY then the International Co-Prosecutor at the ECCC; David Schwendiman, who was Deputy Chief Prosecutor and Head of the Special Department for War Crimes in Bosnia and Herzegovina and then the first Kosovo Specialist Prosecutor; Jack Smith, Kosovo Specialist Prosecutor and formerly Investigations Coordinator at the ICC; Clint Williamson at the ICTY, and Pierre-Richard Prosper at the ICTR, who both also later served as Ambassadors-at-Large for War Crimes Issues; and Teresa McHenry who began at the ICTY and now heads the Department of Justice's Human Rights & Special Prosecutions Unit. There are also a range of U.S. career prosecutors, defense counsel, and human rights lawyers who have led cases, appeared on behalf of defendants, and represented victims over the years before these institutions, including members of our Task Force.

17 *See* Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcommittee on International Operations, Committee on Foreign Relations, United States Senate, 105th Cong. 2d Sess., S. Hrg. 105-724, at 17 (July 23, 1998) (statement of Ambassador David Scheffer) (definitions "were scrubbed and negotiated with tireless effort by U.S. negotiators" and are an "achievement that we can be very proud of").

18 American Society of International Law, *Report of an Independent Task Force on U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (Mar. 2009) [hereinafter 2009 ASIL Task Force Report]. These objections included, in particular, the Court's ability to exercise jurisdiction over non-party nationals if they commit crimes on the territory of a state party and the ability of the prosecutor to commence an investigation on her or his own initiative, with authorization from the judges but without the involvement of states or the UN Security Council. For a more detailed exposition of these objections, see *id*. at 2–4; for analysis of the legal position regarding the jurisdiction over third-party nationals, see *id*. at 26–29.

19 Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcommittee on International Operations, Committee on Foreign Relations, United States Senate, *supra* note 17, at 15–16. *See also* Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole), Vol. II, Extract, Statement by Mr. Scheffer, paras. 20–23, UN Doc. A/CONF.183/C.1/SR.42 (July 17, 1998).

20 William J. Clinton, *Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000)*, *in* Papers of the Presidents, Administration of William J. Clinton, Book III, at 2816–17 (2000).

21 *Id*. at 2816.

22 Eric Schwartz, who served as Senior Director for Multilateral and Humanitarian Affairs at the National Security Council, recounts that during "negotiations on rules relating to the Rome Statute of the ICC . . . Pentagon officials played a central role in establishing the definitions of crimes. But to play this sort of a role, the United States must remain engaged." Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism,"* 4 Chi. J. Int'l L. 223, 230 (2003).

23 Under Secretary for Political Affairs Marc Grossman, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies (May 6, 2002).

24 U.S. Department of State Legal Adviser John B. Bellinger III, The United States and the International Criminal Court: Where We've Been and Where We're Going, Remarks to the DePaul University College of Law (Apr. 25, 2008).

25 2009 ASIL Task Force Report, *supra* note 18, at vi.

26 SC Res. 1593 (Mar. 31, 2005).

27 UN Security Council, 5158th Mtg., Statement by Mrs. Patterson, at 3, UN Doc. S/PV.5158 (Mar. 31, 2005). The referral resolution also contained a number of protections against any potential prosecution of U.S. personnel, which enabled the United States to abstain on the vote. *Id*.

28 Steven R. Weisman, *U.S. Rethinks Its Cutoff of Military Aid to Latin American Nations*, N.Y. Times (Mar. 12, 2006).

29 *See, e.g.*, Deputy Secretary of State Robert Zoellick, Remarks at the Brookings Institution Forum on the Situation in Darfur (Apr. 13, 2006) (if the ICC asks "for information and help, we try to provide that help"; "we will fully cooperate with [the ICC] and pursue those actions as related to the genocide in Darfur").

30 John Bellinger, The United States and the International Criminal Court: Where We've Been and Where We're Going, *supra* note 24.

31 *Id.*; *see* also U.S. Department of State Legal Adviser John B. Bellinger III, U.S. Perspectives on International Criminal Justice, Remarks at the Fletcher School of Law and Diplomacy (Nov. 14, 2008).

32 2009 ASIL Task Force Report, *supra* note 18, at iii, xv–xvi. ASIL followed the 2009 report with a second report, *Beyond Kampala: Next Steps for U.S. Principled Engagement with the International Criminal Court*, in November 2010.

33 SC Res. 1973 (Mar. 17, 2011). The United States also voted in favor of a resolution that would have referred the situation in Syria to the ICC, an exercise blocked by Russia and China. UN Press Release, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution (May 22, 2014).

34 *See, e.g.*, Stephen Pomper, *USG Statement on Int'l Criminal Court Probe into Alleged U.S. War Crimes Is Missing Some Things*, Just Security (Dec. 14, 2017).

35 *See id.*; Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties (Dec. 8, 2017).

36 *See, e.g.*, Todd Buchwald, David M. Crane, Benjamin Ferencz, Stephen J. Rapp, David Scheffer & Clint Williamson, *Former Officials Challenge Pompeo's Threats to the International Criminal Court*, Just Security (Mar. 18, 2020). The authors of this statement included one of the co-chairs of the Task Force and three members of the Advisory Group.

37 *See* Section III.A.2, Text Box - Criticism of Sanctions on ICC by China.

38 *See, e.g.*, American Bar Association, Center for Human Rights, Report to the House of Delegates, Resolution, at 5 (Aug. 2020) ("[A]n attack against the ICC and its professional staff by the United States—historically the leading exemplar of democracy and a just rule of law, of which an independent judiciary is an indispensable part—gives fodder to those who cite such attacks as a legitimate basis to undermine judicial independence in their countries."); *see further* notes 207–218 *infra* and accompanying text.

39 Leo Shane III, Meghann Myers & Carl Prine, *Trump Grants Clemency to Troops in Three Controversial War Crimes Cases*, Military Times (Nov. 15, 2019) ("critics have warned the moves could send the message that troops need not worry about following rules of engagement when fighting enemies abroad"). *See also* Dan Maurer, *Should There Be a War Crime Pardon Exception*, Lawfare (Dec. 3, 2019) ("One notable source of criticism has been from within the current and former ranks, or those who know something of the traditional military ethos. Naval War College and Naval Postgraduate School ethics professors recently *wrote*: 'The pardons of our war criminals by Trump, and his interference in and disrespect of our own military justice system is unprecedented and should trouble all Americans. We will not pull punches—they are shameful and a national disgrace.'"); Gabor Rona, *Can a Pardon Be a War Crime? When Pardons Themselves Violate the Laws of War*, Just Security (Dec. 24, 2020) (questioning whether the pardons themselves might amount to war crimes).

40 Secretary of State Michael R. Pompeo, Remarks to the Press (Mar. 17, 2020).

41 American Servicemembers' Protection Act, 22 U.S.C. §§7421–7433 [hereinafter ASPA]. The legislation was adopted as part of supplemental appropriations legislation after having been considered in various forms in the House and adopted as a floor amendment in the Senate by a vote of 75–19. Then-Senators Clinton and Kerry were among those who voted in favor. Then-Senator Biden opposed the legislation, insisting that the United States could adequately protect its interests with existing authorities. Although he expressed reservations about the Court itself, he accurately anticipated that the legislation—and particularly the threat to use of force to "rescue" non-Americans from the Court and cut off aid to ICC member states—would alienate U.S. allies. *See* 148 Cong. Rec. 9595.

42 ASPA Section 7421, including reference to "Any American prosecuted . . ." (para. 7); "Members of the Armed Forces of the United States should be free from prosecution by the [ICC]" (para. 8); "the Rome Statute creates a risk that the President and other senior elected and appointed officials . . . may be prosecuted" (para. 9); and "The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals" (para. 11).

43 ASPA, *supra* note 41, § 7427. This authority also extended to certain other "covered persons," and earned ASPA the nickname "The Hague Invasion Act." Other provisions limited the ability of the United States to participate in UN peacekeeping operations in circumstances in which the Security Council had failed to exempt participating U.S. military personnel from the ICC's jurisdiction. *Id.*, § 7424.

44 *See* Julian Bava & Kiel Ireland, *The American Servicemembers' Protection Act: Pathways to and Constraints on U.S. Cooperation with the International Criminal Court*, 12 Eyes on the ICC 1 (2016–17).

45 For example, ASPA was passed August 2, 2002. Saddam Hussein was initially detained on December 14, 2003; was turned over to the legal control of the interim Iraqi government on June 30, 2004; and was arraigned and formally charged on July 1, 2004.

46 In terms of process, it has been reported that "[f]or each ICC request for information that is within the control of a United States public entity, the ICC submits a request to the U.S. embassy at The Hague. The embassy then transmits the requests to the State Department, where they are reviewed internally and within an interagency process. For a typical request, an internal memorandum will be circulated to relevant agencies, allowing for an opportunity to object to case-specific information sharing. Absent objection, the request will be approved. For atypical requests, the relevant agencies and authorities may meet face-to-face to weigh competing policy considerations." Aida Ashouri & Caleb Bowers, *Digital Evidence and the American Servicemembers' Protection Act* (Working Paper, Salzburg Workshop on Cyberinvestigations, Oct. 2013).

47 ASPA, *supra* note 41, § 7426. Numerous countries were exempt, including NATO allies, "major non-NATO allies," and Taiwan. *Id.*, § 7426(d). In December 2004, Congress also approved a restriction on assistance funds under the Economic Support Fund to any state party to the Rome Statute (except for states eligible for assistance under the Millennium Challenge Act of 2003), but allowed the President to waive that restriction if the state had signed an Article 98 agreement (the "Nethercutt Amendment"). This restriction was modified for FY2006 (*see* 2009 ASIL Task Force Report, *supra* note 18, at 11–14), and did not appear at all in the FY2009 omnibus appropriation bill.

48 State Department Spokesman Richard Boucher, Press Statement, U.S. Signs 100th Article 98 Agreement (May 3, 2005). The texts of ninety-five of these agreements are here. In September 2018, then-National Security Advisor John Bolton announced a renewed interest in concluding additional agreements, but the Task Force is not aware of any steps taken by the Trump administration to do so. Matthew Kahn, *National Security Adviser John Bolton Remarks to Federalist Society*, Lawfare (Sept. 10, 2018); *see also* Ben Batros, *To Undermine the ICC, Bolton's Target Extends Way Beyond the Court*, Just Security (Sept. 24, 2018).

49 *See* EU Guiding Principles Concerning Arrangements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, Council of Europe Draft Council Conclusions on the ICC (Sept. 30, 2002).

50 U.S. Dep't of Defense Authorization for Appropriations for Fiscal Year 2007, Hearing of the Senate Armed Services Committee, Combatant Commander's on Their Military Strategy and Operational Requirements (Mar. 14, 2006).

51 *See* Clare Ribando Seelke, Cong. Res. Serv., Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America (2007).

52 Secretary of State Condoleezza Rice, Press Statement, En Route to San Juan, Puerto Rico (Mar. 10, 2006).

53 In 2006, restrictions on IMET funding were repealed. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1222, 120 Stat. 2083, 2423 (2006). In 2008, the remaining restrictions on Foreign Military Financing were repealed. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1212, 123 Stat. 3, 371 (2008). For more history of the imposition and later repeal of these restrictions, *see* 2009 ASIL Task Force Report, *supra* note 18, at 11–14.

54 22 U.S.C. §§ 7401–7402.

55 *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 7049(b).

56 *See* 22 U.S.C. § 2708 (b)(10) (emphasis added) (amending legislation is available here). For a general description of the program, *see* Beth Van Schaack, *ICC Fugitive in US Custody?*, Just Security (Jan. 6, 2015); U.S. *Dep't of State*, War Crimes Rewards Program.

57 *See* U.S. Dep't of State, Office of Global Criminal Justice, Fugitives from Justice, Wanted: Joseph Kony (still at large); U.S. Dep't of State, Office of Global Criminal Justice, Fugitives from Justice, Wanted: Okot Odhiambo (deceased); U.S. Dep't of State, Office of Global Criminal Justice, Fugitives from Justice, Wanted: Dominic Ongwen (in custody).

58 *See* U.S. Dep't of State, Office of Global Criminal Justice, Fugitives from Justice, Wanted: Jean Bosco Ntaganda (in custody). *See also* Jason Stearns, *US Bounty Could Foment M23 Splits*, Congo Siasa (Feb. 9, 2013).

59 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115–232, § 1232.

60 Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441.

61 22 U.S.C. Chapter 105 – Global Fragility, §§ 9801–9810 (inserted by Pub. L. No. 116–94, Div. J, Title V, §§ 502–511, Dec. 20, 2019, 133 Stat. 3060; for background to the Act, *see* U.S. Inst. Peace, *The Global Fragility Act: A New U.S. Approach* (Jan. 15, 2020).

62 Women, Peace, and Security Act of 2017, Pub. L. No. 115-68.

63 Syrian War Crimes Accountability Act of 2017 (incorporated into the National Defense Authorization Act for Fiscal Year 2019, *supra* note 59), Pub. L. No. 115-232, § 1232.

64 Iraq and Syria Genocide Relief and Accountability Act of 2018, Pub. L. No. 115-300.

65 *See*, *e.g.*, Elie Wiesel Genocide and Atrocities Prevention Report, at 2–3 (2019).

66 Global Magnitsky Human Rights Accountability Act, Title XII, Subtitle F of Pub. L. No. 114-328 [hereinafter Global Magnitsky Act]; 22 U.S.C. § 2656, Management of Foreign Affairs. *See also* Exec. Ord. 13818, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption (Dec. 20, 2017) [hereinafter EO 13818].

67 This involves six situations (Burundi, CAR I and II, DRC, Libya, Mali, Sudan/Darfur) in which the ICC has one or more active investigations; Ukraine (where the Prosecutor has indicated an intent to open an investigation after completing her preliminary examination); and Venezuela (where a preliminary examination is ongoing). *See* U.S. Dep't of Treasury, Sanctions Programs and Country Information.

68 *See* U.S. Dep't of Treasury, Specially Designated Nationals and Blocked Persons List (SDN). The ICC has ceased its proceedings against some of these individuals, including cases where charges were not confirmed but the sanctions imposed by the United States remain.

69 Rome Statute of the International Criminal Court, Arts. 8(2)(c)(iii), 8(2)(e)(iii), July 17, 1998 [hereinafter Rome Statute]. The ICC investigated and initiated a case based on an attack on an African Union peacekeeping base in Darfur, Sudan. ICC Press Release, Prosecutor: "The Attack on African Union Peacekeepers in Haskanita Was an Attack on Millions of Civilians They Had Come to Protect; We Will Prosecute Those Allegedly Responsible," ICC-OTP-20090517-PR412 (May 17, 2009).

70 Similarly, regional peacekeeping missions that the United States has supported, such as the African Union Mission in Sudan (AMIS) and the African-led International Support Mission to Mali (AFISMA), frequently operate in ICC situation countries. *See* generally White House Press Release, Fact Sheet: U.S. Support for Peacekeeping in Africa (Aug. 6, 2014).

71 *See*, *e.g.*, SC Res. 1991, para. 19 (June 28, 2011) ("further stresses the importance of the Congolese Government actively seeking to hold accountable those responsible for war crimes and crimes against humanity in the country and of regional cooperation to this end, including through cooperation with the International Criminal Court and calls upon MONUSCO to use its existing authority to assist the Government in this regard"); SC Res. 2098 (Mar. 28, 2013) ("Welcoming the commitment made by the Government of the DRC to hold accountable those responsible for atrocities in the country, noting the cooperation of the Government of the DRC with the International Criminal Court (ICC) . . ."); SC Res. 2149, paras. 12, 38 (Apr. 10, 2014) ("Reiterates that all perpetrators of violations of international humanitarian law and human rights violations and abuses must be held accountable and that some of those acts may amount to crimes under the Rome Statute of the International Criminal Court (ICC), to which the CAR is a State party, recalls the statements made by the Prosecutor of the ICC on 7 August 2013 and 9 December 2013, notes further the opening of a preliminary examination by the Prosecutor of the ICC on alleged crimes committed in the CAR since September 2012, and welcomes the cooperation by the Transitional authorities in this regard; . . . notes the relevance of the guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court.").

72 SC Res. 2100, para. 16(g) (Apr. 25, 2013); *see* most recently SC Res. 2531, para. 28(e)(i) (June 29, 2020).

73 Sean D. Murphy, Contemporary Practice of the United States, *Efforts to Obtain Immunity from ICC for U.S. Peacekeepers*, 96 Am. J. Int'l L. 725–29 (2002).

74 UN Security Council, 4563rd Mtg., Statement by Mr. Negroponte, at 2–3, UN Doc. S/PV.4563 (June 30, 2002); Bulgaria, France, Germany, Ireland, Italy, Norway, Russian Federation and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, UN Doc. S/2002/712 (June 30, 2002). The Security Council subsequently passed short extensions of the previous mandate for the Bosnia peacekeeping mission—until July 3 (SC Res.1420 (June 30, 2002)) and then again until July 15 (SC Res. 1421 (July 3, 2002))—by which time the Security Council had passed Resolution 1422 deferring any ICC investigation of personnel connected with UN peacekeeping missions that were nationals of non-party states (*see* infra).

75 SC Res. 1487 (June 12, 2003).

76 In the early stages of UNMIL, the United States contributed up to eighty-four personnel. *See*, *e.g.*, UN, UN Mission's Contributions by Country (Mar. 31, 2004). The mission was subsequently led by Army Reserve Brig. Gen. Hugh Van Roosen, who served as the force Chief of Staff from 2012–2013. *See* Lisa A. Ferdinando, *Army Contributions to U.N. Liberia Mission Significant, Former Force Chief Says*, Army News Serv. (Sept. 20, 2013).

77 At the United States' insistence, the Council then included similar language when it adopted Resolution 1593, referring the situation in Darfur to the ICC Prosecutor. *See* SC Res. 1593, *supra* note 26, para. 6.

78 Secretary of State Colin Powell, Testimony Before the Senate Foreign Relations Committee – The Crisis in Darfur (Sept. 9, 2004).

79 David Bosco, Rough Justice: The International Criminal Court in a World of Power Politics, at 108 et seq. (2013).

80 *Id*. at 111–12 (quoting John Bellinger).

81 SC Res. 1593, *supra* note 26.

82 Security Council, 5158th Mtg., Statement by Mrs. Patterson, at 3, UN Doc. S/PV.5158 (Mar. 31, 2005).

83 Specifically, the Council decided in the Darfur resolution that contributing states that were not parties to the Rome Statute would have exclusive jurisdiction over their "nationals, current or former officials or personnel." In addition, while calling on states to fully cooperate with the ICC, the resolution also recognized that non-party States have "no obligation under the Statute." *See* SC Res. 1593, *supra* note 26, paras. 2, 6–7.

84 *See id*., para. 7; Rome Statute, *supra* note 69, Art. 115(b) ("The expenses of the Court . . . shall be provided by the following sources: . . . (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council"); *see* notes 468–470 *infra* and accompanying text.

85 Human Rights Watch, *The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Administration* (Aug. 2, 2009). *See* Security Council, 5789th Mtg., Statement by Mr. DeLaurentis, at 12, UN Doc. S/PV.5789 (Dec. 5, 2007); Security Council, 5905th Mtg., Statement by President Khalilzad, at 18, UN Doc. S/PV.5905 (June 5, 2008); Security Council, 5912th Mtg., UN Doc. S/PV.5912 (June 16, 2008); Michael Abramowitz & Colum Lynch, *Darfur Killings Soften Bush's Opposition to International Court*, Wash. Post (Oct. 12, 2008).

86 Security Council, 7337th Mtg., Statement by Fatou Bensouda, Prosecutor of the International Criminal Court, at 2, UN Doc. S/PV.7337 (Dec. 12, 2014) ("Faced with an environment where my Office's limited resources for investigations are already overstretched, and given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to put investigative activities in Darfur on hold as I shift resources to other urgent cases, especially those where trial is approaching."); *see* also UN Press Release, Amid Growing Brutality in Darfur, International Criminal Court Prosecutor Urges Security Council to Rethink Tactics for Arresting War Crime Suspects (Dec. 12, 2014). For analysis of state reactions to the lack of Security Council support leading to this decision, *see* Stuart Ford, *The ICC and the Security Council: How Much Support Is There for Ending Impunity?*, 26 Ind. Int'l & Comp. L. Rev. 33, 42 (2016).

87 SC Res. 1970, paras. 6, 8 (Feb. 26, 2011). The Libya referral included identical protections for nationals of the United States (and other non-party States) from the Court's jurisdiction as those found in paragraph 6 of Council's Darfur referral, as well as language like that in paragraph 7 of the resolution recognizing that expenses would be borne by the Rome Statute parties and not the Security Council.

88 U.S. Permanent Representative to the United Nations Susan E. Rice, Remarks in an Explanation of Vote on Resolution 1970 on Libya Sanctions (Feb. 26, 2011).

89 Albania et al.: Draft Resolution, UN Doc. S/2014/348 (May 22, 2014). For the debates, see Security Council, 7180th Mtg., UN Doc. S/PV.7180 (May 22, 2014).

90 Beth Van Schaack, *Deconstructing Syria's Would-Be International Criminal Court Referral: The Politics of International Justice*, 56 Stan. J. Int'l L. 1 (2020).

91 Security Council, Statement by Mr. Mark Simonoff, Minister Counsellor of the United States of America to the United Nations, at 24, UN Doc. S/2020/371 (May 7, 2020) ("Saif Al-Islam Al-Qadhafi, Mahmoud Al-Werfalli, Al-Tuhamy Mohamed Khaled and Abdullah Al-Senussi should face justice for their alleged crimes."). The ICC had issued arrest warrants for all four of the individuals named by the United States, three of which remain outstanding (the case against Abdullah Al-Senussi was declared inadmissible in October 2013).

92 Security Council, Statement by Mr. Simonoff, Minister Counsellor of the United States of America to the United Nations, at 21, UN Doc. S/2020/538 (June 15, 2020) ("We have received reports that Ali Kushayb is in custody. Ali Kushayb must be held accountable for his alleged abuses. The people of Darfur, victims, survivors and their families deserve justice.").

93 Security Council, Statements by Representatives of Belgium, China, and Saint Vincent and the Grenadines, at 6–8, 20, UN Doc. S/2020/1108 (Nov. 13, 2020). In addition to the critique by China (*see* Text Box - Criticism by China of U.S. Sanctions on ICC), see also Joint Statement by Belgium, the Dominican Republic, Estonia, France, Germany, Niger, Saint Vincent and the Grenadines, South Africa, Tunisia, the United Kingdom, Ireland, Mexico, and Norway (reconfirming their "unwavering support for the Court," reiterating their "commitment to uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity and independence undeterred by any measures or threats against the Court, its officials and those cooperating with it," and underscoring that "[a]ny attempt to undermine the independence of the Court should not be tolerated").

94 *See, e.g.*, Security Council, Communiqué of the 142nd Meeting of the Peace and Security Council, para. 11(i), UN Doc. S/2008/481 (July 23, 2008); Security Council 5947th Mtg., UN Doc. S/PV.5947 (July 31, 2008); Security Council, 6028th Mtg., UN Doc. S/PV.6028 (Dec. 3, 2008).

95 For example, a deferral was attempted in 2013 to delay the trial of Kenyan officials. *See* Security Council, UN Doc. S/2013/624 (Oct. 22, 2013). The United States, along with seven other nations, abstained, so the draft resolution was not adopted. *Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining*, UN News (Nov. 15, 2013).

96 SC Res. 1828, at 2 (July 31, 2008) ("Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council (PSC) Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further."). The resolution passed 14–0–1.

97 UN Doc. S/PV.5947, *supra* note 94, at 8 ("The United States abstained in the voting because the language added to the resolution would send the wrong signal to Sudanese President Al-Bashir and undermine efforts to bring him and others to justice.").

98 *See* most recently General Assembly, Seventy-Fifth Sess., Report of the International Criminal Court on Its Activities in 2019/20, UN Doc. A/75/324 (Aug. 24, 2020); GA Res. 75/3 (Nov. 4, 2020).

99 *See* most recently General Assembly, Fifty-Fifth Sess., 84th Plenary Mtg., UN Doc. A/55/PV.84 (Dec. 21, 2000).

100 *See* General Assembly, Fifty-Sixth Sess., 85th Plenary Mtg., Statement by Mr. Hybl, at 9, UN Doc. A/56/PV.85 (Dec. 12, 2001); General Assembly, Fifty-Seventh Sess., 52nd Plenary Mtg., Statement by Mr. Martinez, at 10, UN Doc. A/57/PV.52 (Nov. 19, 2002); General Assembly, Fifty-Eighth Sess., 72nd Plenary Mtg., Statement by Ms. Willson, at 9, UN Doc. A/58/PV.72 (Dec. 9, 2003); General Assembly, Fifty-Ninth Sess., 65th Plenary Mtg., Statement by Ms. Moore, at 9–10, UN Doc. A/59/PV.65 (Dec. 2, 2004); General Assembly, Sixtieth Sess., 53rd Plenary Mtg., Statement by Ms. Willson, at 10, UN Doc. A/60/PV.53 (Nov. 23, 2005); General Assembly, Sixty-First Sess., 56th Plenary Mtg., Statement by Ms. Willson, at 3, UN Doc. A/61/PV.56 (Nov. 20, 2006); General Assembly, Sixty-Second Sess., 57th Plenary Mtg., Statement by Mr. Wolff, at 28–29, UN Doc. A/62/PV.57 (Nov. 26, 2007); General Assembly, Sixty-Third Sess., 45th Plenary Mtg., Statement by Ms. Willson, at 11, UN Doc. A/63/PV.45 (Nov. 11, 2008); General Assembly, Sixty-Fourth Sess., 34th Plenary Mtg., Statement by Ms. McLeod, at 16, UN Doc. A/64/PV.34 (Nov. 2, 2009). For Sudan dissociating from consensus, see UN Doc. A/63/PV.45, at 11.

101 *See in particular* UN Doc. A/60/PV.53, *supra* note 100, at 10–11; UN Doc. A/61/PV.56, *supra* note 100, at 3; UN Doc. A/62/PV.57, *supra* note 100, at 28–30; UN Doc. A/63/PV.45, *supra* note 100, at 11–12.

102 *See* General Assembly, Sixty-Fifth Sess., 52nd Plenary Mtg., UN Doc. A/65/PV.52 (Nov. 23, 2010); General Assembly, Sixty-Sixth Sess., 111th Plenary Mtg., UN Doc. A/66/PV.111 (May 29, 2012); General Assembly, Sixty-Seventh Sess., 95th Plenary Mtg., UN Doc. A/67/PV.95 (Aug. 22, 2013); General Assembly, Sixty-Eighth Sess., 107th Plenary Mtg., UN Doc. A/68/PV.107 (Sept. 9, 2014); General Assembly, Sixty-Ninth Sess., 89th Plenary Mtg., UN Doc. A/69/PV.89 (May 8, 2015); General Assembly, Seventieth Sess., 95th Plenary Mtg., UN Doc. A/70/PV.95 (May 13, 2016); General Assembly, Seventy-First Sess., 68th Plenary Mtg., UN Doc. A/71/PV.68 (Dec. 23, 2016); General Assembly, Seventy-Second Sess., 37th Plenary Mtg., UN Doc. A/72/PV.37 (Oct. 30, 2017).

103 *See* UN Doc. A/72/PV.37, *supra* note 102, at 17–19.

104 *See* General Assembly, Seventy-Third Sess., 28th Plenary Mtg., Statement by Ms. Palau-Hernandez, at 27, UN Doc. A/73/PV.28 (Oct. 29, 2018); General Assembly, Seventy-Fourth Sess., 26th Plenary Mtg., Statement by Mr. Giordano, at 26, UN Doc. A/74/PV.26 (Nov. 4, 2019); General Assembly, Seventy-Fifth Sess., 19th Plenary Mtg., Statement by Mr. Mills, at 16, UN Doc. A/75/PV.19 (Nov. 2, 2020).

105 *See, e.g.*, UN Doc. A/73/PV.28, *supra* note 104, at 23–24 (Myanmar), 27–28 (Sudan), 28 (Syria), 29–30 (Russia).

106 *See, e.g.*, GA Res. 75/238, Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar (Jan. 4, 2021); GA Res. 75/158, Trafficking in Women and Girls (Dec. 23, 2020); GA Res. 75/189, Extrajudicial, Summary or Arbitrary Executions (Dec. 28, 2020); GA Res. 74/143, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Jan. 22, 2020); GA Res. 74/169, Situation of Human Rights in the Syrian Arab Republic (Jan. 23, 2020); GA Res. 75/193, Situation of Human Rights in the Syrian Arab Republic (Dec. 28, 2020); GA Res. 74/166, Situation of Human Rights in the Democratic People's Republic of Korea (Jan. 27, 2020); GA Res. 75/190, Situation of Human Rights in the Democratic People's Republic of Korea (Dec. 28, 2020); GA Res. 75/138, Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts (Dec. 22, 2020); GA Res. 74/116, Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel (Jan. 20, 2020); GA Res. 75/125, Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel (Dec. 21, 2020); GA Res. 74/133, Rights of the Child (Jan. 20, 2020); GA Res. 74/160, Protection of and Assistance to Internally Displaced Persons (Jan. 27, 2020).

107 *See, e.g.*, UN General Assembly Human Rights Council Resolutions and Reports: (1) regarding the DPRK: HRC Res. 34/24, Situation of Human Rights in the Democratic People's Republic of Korea (Apr. 3, 2017); HRC Res. 37/28, Situation of Human Rights in the Democratic People's Republic of Korea (Apr. 9, 2018); (2) regarding Syria: HRC Res. 34/26, Human Rights Situation in the Syria Arab Republic (Apr. 5, 2017); HRC Res. 35/26, Human Rights Situation in the Syria Arab Republic (July 14, 2017); HRC Res. 37/29, Human Rights Situation in the Syria Arab Republic (Apr. 9, 2018); HRC Res. 38/16, Human Rights Situation in the Syria Arab Republic (July 19, 2018); (3) regarding Libya: HRC Res. 34/38, Technical Assistance and Capacity-Building to Improve Human Rights in Libya (Apr. 6, 2017); (4) regarding Mali: HRC Res. 34/39, Technical Assistance and Capacity-Building for Mali in the Field of Human Rights (Apr. 3, 2017); HRC Res. 37/39, Technical Assistance and Capacity-Building for Mali in the Field of Human Rights (Apr. 5, 2018); (5) regarding Myanmar: HRC Res. 37/32, Situation of Human Rights in Myanmar (Apr. 9, 2018); (6) regarding genocide prevention: HRC Res. 37/26, Prevention of Genocide (Apr. 6, 2018); and (7) regarding extrajudicial executions: HRC Res. 35/15, Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (July 11, 2017). *See also* Report of the Human Rights Council, UN Doc. A/72/53 (2017); Report of the Human Rights Council, UN Doc. A/73/53 (2018).

108 For example, the United States insisted that no explicit reference to the ICC be included in Resolution 1502 on the protection of UN personnel, which was passed after the bombing of the UN office in Baghdad (Aug. 26, 2003), though it did accept reference in the preamble to earlier General Assembly resolutions that included favorable references. Frederic L. Kirgis, *Security Council Resolution 1502 on the Protection of Humanitarian and United Nations Personnel*, 8 ASIL Insights (Sept. 12, 2003).

109 *See* Michele Kelemen, *Taylor War Crimes Trial Worries West Africa*, NPR (Apr. 6, 2006).

110 Statement by the President of the Security Council, at 3, UN Doc. S/PRST/2012/1 (Jan. 19, 2012). The President noted:

> The Security Council recalls the Statement by its President on 29 June 2010 (S/PRST/2010/11) which included the contribution of the International Criminal Court, ad hoc and mixed tribunals, as well as chambers in national tribunals to the fight against impunity for the most serious crimes of concern to the international community. In this regard, the Council reiterates its previous call on the importance of State cooperation with these Courts and Tribunals in accordance with the states' respective obligations.

111 *See*, *e.g.*, SC Res. 1960, pmbl., at 2, (Dec. 16, 2010) (drawing attention to the full range of justice and reconciliation measures available and recalling the range of sexual offenses in the Rome Statute); SC Res. 2250, para. 6 (Dec. 9, 2015) ("noting that the fight against impunity for the most serious crimes of international concern has been strengthened through the work on and prosecution of these crimes by the International Criminal Court, ad hoc and mixed tribunals and specialized chambers in national tribunals"); SC Res. 2122, para. 6, (Oct. 18, 2013) (same); Statement by the President of the Security Council, UN Doc. S/PRST/2014/21 (Oct. 28, 2014) (same).

112 *See*, *e.g.*, SC Res. 2222, pmbl. (May 27, 2015); Statement by the President of the Security Council, *supra* note 110, at 2–3 (expressing support for the ICC, reiterating its call for states to cooperate with international courts "in accordance with the states' respective obligations," and expressing its commitment to an effective follow up).

113 SC Res. 2171, pmbl., at 3 (Aug. 21, 2014) ("recognising in this regard the contribution of the International Criminal Court, in accordance with the principle of complementarity to national criminal jurisdictions as set out in the Rome Statute, towards holding accountable those responsible for such crimes; and reiterating its call on the importance of State cooperation with these courts and tribunals in accordance with the States' respective obligations").

114 Resolution 2238, for example, extended the UN Support Mission in Libya and reiterated its call for the Libyan Government to cooperate with the Court. SC Res. 2238, pmbl., para. 10 (Sept. 10, 2015).

115 SC Res. 2448, paras. 26, 27, 40 (Dec. 13, 2018). *See also* Security Council Report, *Renewal of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)* (Dec. 6, 2018).

116 For fuller descriptions of the underlying issues, *see* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 Am. J. Int'l L. 257 (2015); Beth van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 Colum. J. Transnat'l L. 505 (2011).

117 For analysis leading up to the Review Conference of the issues to be addressed, *see* Vijay Padmanabhan, From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference (Council on Foreign Relations Special Report No. 55, Apr. 2010). For recommendations on U.S. engagement following the Review Conference, *see* American Society of International Law, *Beyond Kampala: Next Steps for U.S. Principled Engagement with the International Criminal Court* (Nov. 2010).

118 *Id*. *See also* Brett Schaefer, *The Kampala Aftermath: The U.S. Should Remain Wary of the ICC*, Heritage Found. (Aug. 9, 2010).

119 Joint Committee Staff Trip Report for the Senate Foreign Relations Committee, International Criminal Court Review Conference, Kampala, Uganda, May 31–June 11, 2010, 111th Cong., 2d Sess., at 12 (Sept. 2, 2010).

120 *See* Resolution RC/Res.5, Amendments to Article 8 of the Rome Statute (June 10, 2010).

121 Review Conference of the Rome Statute, Pledges, Doc. No. RC/9, Kampala, May 31–June 11, 2010, at 18 (July 15, 2010) [hereinafter Review Conference of the Rome Statute, Pledges].

122 Ambassador at Large for War Crimes Issues Stephen Rapp, Address to Assembly of States Parties (Nov. 19, 2009). Between 2009 and 2016, a representative of the United States participated at and made similar interventions in each meeting of the Assembly of States Parties: *see* here (for statement to the 13th session of the ASP, *see* here).

123 For the statement at the ASP meeting in 2017, *see* Statement on Behalf of the United States, 16th Session of the Assembly of States Parties (Dec. 8, 2017).

124 Statement by Mr. Hu Bin, Head of the Chinese Observer Delegation and Deputy Director-General of the Department of Treaty and Law, Ministry of Foreign Affairs of China, 18th Session of the Assembly of States Parties (Dec. 3, 2019).

125 2010 National Security Strategy, *supra* note 13, at 48 ("Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law."). *See also* National Security Strategy, 22 (Feb. 2015) ("We will work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent with U.S. law and our commitment to protecting our personnel.") [hereinafter 2015 National Security Strategy].

126 *See, e.g.*, Robert Zoellick, Remarks at the Brookings Institution Forum on the Situation in Darfur, *supra* note 29 (if the ICC asks "for information and help, we try to provide that help"; "we will fully cooperate with [the ICC] and pursue those actions as related to the genocide in Darfur"); Security Council, 7199th Mtg., Statement by Mr. Lord, at 15, UN Doc. S/PV.7199 (June 17, 2014) (the United States "will continue to support Prosecutor Bensouda and ICC efforts to bring to justice those most responsible for serious crimes in Darfur"; *see* also Security Council, 6778th Mtg., Statement by Mr. DeLaurentis, at 8–10, UN Doc. S/PV.6778 (June 5, 2012); Security Council, 7337th Mtg., Statement by Mr. Pressman, at 11–13, UN Doc. S/PV.7337 (Dec. 12, 2014). See note 94 *supra* for U.S. statements resisting deferral of the investigation or any prosecutions arising out of the situation in Darfur.

127 H.R. 2478, Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172 (May 19, 2009).

128 Review Conference of the Rome Statute, Pledges, *supra* note 121, at 18.

129 White House Press Release, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army (Oct. 14, 2011). *See generally* *Operation Observant Compass*, Glob. Sec.

130 Kasper Agger, *Completing the Mission: U.S. Special Forces Are Essential for Ending the LRA*, Enough Proj. (Oct. 2013).

131 John Kerry, *More Work to Bring War Criminals to Justice*, Huffington Post (Apr. 3, 2013); Human Rights Watch, *Bosco Ntaganda*.

132 Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment (July 8, 2019) (finding Bosco Ntaganda guilty of eighteen counts of war crimes and crimes against humanity); Prosecutor v. Ntaganda, ICC-01/04-02/06-2442, Sentencing Judgment (Nov. 7, 2019) (sentencing Bosco Ntaganda to a total of thirty years of imprisonment). The conviction and sentence were upheld on appeal. *See* Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Red, Public Redacted Version of Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor Against the Decision of Trial Chamber VI of 8 July 2019 Entitled "Judgment" (Mar. 30, 2021); Prosecutor v. Ntaganda, ICC-01/04-02/06-2667-Red, Public Redacted Version of Judgment on the Appeal of Mr Bosco Ntaganda Against the Decision of Trial Chamber VI of 7 November 2019 Entitled "Sentencing Judgment" (Mar. 30, 2021).

133 *LRA Rebel Dominic Ongwen Surrenders to US Forces in CAR*, BBC News (Jan. 7, 2015); ICC Press Release, Dominic Ongwen Transferred to the Hague, ICC-CPI-20150120-PR1084 (Jan. 20, 2015).

134 Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment (Feb. 4, 2021) (finding Dominic Ongwen guilty of sixty-one counts of crimes against humanity and war crimes).

135 State Department Spokesperson Ned Price, Press Statement, Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity (Feb. 4, 2021).

136 *See, e.g.*, Jorge A. F. Godinho, *The Surrender Agreements Between the US and the ICTY and ICTR: A Critical View*, 1 J. Int'l Crim. Just. 502 (2003).

137 David Scheffer, *Proposal for an International Criminal Court Arrest Procedures Protocol*, 12 Nw. J. Hum. Rts. 229 (2014).

138 Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, Statement of the U.S. at the Eleventh Session of the Assembly of States Parties of the International Criminal Court (Nov. 15, 2012).

139 *See* ASPA, *supra* note 41, § 7423(h): "No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court."

140 USAID, Central African Republic (last updated Sept. 25, 2020) ("In FY 2015, USAID provided nearly $84 million in humanitarian assistance to conflict-affected and displaced populations in CAR and CAR refugees in other countries."); Ambassador Andrew Bremberg, U.S. Statement on Funding for the Rohingya Humanitarian Crisis (Mar. 3, 2020) ("The United States has already provided more than $760 million since the August 2017 escalation of violence that prompted over 740,000 Rohingya to flee to Bangladesh. With this new funding, our total humanitarian assistance reaches nearly $820 million since 2017. Of this funding, nearly $700 million is for programs inside Bangladesh.").

141 Robert Zoellick, Remarks at the Brookings Institution Forum on the Situation in Darfur, *supra* note 29.

142 Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, Intervention of the United States Observer Delegation, 13th Assembly of States Parties (Dec. 15, 2014). *See also* notes 44–47 *supra* and accompanying text.

143 Simon Lewis, *Biden Administration to Review Sanctions on International Criminal Court Officials*, Reuters (Jan. 26, 2021).

144 Article 54(3)(e) of the Rome Statute allows the prosecution to agree not to disclose information obtained on condition of confidentiality for lead and background purposes ("solely for the purpose of generating new evidence") (Article 72 establishes a separate regime for protection of national security information). However, Article 67(2) requires the prosecutor to disclose to the accused exculpatory evidence in her possession or control, and the Court's decisions in Lubanga revealed significant tensions between these provisions that limits the ability of the prosecutor to assure confidentiality of information without potentially constraining her ability to proceed with a trial (*see in particular* Prosecutor v. Lubanga, ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused (June 15, 2008).

145 *See, e.g.*, Marc Grossman Remarks, American Foreign Policy and the International Criminal Court, *supra* note 23 (criticizing the ICC as "a flawed outcome", "an institution of unchecked power," and "open for exploitation and politically motivated prosecutions"); John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 L. & Contemp. Probs. 167 (2001).

146 Kahn, *supra* note 48.

147 Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien (June 11, 2020).

148 Secretary Michael R. Pompeo at a Press Availability (Sept. 2, 2020).

149 Stephen J. Rapp, Intervention of the United States Observer Delegation, 13th Assembly of States Parties, *supra* note 142.

150 *See* Office of Global Criminal Justice Acting Director Jane Stromseth, Remarks at the Fourteenth Session of the International Criminal Court Assembly of States Parties (Nov. 19, 2015) ("The United States has expressed its support for each of the investigations and prosecutions currently under way before the Court"); *see* also note 157 *infra*.

151 White House Press Release, Statement by President Obama on the International Court Announcement (Dec. 15, 2010) ("I urge all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation.").

152 U.S. Mission to the UN, Remarks at a UN Security Council Briefing on Sudan and the International Criminal Court (June 8, 2017) ("Having referred the situation in Darfur to the ICC over ten years ago, we must continue to demand Sudan's compliance with this Council's decisions. While victims have not yet seen justice, and refugees and internally displaced persons continue to struggle years after the conflict began, it is unacceptable that President Bashir still travels and receives a warm welcome from certain quarters of the world—and unacceptable that none of the Sudanese officials with outstanding arrest warrants have been brought to justice.").

153 U.S. Mission to the UN, Remarks at a UN Security Council Briefing on the Situation in Libya (May 8, 2017) ("We urge all relevant Libyan actors to facilitate the transfer of Saif Qadhafi to The Hague so he may stand trial for his alleged crimes against humanity. We welcome the continued reports of Libya's cooperation with the Prosecutor, consistent with this Council's calls for such cooperation and Libya's obligations under resolution 1970.").

154 Secretary of State John Kerry, Press Statement, Bosco Ntaganda's Expected Surrender to the International Criminal Court (Mar. 22, 2013) ("Ultimately, peace and stability in the D.R.C. and the Great Lakes will require the restoration of civil order, justice, and accountability. Ntaganda's expected appearance before the International Criminal Court in The Hague will contribute to that goal, and will also send a strong message to all perpetrators of atrocities that they will be held accountable for their crimes.").

155 *See, e.g.*, State Department Spokesperson John Kirby, Press Statement, ICC Announces Cases on Destruction of Cultural Sites in Mali (Oct. 2, 2015); Deputy Department Spokesperson Mark C. Toner, Deputy Department Spokesperson, Press Statement, ICC Judgment in Mali Cultural Destruction Case (Sept. 27, 2016).

156 ICC Press Release, The Four Staff Members Released in Libya, ICC-CPI-20120702-PR820 (July 2, 2012).

157 *See, e.g.*, Jane Stromseth, Remarks at the Fourteenth Session of the International Criminal Court Assembly of States Parties, *supra* note 150; Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (Nov. 21, 2013); Stephen J. Rapp, Statement of the U.S. at the Eleventh Session of the Assembly of States Parties of the International Criminal Court, *supra* note 138; Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, U.S Statement to the Assembly of States Parties of the International Criminal Court (Dec. 14, 2011).

158 *See* note 125 *supra*, and Section V.C, *Text Box - References to Atrocity Prevention and Accountability in National Security Strategies*.

159 Julian Borger, @julianborger, Twitter (Jan. 26, 2021, 4:01 p.m.)

160 H.R. 2989, South Sudan Peace Promotion and Accountability Act of 2015, 114th Cong., 1st Sess. (supporting the establishment of a credible, independent hybrid judicial court or investigation by the International Criminal Court or other credible judicial court and for all parties in South Sudan to deliberate in a peaceful manner for transitional justice and a truth and reconciliation commission).

161 S. Res. 363, A Resolution Expressing Profound Concern About the Growing Political, Humanitarian, and Economic Crisis in Venezuela and the Widespread Human Rights Abuses Perpetrated by the Government of Venezuela, 115th Cong., 1st Sess. (supporting the review by the Organization of American States of whether human rights abuses in Venezuela warrant an investigation by the ICC).

162 S. Res. 360, A Resolution Calling for International Accountability for the Crimes Against Humanity Committed by the Burmese Military Against the Rohingya in Burma, 115th Cong., 1st Sess. (urging the UN to refer those responsible for the crimes against humanity committed by the Burmese military against the Rohingya to the ICC); H.R. 3190, Burma Unified through Rigorous Military Accountability Act of 2019, 116th Cong., 1st Sess. S*ee also* H.R. 4169, Sudan Peace, Security, and Accountability Act of 2012, 112th Cong. 2d Sess. ("The President shall impose on any person or government at least two of the sanctions specified in section 7 if the President determines and certifies to the appropriate congressional committees that such person or government has failed to execute an International Criminal Court arrest warrant against any Government of Sudan official if such person or government—(1) had the jurisdictional authority to execute the warrant; (2) had the opportunity to execute the warrant; and (3) failed to do so without reasonable justification."); S. Res. 237, H.R. 394, A Resolution Condemning Joseph Kony and the Lord's Resistance Army for Continuing to Perpetrate Crimes Against Humanity, War Crimes, and Mass Atrocities, and Supporting Ongoing Efforts by the United States Government, the African Union, and Governments and Regional Organizations in Central Africa to Remove Joseph Kony and Lord's Resistance Army Commanders from the Battlefield and Promote Protection and Recovery of Affected Communities, 114th Cong., 1st Sess.

163 This includes the case against Al Hassan, commenced on July 14, 2020 (The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18), and a second case against Yekatom and Ngaïssona, commenced on February 16, 2021, with the presentation of evidence scheduled to commence on March 15, 2021 (The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18).

164 Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") surrendered to authorities in June 2020 and was transferred to the Court soon after. ICC Press Release, Situation in Darfur (Sudan): Ali Kushayb in ICC Custody, ICC-CPI-20200609-PR1525 (June 9, 2020). In February 2021, the government of Sudan signed a Memorandum of Understanding with the ICC regarding the trial of Ali Kushayb. *Sudan Signs MoU with ICC on Ali Kushayb Trial*, Dabanga (Feb. 16, 2021).

165 ICC Press Release, Situation in Central African Republic II: Mahamat Said Abdel Kani Surrendered to the ICC for Crimes Against Humanity and War Crimes, ICC-CPI-2021024-PR1559 (Jan. 24, 2021).

166 ICC OTP, Report on Preliminary Examination Activities 2020, para. 247 (Dec. 14, 2020) [hereinafter 2020 OTP Report on Preliminary Examinations]. As the prosecutor noted, the United Kingdom had "establish[ed] an independent investigative body [the Iraq Historic Allegations Team (IHAT) and its successor, the Service Police Legacy Investigations (SPLI)] to re-examine all historical allegations against members of the UK armed forces arising from the conflict in Iraq . . . [and] had initiated a number of criminal proceedings, involving pre-investigative assessment of claims, investigations, and a more limited number of referrals for prosecution. The Office concluded that this process appeared to include the most serious incidents which would likely arise from an investigation of the situation by the Office." *Id.*, para. 241. The question was thus not whether the U.K. authorities had investigated or remained inactive, but rather whether the investigation and the decisions whether or not to prosecute were genuine or carried out "in a manner that was inconsistent with an intent to bring the person(s) concerned to justice." *Id.*, para. 245.

167 Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-111, Decision on the "Application for Judicial Review by the Government of the Comoros" (Sept. 16, 2020). *See also* Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-115, Decision on the Request for Leave to Appeal the "Decision on the 'Application for Judicial Review by the Government of the Comoros'" (Dec. 21, 2020).

168 Referral of Situation in Venezuela to the ICC by Argentina, Canada, Colombia, Chile, Paraguay, and Peru (Sept. 26, 2018) (unofficial translation).

169 ICC OTP, Report on Preliminary Examination Activities 2012, para. 28 (Nov. 22, 2012) [hereinafter 2012 OTP Report on Preliminary Examinations].

170 ICC OTP, Report on Preliminary Examination Activities 2013, para. 28 (Nov. 2013) [hereinafter 2013 OTP Report on Preliminary Examinations].

171 ICC OTP, Report on Preliminary Examination Activities 2014, paras. 94–95 (Dec. 2, 2014) [hereinafter 2014 OTP Report on Preliminary Examinations].

172 ICC OTP, Report on Preliminary Examination Activities 2011, para. 25 (Dec. 13, 2011) [hereinafter 2011 OTP Report on Preliminary Examinations]; 2012 OTP Report on Preliminary Examinations, *supra* note 169, paras. 25–27; 2013 OTP Report on Preliminary Examinations, *supra* note 170, paras. 24–27. The operations of international military forces examined by OTP included aerial attacks, force protection, search and seizure, and night raid operations.

173 2014 OTP Report on Preliminary Examinations, *supra* note 171, para. 97; ICC OTP, Report on Preliminary Examination Activities 2016, paras. 211–13 (Nov. 14, 2016) [hereinafter 2016 OTP Report on Preliminary Examinations]; ICC OTP, Report on Preliminary Examination Activities 2017, paras. 253–55 (Dec. 4, 2017) [hereinafter 2017 OTP Report on Preliminary Examinations].

174 2016 OTP Report on Preliminary Examinations, *supra* note 173, at 51.

175 Situation in Afghanistan, ICC-02/17-7-Red, Public Redacted Version of "Request For Authorisation of an Investigation Pursuant to Article 15" (Nov. 20, 2017) [hereinafter Situation in Afghanistan, OTP Application to Investigate].

176 ICC OTP, Situation in Afghanistan, Summary of the Prosecutor's Request for Authorisation of an Investigation Pursuant to Article 15, para. 33 (Nov. 20, 2017) [hereinafter ICC OTP, Summary of Application to Investigate Afghanistan].

177 *Id.*, para. 37 (There have been "reports that torture has been practised institutionally in certain facilities. High percentages of detainees have reported having experienced torture or cruel treatment.").

178 Other allied states have also grappled with allegations of abuses by their military forces in Afghanistan and have taken various investigative and disciplinary measures. In November 2020, Australia completed an inquiry into allegations of killings of prisoners and civilians and other abuses by its special forces personnel in Afghanistan. Inspector General of the Australian Defence Force, Afghanistan Inquiry Report (2020). Major-General Paul Brereton's report recommended that thirty-six incidents be referred for criminal investigation. The Australian government appointed a former federal judge and commonwealth director of public prosecutions to lead a criminal investigation into nineteen special forces soldiers for the alleged killings of thirty-nine prisoners and civilians, and the cruel treatment of two others; steps were also taken to dismiss at least thirteen additional servicemembers based on evidence that they had assisted in or covered up the abuses. Andrew Greene, *Former Federal Court Judge Named as Special Investigator for Afghanistan War Crime Allegations*, ABC News (Dec. 16, 2020); *Australian "War Crimes": Troops to Be Fired Over Afghan Killings*, BBC News (Nov. 27, 2020). Germany's investigations of allegations of war crimes by its military personnel in Afghanistan include a parliamentary inquiry and a criminal investigation of military personnel in relation to a September 2009 airstrike near Kunduz. The decision not the prosecute those military personnel was determined to be consistent with Germany's obligations under human rights law by the Grand Chamber of the European Court of Human Rights in February 2021. Eur. Ct. Hum. Rights Registrar Press Release, The Investigation by the German Authorities Following a Lethal Airstrike in the Context of NATO Operations in Afghanistan Did Not Breach the Convention (Feb. 16, 2021).

179 Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, para. 4; ICC OTP, Summary of Application to Investigate Afghanistan, *supra* note 176, paras. 43–45. The Preliminary Examination reports reflect this narrowing focus, with the 2016 Preliminary Examination Report limiting discussion of U.S. personnel to "War crimes of torture and related ill-treatment." 2016 OTP Report on Preliminary Examinations, *supra* note 173, para. 198(c).

180 To the contrary, in seeking authorization to investigate, the prosecutor determined (on the information available to her at that point) "that there is no reasonable basis to believe that crimes falling within the jurisdiction of the Court were committed during military operations conducted by international military forces." *See* Situation in Afghanistan, ICC-02/17-12, Prosecutor's Provision of Additional Information Pursuant to Pre-Trial Chamber III's "Order to the Prosecutor to Provide Additional Information" (ICC-02/17-8), para. 12 (Dec. 12, 2017); Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, paras. 255–57.

181 Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, para. 189.

182 *Id.*, para. 355.

183 *Id.* ("Nonetheless, the acts allegedly committed were serious both in their number and in their effect, and although implemented pursuant to authorised interrogation policies adopted locally rather than at headquarters level, implicated personal responsibility within the command structure." The Prosecutor in particular identified concerns that that "CJTF-180 Command approved an interrogation policy that included the use of the enhanced interrogation techniques. . . ." *Id.*, para. 228.

184 *Id.*, para. 219.

185 *Contrast* Secretary of State Michael R. Pompeo, Press Statement, ICC Decision on Afghanistan (Mar. 5, 2020) (claiming that the decision to authorize an investigation in Afghanistan shows that the ICC become "a vehicle for political vendettas").

186 Merrit Kennedy, *ICC Prosecutor Calls for Afghanistan War Crimes Investigation*, NPR (Nov. 3, 2017).

187 Kahn, *supra* note 48.

188 Secretary of State Michael R. Pompeo, Remarks to the Press (Mar. 15, 2019).

189 Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. Times (Apr. 5, 2019).

190 Situation in Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, paras. 48, 60, 90, 94, 96 (Apr. 12, 2019).

191 President Trump, Statement on the International Criminal Court's Decision Not To Authorize an Investigation into the Situation in Afghanistan (Apr. 12, 2019).

192 *Id. See also* U.S. Dep't of State, Michael R. Pompeo, Secretary of State, Unanimous Rejection of International Criminal Court Investigation (Apr. 12, 2019) ("Today, the International Criminal Court (ICC) unanimously rejected the request of the Prosecutor to proceed with an investigation of American personnel who served in Afghanistan because such an investigation would not serve the interests of justice. This decision is a victory for the rule of law and the integrity of the ICC as an institution, given the United States is not subject to the ICC's jurisdiction. The ICC's decision follows the State Department's March 15 announcement of visa restrictions on ICC personnel involved in any investigation of U.S. personnel, and I am glad the Court reconsidered its actions.").

193 ICC Press Release, Afghanistan: ICC Appeals Chamber Schedules a Hearing on 4–6 December 2019 to Hear Oral Arguments, ICC-CPI-20190927–MA244 (Sept. 27, 2019).

194 Situation in Afghanistan, ICC-02/17-98, Confirmation that Mr Jay Alan Sekulow Will Make Oral Submissions at the Oral Hearing to Be Held Between 4 and 6 December 2019 (Oct. 24, 2019). *See also* Situation in Afghanistan, ICC-02/17-T-001-ENG, Transcript of Appeals Hearing, at 84–87 (Dec. 4, 2019).

195 Situation in Afghanistan, ICC-02/17-130, Written Submissions of the Government of the Islamic Republic of Afghanistan (Dec. 2, 2019).

196 Situation in Afghanistan, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, paras. 37–41 (Mar. 5, 2020).

197 *Id.*, para. 79.

198 Michael R. Pompeo, Press Statement, ICC Decision on Afghanistan *supra* note 185.

199 Michael R. Pompeo, Mar. 17, 2020 Remarks to the Press, *supra* note 40.

200 Buchwald, et al., *supra* note 36.

201 Exec. Ord. 13928, Blocking Property of Certain Persons Associated With the International Criminal Court (June 11, 2020); Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien, *supra* note 147.

202 Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien, *supra* note 147.

203 *See, e.g.*, Ambassador David Scheffer, *The Self-Defeating Executive Order Against the International Criminal Court*, Just Security (June 12, 2020); William Burke-White, *The Danger of Trump's New Sanctions on the International Criminal Court and Human Rights Defenders*, Brookings (June 11, 2020). Those critiques were also based on undermining the credibility of U.S. sanctions. Rob Berschinski, *Trump's ICC EO Will Undercut All U.S. Sanctions Programs—Is that Why Treasury Isn't Conspicuously on Board?*, Just Security (June 16, 2020).

204 *ABA Adopts Policy Condemning Threats Against the ICC and Its Officers*, Int'l Crim. Just. Today (Aug. 3, 2020).

205 Ellen Nakashima & Carol Morello, *Lawyers Urge Trump to Rescind Sanctions and Travel Bans for International Criminal Court*, Wash. Post (June 29, 2020).

206 Adam M. Smith, *Dissecting the Executive Order on Int'l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs*, Just Security (June 15, 2020).

207 *See, e.g.*, *International Criminal Justice: Statement by the High Representative Following the US Decision on Possible Sanctions Related to the International Criminal Court*, EU External Action Serv. (June 16, 2020) (statement by EU foreign policy chief Josep Borrell that "The European Union expresses grave concern . . . and reconfirms its unwavering support for the International Criminal Court. Sanctions against those involved in the work of the ICC, its staff and their families as well as persons associated with the ICC are unacceptable . . . . The European Union remains committed to defending the Court from any outside interference aimed at obstructing the course of justice . . . .").

208 '"The UK strongly supports the International Criminal Court in tackling impunity for the worst international crimes,' Foreign Secretary Dominic Raab said." *UK Supports International Court After Trump Approves Sanctions*, Reuters (June 13, 2020).

209 Government of Canada, Joint Statement in Support of the International Criminal Court (June 23, 2020); Permanent Mission of France to the United Nations in New York, Statement in Support of the International Criminal Court (ICC) Following the Release of the US Executive Order of 11 June 2020 (June 23, 2020). *See*, in similar terms, a statement issued by ten Members of the Security Council that are States Parties to the Rome Statute (Belgium, the Dominican Republic, Estonia, France, Germany, Niger, Saint Vincent and the Grenadines, South Africa, Tunisia, and the United Kingdom) as well as three incoming Members of the Security Council that are also States Parties to the Rome Statute (Ireland, Mexico, and Norway). Permanent Mission of the Federal Republic of Germany to the United Nations Press Release, UN Security Council Stakeout on the International Criminal Court (Nov. 10, 2020).

210 Wesley K. Clark, *The United States Has Nothing to Fear From the ICC*, For. Pol'y (July 2, 2020).

211 Secretary of State Michael R. Pompeo, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (Sept. 2, 2020).

212 Beth Van Schaack, *The Int'l Criminal Court Executive Order: Global Reactions Compiled*, Just Security (Sept. 1, 2020).

213 *International Criminal Court: Statement by the High Representative/Vice-President Josep Borrell on US Sanctions*, EU External Action Serv. (Sept. 3, 2020).

214 Pranshu Verma, *Trump's Sanctions on International Court May Do Little Beyond Alienating Allies*, N.Y. Times (Oct. 18, 2020) (quoting Dan Fried). *See also* Stephanie L. Connor, *United States Sanctions ICC Prosecutor Investigating Potential War Crimes*, FCPA Blog (Sept. 4, 2020).

215 Open Society Justice Initiative, et al. v. Trump, No. 1:2020cv08121 (S.D.N.Y. Oct. 1, 2020); Open Society Just. Initiative Press Release, Open Society Justice Initiative Sues Trump Administration Over International Criminal Court Executive Order (Oct. 1, 2020).

216 Andrew Boyle, *ICC Associates Win Temporary Reprieve from Draconian US Sanctions*, Just Security (Jan. 5, 2021).

217 Sadat, et al. v. Trump, et al., No. 4:21-cv-00416 (N.D. Cal. Jan. 15, 2021).

218 Lewis, *supra* note 143.

219 White House, Executive Order on the Termination of Emergency with Respect to the International Criminal Court (Apr. 1, 2021); Secretary of State Antony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court (Apr. 2, 2021). The Executive Order also terminated the national emergency that had been declared in Executive Order 13928 as the basis for the sanctions.

220 Antony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, *supra* note 219.

221 Situation in Afghanistan, ICC-02/17-139-Anx1, Deferral Request Made by the Government of the Islamic Republic of Afghanistan Pursuant to Article 18(2) of the Rome Statute (Mar. 26, 2020).

222 Report of the International Criminal Court on Its Activities in 2019/20, UN Doc. A/75/324 (Aug. 24, 2020).

223 The Prosecutor's report states: "With respect to the admissibility of potential cases concerning crimes allegedly committed by members of the IDF, the Office noted that due to limited accessible information in relation to proceedings that have been undertaken and the existence of pending proceedings in relation to other allegations, the Office's admissibility assessment in terms of the scope and genuineness of relevant domestic proceedings remained ongoing and would need to be kept under review in the context of an investigation. However, the Office concluded that the potential cases concerning crimes allegedly committed by members of Hamas and PAGs [Palestinian armed groups] would be admissible pursuant to article 17(1)(a)–(d) of the Statute." 2020 OTP Report on Preliminary Examinations, *supra* note 166, para. 222.

224 Palestinian National Authority, Ministry of Justice, Office of Minister, Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009).

225 S*ee* Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, at 22 et seq., ST/LEG/7/Rev.1 (1999).

226 ICC OTP, Statement Regarding Situation in Palestine (Apr. 3, 2012).

227 GA Res. 67/19, para. 2 (Dec. 4, 2012).

228 Mahmoud Abbas, Declaration Accepting the Jurisdiction of the International Criminal Court (Dec. 31, 2014, lodged Jan. 1, 2015). That initial attempt to accept jurisdiction covered alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." I*d*. The Palestinians subsequently submitted a document purporting to refer the situation on the basis of Palestine's "right as a State Party to the Rome Statute" on May 15, 2018. Situation in Palestine, Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute (May 15, 2018).

229 ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015).

230 Situation in Palestine, ICC-01/18-12, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, para. 5 (Jan. 20, 2020) (the request was refiled for technical reasons on January 22, 2020).

231 Situation in Palestine, ICC-01/18-14, Order Setting the Procedure and the Schedule for the Submission of Observations (Jan. 28, 2020).

232 State of Israel, Office of the Attorney General, The International Criminal Court's Lack of Jurisdiction Over the So-Called "Situation of Palestine" (White Paper, Dec. 20, 2019).

233 Situation in Palestine, ICC-01/18-83, Submission Pursuant to Rule 103 (Todd F. Buchwald and Steven J. Rapp) (Mar. 16, 2020). The authors of the brief included one of the co-chairs of the Task Force and a member of the Advisory Group.

234 Situation in Palestine, ICC-01/18-143, Decision on the "Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine," paras. 100, 118 (Feb. 5, 2021) [hereinafter Situation in Palestine, Ruling on Territorial Jurisdiction].

235 Secretary of State Anthony J. Blinken, Press Statement, The United States Opposes the ICC Investigation into the Palestinian Situation (Mar. 3, 2021). For its part, the ICC Pre-Trial Chamber indicated that its decision did not entail a determination as to whether the Palestinians "fulfill[] the prerequisites of statehood under international law" (or that it was "adjudicating a border dispute under international law [or] prejudging the question of any future borders"). Situation in Palestine, Ruling on Territorial Jurisdiction, *supra* note 234, paras. 93, 113. Israel, to the contrary, has argued that the question of jurisdiction cannot be separated from the question of whether an entity actually qualifies as a state under international law because the ICC can exercise jurisdiction only to the extent it has been delegated from an entity that qualifies as a state with such a delegation authority. *See, e.g.*, State of Israel, Office of the Attorney General, The International Criminal Court's Lack of Jurisdiction Over the So-Called "Situation in Palestine," *supra* note 232, para. 4.

236 ICC OTP, Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine (Mar. 3, 2021).

237 *See, e.g.*, Consolidated Appropriations Act, 2021, *supra* note 55, § 7041(k)(2).

238 In the press release, the State Department Spokesperson said that the closure reflected concerns that the PLO leadership had not taken steps to advance meaningful negotiations with Israel and that the decision "is also consistent with Administration and Congressional concerns with Palestinians attempts to prompt an investigation of Israel by the [ICC]." U.S. Dep't of State, Office of the Spokesperson, Closure of the PLO Office in Washington (Sept. 10, 2018).

239 Letter from Senator Benjamin L. Cardin and Senator Rob Portman to Secretary of State Michael R. Pompeo (May 13, 2020).The Cardin/Portman letter was joined by sixty-nine additional Senators, including then-Senator (and now-Vice President) Kamala Harris. *See also* Letter from House Representative Elaine G. Luria, et al. to Secretary of State Michael R. Pompeo (May 12, 2020) (joined by over 260 members of Congress).

240 Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien, *supra* note 147.

241 Senator Chris Coons, @Chris Coons, Twitter (Sept. 3, 2020, 8:49 P.M.) ("We need to be engaging with international institutions to address their shortcomings and promote US values. Sanctions on ICC officials accomplish neither.").

242 Office of Congressman James P. McGovern Press Release, Rep. McGovern Slams Trump Administration for Misguided Decision to Impose Sanctions on International Criminal Court Officials (Sept. 2, 2020); *see* also Office of Senator Patrick Leahy Press Release, Reaction to the White House Announcement of Sanctions Against Employees of the International Criminal Court (June 11, 2020); Office of Senator Patrick Leahy Press Release, Reaction to the Trump Administration's Decision to Sanction Personnel of the International Criminal Court (Sept. 2, 2020).

243 *See, e.g.*, *Former ICC Chief Prosecutor: Investigation Could Take 18 Months*, Jerusalem Post (Feb. 8, 2021).

244 Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012); Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014); Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment (July 8, 2019) (currently on appeal); Prosecutor v. Al-Mahdi, ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016) (by way of a guilty plea); ICC Press Release, Dominic Ongwen Declared Guilty of War Crimes and Crimes Against Humanity Committed in Uganda, ICC-CPI-20210204-PR1564 (Feb. 4, 2021). In addition, there have also been five convictions for "offences against the administration of justice" (effectively the crime of contempt). *See* Prosecutor v. Bemba Gombo, et al., ICC-01/05-01/13-1989-Red, Public Redacted Version of Judgment Pursuant to Article 74 of the Statute (Oct. 19, 2016).

245 Charges against Kenyatta were withdrawn on December 5, 2014. Prosecutor v. Kenyatta, ICC-01/09-02/11-983, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014). The case against Ruto was terminated on April 5, 2016, when the Trial Chamber ruled that there was no case to answer. Prosecutor v. Ruto and Sang, ICC-01/09-01/11-2027-Red-Corr, Public Redacted Version of: Decision on Defence Applications for Judgments of Acquittal (Apr. 5, 2016).

246 ICC Press Release, ICC Trial Chamber I Acquits Laurent Gbagbo and Charles Blé Goudé from All Charges, ICC-CPI-20190115-PR1427 (Jan. 15, 2019). For written reasons, *see* Prosecutor v. Gbagbo and Blé Goudé, ICC-02/11-01/15-1263, Reasons for Oral Decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée (July 16, 2019). This decision was upheld on appeal. *See* Prosecutor v. Gbagbo and Blé Goudé, ICC-02/11-01/15-1400, Judgment in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions (Mar. 31, 2021).

247 ICC Press Release, ICC Appeals Chamber Acquits Mr Bemba from Charges of War Crimes and Crimes Against Humanity, ICC-CPI-20180608-PR1390 (June 8, 2018). In addition, Ngudjolo was acquitted (Prosecutor v. Ngudjolo, ICC-01/04-02/12-3-tENG, Judgment Pursuant to Article 74 of the Statute (Dec. 18, 2012)), cases against four other individuals were dismissed after confirmation hearings (Prosecutor v. Abu Garda, ICC-02/05-02/09-243-Red, Public Redacted Version: Decision on the Confirmation of Charges (Feb. 8, 2010); Prosecutor v. Mbarushimana, ICC-01/04-01/10-465-Red, Public Redacted Version: Decision on the Confirmation of Charges (Dec. 16, 2011); and two Kenya suspects—Ali and Kosgey); proceedings against the two other Kenyan accused were discontinued (either withdrawn by the Prosecutor or vacated by the Chamber).

248 Douglas Guilfoyle, *Part II – This Is Not Fine: The International Criminal Court in Trouble*, EJIL: *Talk!* (Mar. 22, 2019).

249 *See generally* Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 Melb. J. Int'l L. (2019); Open Society Justice Initiative & Amsterdam Center for International Law/Department of Criminal Law, Amsterdam Law School, *Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms, and Practices* (Apr. 15, 2020).

250 Jane Stromseth, *Is the ICC Making a Difference?*, Just Security (Dec. 6, 2017). *See also* Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 Am. J. Int'l L. 689 (2017).

251 Such concerns included statements by the then-Chair of the African Union's Executive Council in 2013 that "the court has transformed itself into a political instrument targeting Africa and Africans," (*African Union Condemns "Unfair" ICC*, BBC News (Oct. 11, 2013)) although the threats of mass withdrawal of African states from the Court did not materialize (Theresa Reinold, *African Union v. International Criminal Court: Episode MLXIII(?)*, EJIL: *Talk!* (Mar. 23, 2018)).

252 South Africa and The Gambia also provided notification of their intent to withdraw, but subsequently rescinded that withdrawal and remain parties to the Rome Statute.

253 Crimes in Myanmar against the Rohingya (through their forced displacement into Bangladesh, an ICC state party). *See* Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Investigation.

254 Bolivia; Colombia; Guinea; the Philippines; and Venezuela (where it is conducting preliminary examinations of two separate situations). ICC, Preliminary Examinations.

255 2020 OTP Report on Preliminary Examinations, *supra* note 166.

256 Rome Statute, *supra* note 69, Art. 5 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole."); *see also id.*, pmbl., Art. 1.

257 ICC OTP, Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine (Dec. 11, 2020).

258 2020 OTP Report on Preliminary Examinations, *supra* note 166, paras. 265, 289 ("For the next steps, in the light of the operational capacity of the Office to roll out new investigations, the fact that several preliminary examinations have reached or are approaching the same stage, as well as operational challenges brought on by the COVID-19 pandemic, the Prosecutor intends to consult with the incoming new Prosecutor, once elected, on the strategic and operational issues related to the prioritisation of the Office's workload and the filing of necessary applications before the Pre-Trial Chamber. In the interim, the Office will continue to take measures to seek to ensure the integrity of any future investigation.").

259 *See* Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, paras. 686, 694 (Sept. 30, 2020) [hereinafter IER Report]. The Prosecutor subsequently issued a draft *Policy on Situation Completion* on March 25, 2021, for consultation and comments by states parties, civil society, and other stakeholders. ICC Press Release, The Office of the Prosecutor Publishes Draft Policy on Situation Completion for Consultation, ICC-OTP-20210325-PR1580 (Mar. 25, 2021).

260 DRC opened in June 2004 (Situation in the Democratic Republic of the Congo, ICC-01/04, Investigation); northern Uganda in July 2004 (Situation in Uganda, ICC-02/04, Investigation).

261 For example, in northern Uganda and in Kenya there do not appear to have been any active investigations in recent years.

262 Preliminary Examinations involving the Comoros, Gabon, Honduras, UK/Iraq, and Republic of Korea have been closed with a decision not to proceed. ICC, Preliminary Examinations, *supra* note 254.

263 Guilfoyle, *supra* note 249.

264 Parimal Kashyap, *Judge Ozaki's Case: Moonlighting at the International Criminal Court?*, Völkerrechtsblog (May 10, 2019); Kevin Jon Heller, *Judge Ozaki Must Resign – or Be Removed*, Opinio Juris (Mar. 29, 2019).

265 Marlise Simons, *In The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay*, N.Y. Times (Jan. 20, 2019).

266 Kevin Jon Heller, *Problematic Statements by the French Judge at the ICC*, Opinio Juris (May 3, 2019).

267 *See e.g.* Prosecutor v. Bemba, ICC-01/05-01/08-3636-Anx2, Appeal Judgment, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, para. 4, (June 8, 2018) ("appears to be a fundamental difference in the way we look at our mandates as international judges. . . . [I]t is probably fair to say that we attach more importance to the strict application of the burden and standard of proof. We also seem to put more emphasis on compliance with due process norms that are essential to protecting the rights of the accused in an adversarial trial setting."). Professor Guilfoyle notes even stronger critiques in a number of dissenting opinions, considering that: "While dissent is not a sign of a lack of collegiality per se, exceptionally robust language in which one accuses colleagues of having acted unfairly or ultra vires (as occurred in these cases) may be." Guilfoyle, *supra* note 249.

268 Janet H. Anderson, *Plot Twists at the ICC for Jean-Pierre Bemba*, Justice Info (Mar. 12, 2019); Owiso Owiso, *"Oops, We Misplaced the Keys . . . too Bad!": The International Criminal Court and the Fiasco of Mr Jean-Pierre Bemba's Compensation Claim*, EJIL:*Talk!* (June 3, 2020). For the legal background, see Daley J. Birkett, *Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal*, 18 J. Int'l Crim. Just. 765 (2020).

269 Government of the UK, Foreign & Commonwealth Office, Statement by Andrew Murdoch, Legal Director to the International Criminal Court Assembly of States Parties, at Its 17th Session in The Hague (Dec. 5, 2018).

270 Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser & Tiina Intelmann, *The International Criminal Court Needs Fixing*, New Atlanticist (Apr. 24, 2019).

271 IER Report, *supra* note 259, para. 634.

272 *Id.*, paras. 644–50, rec. R227.

273 *Id.*, paras. 684–88, rec. R243; and including feasibility factors, see rec. R244.

274 Review of the International Criminal Court and the Rome Statute System, para. 18(c), ICC Res. ICC-ASP/18/Res.7 (adopted Dec. 6, 2019).

275 ICC Assembly of States Parties, Report of the Bureau on Complementarity, paras. 28, 41(3), ICC-ASP/19/22.

276 Supplemental Appropriations Act for Fiscal Year 2002, 148 Cong. Rec. 9595. For examples of the expression of this position under the Bush and Trump Administrations, see Sections I, II.A, and IV.A. As a further example, President Obama's 2010 National Security Strategy led its reference to the ICC by stating that "Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel . . ." (*see* Section V.C, *Text Box - References to Atrocity Prevention and Accountability in National Security Strategies*).

277 *See* Supplementary Hearing Before the Senate Committee on Foreign Relations, 83rd Cong, 1st Sess., at 3 (June 24, 1953). The reservation was ultimately rejected, 99 Cong. Rec, 9080, 9083, following interventions by President Eisenhower personally (*see* Letter from President Eisenhower to Senator Knowland, reprinted at 99 Cong. Rec. 8879 (July 14, 1953)).

278 *See* U.S. Dep't of State, International Security Advisory Board, Report on Status of Forces Agreement (Jan. 16, 2015).

279 *See id.*, Sec. III (observing that the United States "has an interest in preserving the principle that U.S. military discipline is enforced by the U.S. military justice system," which protects servicemembers' rights and public support for military deployments. "U.S. willingness to deploy forces overseas—and public support for such deployments—could suffer significant setbacks if U.S. personnel were at risk of being tried . . ." in systems that lacked (or were perceived as lacking) such due process protections.).

280 Lindsay L. Rodman, *Unity of Command: Authority and Responsibility Over Military Justice*, 93 Joint Force Q. 71 (2019). Rodman notes the Air Force identifies "'responsibility for UCMJ actions'" as a minimum requirement for a commander to have sufficient administrative control of a unit. *Id.* at 75 (citation omitted). Military lawyers in other countries similarly recognize that "operational necessity may demand that a commander under all circumstances exercises full control over his forces, including the exercise of criminal jurisdiction." Joop Voetelink, *Status of Forces and Criminal Jurisdiction*, LX Neth. Int'l L. Rev. LX 231, 250 (2013).

281 *See* notes 47–53 *supra* and accompanying text.

282 EU Guiding Principles Concerning Arrangements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *supra* note 49. The Guidelines state with respect to the "scope of persons" covered by any agreement: "Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute."

283 2009 ASIL Task Force Report, *supra* note 18, at 26–29.

284 Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien, *supra* note 147.

285 John B. Bellinger III, *What President Biden and the ICC Prosecutor Should Do to End the United States–ICC Conflict*, Hum. Rts. & Int'l Crim. L. ICC F. (Jan. 8, 2021) ("The Prosecutor surely knows there is no possibility that any U.S. official will ever be arrested and prosecuted in the Hague.").

286 *See* ICTY, Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report to the Prosecutor (June 2000).

287 Clark, *supra* note 210.

288 *See* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 49, Aug. 12, 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 50, Aug. 12, 1949, 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 146, Aug. 12, 75 UNTS 287 ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.") (all Geneva Conventions available here).

289 For example, in November 2009, an Italian court convicted in absentia twenty-two CIA personnel and one U.S. Air Force officer for the alleged abduction and rendition of Abu Omar in Italy. *See* Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. Times (Nov. 4, 2009); Beth Van Schaack, *A Look at the Case of the Ex-CIA Officer Being Extradited to Italy for Her Role in a 2003 Rendition*, Just Security (Feb. 24, 2017). The Italian Ministry of Justice had agreed that the United States had "the primary right to exercise jurisdiction" over the Air Force officer under the NATO Status of Forces Agreement. NATO Status of Forces Agreement, Art. 7, June 19, 1951; Chris Jenks & Eric Talbot Jensen, *All Human Rights are Equal, But Some Are More Equal than Others: The Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 Harv. Nat'l Sec. J. 171 (2010). An Italian court nevertheless proceeded to the conviction, but—against the backdrop of the provision in the SOFA regarding right of primary jurisdiction—the Italian President then pardoned Romano, saying that he was acting to solve "a situation of great delicacy." *Italy Pardons U.S. Pilot Convicted in CIA Rendition Case*, Reuters (Apr. 5, 2013); *Italy Pardons U.S. Air Force Officer in Rendition Case*, CNN (Apr. 6, 2013).

290 Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 Am. J. Int'l L. 888 (2003).

291 *See, e.g.*, *Belfast Guidelines on Amnesty and Accountability* (2013).

292 Ehsan Qaane, *Investigating Post-2003 War Crimes: Afghan Government Wants "One More Year' from the ICC*, Afghan Analysts Network (June 27, 2017).

293 Patricia Gossman, *Amnesty and the Peace Process in Afghanistan*, INPROL (Feb. 2019); Qaane, *supra* note 292.

294 *See* Security Council, Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America (Feb. 29, 2020), Annex to the Letter Dated 6 March 2020 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2020/184 (Mar. 9, 2020).

295 *See* Communiqué, 2020 Afghanistan Conference, Geneva (Nov. 23–24, 2020).

296 Rome Statute, *supra* note 69, Arts. 53(1)(c), (2)(c).

297 *Id*. Art. 16.

298 ICC OTP, *Policy Paper on the Interests of Justice* (2007).

299 For example, in the context of the former Yugoslavia, General Clark recounts that he "witnessed firsthand how the U.N.'s Yugoslavia tribunal helped end the conflict in Kosovo and drive Slobodan Milosevic and other abusive leaders from power." Clark, *supra* note 210. And in the aftermath of the Kenya post-election violence of 2007–08, the "United States scolded Kenya . . . for its failure to create a local court to deal with the perpetrators of post-election chaos last year that was the worst violence since independence from Britain in 1963." Andrew Cawthorne, *U.S. Chides Kenya for Inaction on Post-Poll Chaos*, Reuters (Aug. 4, 2009).

300 *See, e.g.*, Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (July 7, 2009). For reflections on how to reconcile the arguments for and against the role of justice in sustaining or impeding peace settlements, see, e.g., Nick Grono & Caroline Flintoft, *Negotiating Justice to Understand Accountability*, Int'l Crisis Group (June 25, 2007).

301 Beth Van Schaack, *Good Governance Paper No. 13: Atrocities Prevention and Response*, Just Security (Oct. 29, 2020); Beth Van Schaack, *Atrocities Prevention & Response: A Good Governance Blueprint* (Dec. 17, 2020).

302 Presidential Study Directive on Mass Atrocities (PSD-10) (Aug. 4, 2011).

303 Alex Bellamy, *Reducing Risk, Strengthening Resilience: Toward the Structural Prevention of Atrocity Crimes*, Stanley Ctr. Peace & Sec. (Apr. 2016).

304 2015 National Security Strategy, *supra* note 125, at 22.

305 National Security Strategy of the United States of America, at 52 (Dec. 2017) [hereinafter 2017 National Security Strategy].

306 U.S. Dep't of State, 2020 Report to Congress Pursuant to Section 5 of the Elie Wiesel Genocide and Atrocities Prevention Act of 2018 (Pub. L. No. 115-441) (Aug. 7, 2020) [hereinafter 2020 Elie Wiesel Act Report].

307 Elie Wiesel Genocide and Atrocities Prevention Act of 2018, *supra* note 60, §§ 2, 3(3)(C).

308 National Defense Authorization Act for Fiscal Year 2021, Pub. L. No: 116-283, § 1210D (Mitigation and Prevention of Atrocities in High-Risk Countries).

309 *See* Stuart Ford, *Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention*, 43 Loy. L.A. Int'l & Comp. L. Rev. 101 (2020) (summarizing critiques of the effectiveness of the ICC at preventing violence, noting that many scholars have expressed doubt that international courts can prevent violations, at 109 and authorities cited therein). For his part, Ford reviews five recent empirical studies (at 110–21), and concludes that in at least some circumstances "there is now strong evidence that the ICC does prevent violence." *Id*. at 122. *See also* Christen Romero Philips, *The International Criminal Court & Deterrence: A Report to the Office of Global Criminal Justice, U.S. Department of State*, Stanford L. School: L. & Pol'y Lab (June 2016) (presenting overview of three "Arguments and Empirical Research Showing Support for the ICC's Deterrence Effect" (at 2–5), and four "Theoretical Arguments Against the ICC's Deterrence Effect" (at 6–9)).

310 Key passages from the preamble include express the international community's views in this regard:

> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
> Recognizing that such grave crimes threaten the peace, security and well-being of the world,
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. . . .

Rome Statute, *supra* note 69, pmbl.

311 2017 National Security Strategy, *supra* note 305, at 42 (including the commitment that the United States "will hold perpetrators of genocide and mass atrocities accountable").

312 *See*, *e.g.*, House Res. 310 passed unanimously by the House in 2015 and recognizing that the ICTY has "helped strengthen peace and encouraged reconciliation" and "asserts that is in the national interest of the United States that those individuals who are responsible for these crimes and breaches should continue to be held accountable for their actions." Likewise, S. Res. 413 (2014) recognized successful prosecutions by the ICTR including "the first convictions for rape as a weapon of war" and expressed support for the US to "ensure measures of accountability" for contemporary atrocities, such as those in Syria, CAR, South Sudan, and elsewhere.

313 *See* note 14 *supra*.

314 Including, amongst others, the Syria Justice and Accountability Center (SJAC) and the Commission for International Justice and Accountability (CIJA).

315 U.S. Dep't of State, Office of the Spokesperson, Joint Statement by the Secretary of State of the United States of America, the Foreign Secretary of the United Kingdom, and the Foreign Ministers of France, Germany, and Italy (Mar. 15, 2021). The statement continued: "We will continue to support the important role of the Commission of Inquiry and the International, Impartial and Independent Mechanism. We welcome the ongoing efforts by national courts to investigate and prosecute crimes within their jurisdiction committed in Syria." *Id*.

316 U.S. Dep't of State, Documentation of Atrocities in Northern Rakhine State (Aug 2018).

317 Beth Van Schaack, *Ugandan ICC Fugitive No More? The Hunt for Joseph Kony et al.*, Just Security (Mar. 3, 2014).

318 Am. Bar. Assoc., *Our Work in the DRC*; *see* also Tessa Khan & Jim Wormington, *Mobile Courts in the DRC-Lessons from Development for International Criminal Justice* (Oxford Transitional Justice Research Working Paper Series, July 9, 2012).

319 Beth Van Schaack, *Breaking News: Security Council Authorizes Robust Peacekeeping Mandate for CAR*, Just Security (Dec. 5, 2013); Beth Van Schaack, *The End of the M23, Will Justice Follow?*, Just Security (Nov. 7, 2013).

320 2019 Elie Wiesel Genocide and Atrocities Prevention Report, *supra* note 65, at 6–7. The 2020 Elie Wiesel Act report clarifies that the $10.5 million of State Department and USAID funding for atrocity prevention programming "includes $4 million to develop actionable case files against perpetrators of atrocities in Iraq and Syria, including ISIS and the Assad regime. State also provided $1 million to support UNITAD's ongoing efforts to gather evidence on ISIS crimes in the Ninewa Plain." 2020 Elie Wiesel Act Report, *supra* note 306.

321 Women, Peace, and Security Act of 2017, *supra* note 62.

322 Incorporated into the National Defense Authorization Act for Fiscal Year 2019, *supra* note 59, § 1232.

323 Iraq and Syria Genocide Relief and Accountability Act of 2018, *supra* note 64.

324 Caesar Syria Civilian Protection Act of 2019, incorporated into the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, Title LXXIV, §§ 7401 et seq.

325 Consolidated Appropriations Act, 2021, *supra* note 55, § 7065(a)(2).

326 *See*, *e.g.*, U.S. Code, Title 18, Chapters 11B (Chemical Weapons), 50A (Genocide), 77 (Slavery and Trafficking in Persons), 81 (Piracy), 113B (Terrorism), 113C (Torture), and 118 (War Crimes).

327 Torture Victims' Protection Act, 28 U.S.C. § 1350 Note (Mar. 12, 1992).

328 Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A–B.

329 Global Magnitsky Act, *supra* note 66; 22 U.S.C. § 2656, *supra* note 66; EO 13818, *supra* note 66.

330 USCIRF's chapters in the 2015 Annual Report on Iraq and Syria. USCIRF Press Release, USCIRF Statement on the Designation of Victims of Genocide, Persecution, and Crimes Against Humanity in Syria and Iraq (Dec. 7, 2015).

331 Kirsten Lavery, *The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma*, USCIRF, at 5 (Mar. 2020).

332 Referral of Situation in Venezuela to the ICC by Argentina, Canada, Colombia, Chile, Paraguay, and Peru, *supra* note 168; *U.S. to Use All Economic, Political Tools to Hold Maduro Accountable: Pompeo*, Reuters (Apr. 14, 2019).

333 Instructions for the Government of Armies of the United States in the Field (Lieber Code) (Apr. 24, 1863).

334 *See*, *e.g.*, DOD Directive 2311.01, DOD Law of War Program (July 2, 2020).

335 U.S. Dep't of Defense, Law of War Manual, § 18.2, at 1072–74 (June 2015).

336 Clark, *supra* note 210.

337 United States Strategy to Prevent Conflict and Promote Stability, at 8 (2020).

338 Under 10 U.S.C. § 333.

339 2020 Elie Wiesel Act Report, *supra* note 306.

340 For funds under the Foreign Assistance Act and Arms Export Control Act, see Foreign Assistance Act of 1961, 22 U.S.C. ch. 32, § 2378(d); for Department of Defense funds, see 10 U.S.C. § 362. *See also* U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Fact Sheet, About the Leahy Law (Jan. 20, 2021).

341 Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN Chronicle (identifying the ICC's core role as "enforcing and inducing compliance with specific norms of international law aimed at outlawing and preventing mass violence").

342 *See* 18 U.S.C. ch. 118, §§ 2441, 2442.

343 *See*, *e.g.*, Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, Remarks at a UN Security Council Briefing on the International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda (Dec. 6, 2017).

344 Prosecutor v. Bemba, Appeal Judgment, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, *supra* note 267, paras. 166–93.

345 Prosecutor v. Lubanga, Judgment Pursuant to Article 74 of the Statute, *supra* note 244, paras. 523–67.

346 Review Conference of the Rome Statute, Pledges, *supra* note 121, at 18.

347 For example, regarding the DRC, in 2018 the House of Representatives passed H.R. 6207 (374–11) in which it declared in Section 2(c) that the "sense of Congress that the Secretary of State and the Administrator of the United States Agency for International Development should—(1) continue to—(A) support long-term peace and stability in the Democratic Republic of the Congo by strengthening democratic institutions and promoting respect for the rule of law at the national, provincial, and local levels." And in April 2019, the State Department pledged to work with the new president of the DRC "to advance his agenda to . . . strengthen the rule of law, enhance security, [and] protect human rights . . . ." U.S. Dep't of State, Office of the Spokesperson, Department Press Briefing (Mar. 26, 2019).

348 For example, in March 2020 the House of Representative overwhelmingly passed (378–7) H. Res. 387, condemning continued violence against civilians by armed groups in the Central African Republic, supporting efforts to achieve a lasting political solution to the conflict, and recognizing a number of humanitarian and rule of law programs that the U.S. supports, including the establishment of the Special Criminal Court as a "commitment to justice and accountability." H. Res. 387, Condemning Continued Violence Against Civilians by Armed Groups in the Central African Republic and Supporting Efforts to Achieve a Lasting Political Solution to the Conflict (Mar. 3, 2020). It also called on the Secretary of State and USAID to provide humanitarian and developmental assistance, support peacebuilding, justice, and rule of law programming. *Id*.

349 In H. Res. 387, Congress called on the Secretary of State and USAID (in the context of encouraging support for rule of law and humanitarian assistance) to "undertake efforts to prioritize mutual interests between the United States and the Central African Republic and take steps to position the United States as a leader working with the Government of the Central African Republic in the areas of reconstruction, postconflict remediation, and institution building, as well as taking steps to combat Russian influence in the country and region." *Id.*, § 7(e).

350 *See* Am. Bar Assoc., Ctr. Hum. Rts., Report to the House of Delegates (May 4, 2020); *Legal Scholars and Attorneys Urge President Trump to Rescind ICC Punishments*, Wash. Post (June 29, 2020).

351 Government of Canada, Joint Statement in Support of the International Criminal Court, *supra* note 209.

352 For example, Ambassador-at-Large for Global Criminal Justice Morse Tan indicated that the United States was presenting the Court with two options: "number one, change course and amend the Rome Statute so that it will not be possible for American personnel to be hauled before it; or number two, and the Secretary has been clear on this, that the second option would be that the U.S. would seek the dissolution of the Court itself." Am. Enterprise, Inst., The International Criminal Court and Global Criminal Justice: A Conversation with Amb. Morse H. Tan, at 20:21.

353 Antony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, *supra* note 219. *See* notes 218–220 *supra* and accompanying text.

354 *See* Lt. Col. (ret.) Jay Morse, *Why We Prosecute Wartime Misconduct*, Just Security (Mar. 10, 2021) (noting that pardoning the commission of war crimes will result in manifest injustice not only to the victims, but also to "the tens of thousands of service members who have deployed and served honorably in conflict zones, as well as to the U.S. military justice system as a whole"); Clark, *supra* note 210 ("The pardons that President Trump issued last year, reversing or ending proceedings against U.S. service members convicted or charged with serious crimes against civilians and prisoners in Afghanistan and Iraq, did great damage in this respect. So, too, has the president's loose talk about committing war crimes, such as pillaging Syrian oil or destroying Iranian cultural sites.").

355 *See* Section IV.C.

356 Secretary of State Antony J. Blinken, Interview with Wolf Blitzer of CNN's The Situation Room (Feb. 8, 2021). *See also* U.S. Dep't of State, Ned Price, Department Spokesperson, Department Press Briefing (Feb. 8, 2021) ("I think our orienting principle here is that the United States can be a constructive force, that we can help shape the course of world events, we can help shape international institutions when we're present, when we're at the table.").

357 Global Magnitsky Act, *supra* note 66; EO 13818, *supra* note 66. The 2019 Elie Wiesel Act Report specifically referred to the ability of to use sanctions programs, including under the Global Magnitsky Act, "to publicly designate any persons involved in atrocities . . . ." 2019 Elie Wiesel Act Report, *supra* note 65, at 7.

358 Similar authorities include: Canada's Justice for Victims of Corrupt Foreign Officials Act, Bill S-226 (Oct. 18, 2017); the United Kingdom's Global Human Rights Sanctions Regulations 2020, No. 680 (July 6, 2020); and the European Union's recently enacted human rights sanctions regime, which explicitly includes sanctions for individuals accused of committing genocide or crimes against humanity, Council Regulation (EU) 2020/1998 (Dec. 7, 2020), Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses, Article 2(1)(a)–(b).

359 Assembly of States Parties, Report of the Bureau on Cooperation, ICC-ASP/13/29, Annex IV, at 19 (Nov. 21, 2014) (paras. 5–7 setting out aspects of the UK policy; para. 8 noting "the practices applied by other States and the European Union").

360 Guidance on Contacts with Persons Who Are the Subject of Arrest Warrants or Summonses Issued by the International Criminal Court, UN Doc. A/67/828–S/2013/210 (Apr. 8, 2013).

361 Beth Van Schaack, *Why Is Tillerson Shuttering the State Dept.'s Global Justice Bureau?*, Newsweek (July 18, 2017); Jane Stromseth, *Why the U.S. Needs the Office of Global Criminal Justice Led by a Senate-Confirmed Ambassador-at-Large*, Just Security (July 26, 2017).

362 Beth Van Schaack, *Representative Ted Lieu in Defense of Global Justice*, Just Security (July 31, 2017).

363 Beth Van Schaack, *Key U.S. Foreign Policy Positions—Including Ambassador for War Crimes—Saved from Getting Axed*, Just Security (Aug. 29, 2017).

364 Stromseth, *supra* note 361.

365 Human Rights Watch, *Q&A: The Case of Hissène Habré Before the Extraordinary African Chambers in Senegal* (May 3, 2016); Human Rights Watch, *Senegal: US to Give US$ 1 Million to Habré Court* (Oct. 1, 2013).

366 "The United States has been the largest contributor so far, contributing nearly 30% of the SCSL's funds through the end of 2009." Ford, *supra* note 7, at 976.

367 *See*, *e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §7043(c)(1) ("KHMER ROUGE TRIBUNAL.—Of the funds appropriated by this Act that are made available for assistance for Cambodia, up to $2,000,000 may be made available for a contribution to the Extraordinary Chambers in the Court of Cambodia (ECCC), in a manner consistent with prior fiscal years, except that such funds may only be made available for a contribution to the appeals process in Case 002/01."). Previous appropriations acts had frequently included language restricting the use of appropriated funds to support the ECCC unless the Secretary of State made a particular certification—e.g., "that the Government of Cambodia has provided, or otherwise secured, funding for the national side of such tribunal" or "that the United Nations and the Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the tribunal"—Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 7071(c); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7044(c); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7043(c)(4))—while others had precluded funding, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 7043(b)(1)(B)(i)).

368 For example, the United Nations provided subvention funding to the SCSL in 2004, 2011, and 2012, and to the ECCC in 2014. GA Res. 68/247 B (Apr. 23, 2014).

369 Joint Explanatory Statement for Department of State, Foreign Operations and Replated Programs Appropriations Bill, 2021.

370 *See* note 55 *supra* and accompanying text.

371 Among other things, the United States sponsored a side event (State Department Legal Advisor Harold Hongju Koh, The Challenges and Future of International Justice, Panel Discussion at NYU Center for Global Affairs (Oct. 27, 2010)) and pledged to "renew[] its commitment to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide." Review Conference of the Rome Statute, Pledges, *supra* note 125, at 18.

372 *See*, *e.g.*, Phil Clark, Distant Justice: The Impact of the International Criminal Court on African Politics (2018); Jane Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 Geo. J. Int'l L. 251 (2007) (accountability proceedings located within affected countries, and that enjoy public support and engage in systematic outreach, are one factor increasing potential to enhance rule of law). For similar considerations in the context of hybrid tribunals or other mixed courts with international and national components, see Elena Naughton, *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, Int'l Ctr. Transitional Just. (Dec. 5, 2018).

373 Rome Statute, *supra* note 69, pmbl.

374 At the time, a key focus was the senior commanders of the Lord's Resistance Army in Northern Uganda, for whom the ICC had issued arrest warrants. The program was extended in part because Congress recognized that U.S. troops involved in the hunt for these fugitives indicated "that a rewards program aimed at Kony could help generate intelligence and bolster their efforts. They are asking for this. They think this can make a difference on the ground." Department of State Rewards Program Update and Technical Corrections Act of 2012, Cong. Rec. Vol. 158, No. 170 (Dec. 30, 2012).

375 Kerry, *supra* note 131.

376 Rome Statute, *supra* note 69, Arts. 44(6) (Victims and Witness Unit), 68(3) (participation of victims in proceedings), 75 (reparations), 79(1) (Trust Fund for Victims).

377 *See* notes 54–55 *supra* and accompanying text.

378 The ICC is established by Article 1 of the Rome Statute: "An International Criminal Court ('the Court') is hereby established." In contrast, Article 79 of the Statute provides that a "Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." *See generally* Diane Amann, *U.S. Law & G8 Ministers' Call for Donations to Rome Statute's Trust Fund for Victims* (May 3, 2012).

379 The Assembly of States Parties established the Trust Fund for Victims, and its five-member Board of Directors, in September 2002: Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims, ICC-ASP/1/Res.6 (Sept. 9, 2002). It subsequently established a Secretariat for the TFV (Establishment of the Secretariat of the Trust Fund for Victims, ICC-ASP/3/Res.7 (Sept. 10, 2004)) and passed Regulations governing its operations (Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 (Dec. 3, 2005)).

380 The TFV's "assistance programmes do not require a direct link to an ICC conviction or judicial proceedings. The TFV may develop assistance programmes in different scenarios: before the start of judicial proceedings, during judicial proceedings and after the end of judicial proceedings in an ICC situation country." The Trust Fund for Victims, Assistance Programmes.

381 This "assistance mandate" supports "the most vulnerable victims, their families, and their communities. These victims have suffered from the gravest forms of violence. The TFV teams work in collaboration with local partners to deliver life-changing programmes including mental health, medical interventions, and material support." The Trust Fund for Victims, Our Mandates.

382 The Trust Fund for Victims, Where We Work. The TFV is also assessing or developing assistance programs in Mali, Côte d'Ivoire, and Kenya.

383 G-8 Declaration on Preventing Sexual Violence in Conflict, para. 8 (Apr. 11, 2013) ("Ministers emphasised the need for further funding support for victims and called on the international community, including the G8, to increase their efforts to mobilise such funding, including to programmes such as the ICC Trust Fund for Victims and its implementing partners.").

384 Amendment Regarding Voluntary Contributions Earmarked for Specific Purposes, ICC-ASP/6/Res.3 (Dec. 14, 2007).

385 The Trust Fund has highlighted that "earmarked funding constitutes an important component of the TFV's resources under the assistance mandate, especially for supporting victims of sexual and gender-based violence (SGBV)." The Trust Fund for Victims, Assistance Mandate.

386 *See* Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, *in* Arcs of Global Justice 18 (Margaret M. deGuzman & Diane Marie Amann eds., 2018); *A Necessary Good: U.S. Leadership On Preventing Mass Atrocities*, at 36 (Final Report of the Experts Committee on Preventing Mass Violence, Nov. 2016) ("The administration should submit to Congress—and Congress should pass—proposed legislation to make the commission of crimes against humanity a felony under Title 18 of the U.S. Criminal Code.").

387 Marc Grossman Remarks, American Foreign Policy and the International Criminal Court, *supra* note 23.

388 Council Regulation (EU) 2020/1998, *supra* note 358, Art. 2(1)(a)–(b).

389 The authority to impose new sanctions under the current Global Magnitsky Act will terminate on December 23, 2022 (six years after its enactment, see § 1265). *See* Tom Lantos Human Rights Commission, Hearing, The Global Magnitsky Human Rights Accountability Act: Taking Stock (Mar. 24, 2021).

390 Beth Van Schaack, *United States War Crimes Statute & Sri Lanka*, Just Security (May 20, 2014); Testimony of Professor Beth Van Schaack before the Tom Lantos Human Rights Commission, United States House of Representatives on Pursuing Accountability for Atrocities (June 13, 2019).

391 10 U.S.C. § 950q; Beth Van Schaack, *Title 18's Blind Spot: Superior Responsibility*, Just Security (June 3, 2014); Brian Finucane, *A Commander's Duty to Punish War Crimes: Past U.S. Recognition*, Just Security (Dec. 4, 2020).

392 Nushin Sarkarati, *Liberia's Civil War Atrocities Confronted in a Philadelphia Courtroom*, Just Security (Oct. 12, 2017); Beth Van Schaack, *Salvadoran General Deemed Deportable in the Absence of Criminal Charges*, Just Security (Mar. 17, 2015).

393 *See* Volume 6(2) of the African Journal of International Criminal Justice (2002) for a discussion of the treaty initiative; Leila Nadya Sadat, Forging a Convention for Crimes Against Humanity (2011).

394 Larissa van den Herik, *Relating to "the Other": The ILC Draft Convention on Crimes Against Humanity and the Mutual Legal Assistance Initiative*, 6 Afr. J. Int'l Crim. Justice 274 (2002).

395 For example, although the Genocide Convention was opened for signature in 1948, the United States did not ratify the Convention until November 1988. *See* Multilateral Treaties Deposited with the Secretary General: Status as at 31 Dec. 1988, at 97, UN Doc. ST/ LEG/SER.E/7, UN Sales No. E.89.V.6 (1989); Lawrence J. LeBlanc, The United States and the Genocide Convention (1991).

396 *See*, *e.g.*, U.S. Code, Title 18, chs. 11B, 50A, 77, 81, 113B, 133C, 118, *supra* note 326. Many of these authorities have been underutilized. Although there have been a number of prosecutions under the terrorism, piracy, and trafficking statutes and involving extraterritorial conduct by perpetrators within the United States' jurisdictional reach, the United States has never prosecuted anyone under its war crimes, genocide, or child soldiers statutes, and only two cases have proceeded under its torture statute, including the recent indictment of Michael Sang Correa of The Gambia—a welcome development. Beth Van Schaack, *Accused Gambian Torturer Arrested in Denver*, Just Security (June 11, 2020).

397 White House Press Release, Press Conference by the President (Aug. 1, 2014).

398 Antony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, *supra* note 219.

399 Executive Order on the Termination of Emergency with Respect to the International Criminal Court, *supra* note 219 (stating that the U.S. "continues to object to assertions of jurisdiction over personnel of such non-States Parties as the United States absent their consent or referral by the United Nations Security Council"); Antony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, *supra* note 219 ("We maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties."); State Department Spokesperson Ned Price, Press Statement, Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation (Feb. 5, 2021) ("The United States has always taken the position that the court's jurisdiction should be reserved for countries that consent to it, or that are referred by the UN Security Council.").

400 Michael R. Pompeo, Mar. 17, 2020 Remarks to the Press, *supra* note 40.

401 To the extent that the new Administration decides to continue to articulate this argument, it should emphasize policy, as opposed to legal, terms. It is reasonable to point out that an important consideration, among others, in exercising prosecutorial discretion and choosing where to investigate should be whether the accused are nationals of non-state parties, given the added challenges to securing cooperation in such circumstances.

402 Restatement (Fourth), The Foreign Relations Law of the United States, § 401 (2018); ASIL, *Jurisdictional, Preliminary, and Procedural Concerns*, *in* Benchbook on International Law § II.A (Diane Marie Amann ed., 2014) ("Territoriality is the principle that a country may regulate both civil and criminal matters within its sovereign borders. . . . It has long been recognized as a basis for the assertion of jurisdiction.").

403 2009 ASIL Task Force Report, *supra* note 18, 26–29.

404 The fact that the Task Force is offering the recommendations in this Section as a pragmatic path forward for the new Administration should not be taken to suggest that its members agree with the approach that the United States has taken in the past to address the issue.

405 Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, para. 189.

406 *See id.*, para. 193, nn. 270–284. For example, the footnote references CIA reports, but not DOD reports, for waterboarding. *See id.*, para. 193(xiii), n. 284. Other techniques reported to have been used are similarly sourced to CIA reports but not DOD reports, including: "sexual violence . . . by means of 'rectal rehydration' or 'rectal feeding' applied with excessive force," "cramped or close confinement . . . for example by placing detainees in boxes," "manipulation of the environment, especially exposure to extreme heat of cold," and "suspension, such as from the ceiling in a vertical shackling position as to enhance sleep deprivation or otherwise inflict pain." *Id.*. para. 193(iv), (vii), (xi)–(xii).

407 *Id.*, para. 355.

408 Schlesinger Report, cited in *id.*, para. 303.

409 *See* Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, para. 302 ("the Church Report indicated that as of September 2004, 27 investigations in response to allegations of detainee abuse by DOD personnel in Afghanistan had been initiated, involving 65 service members and 25–50 detainees"), 303 ("the Schlesinger Report identified approximately 300 allegations of detainee abuse in Afghanistan, Iraq and Guantanamo Bay as of mid-August 2004, resulting in 155 completed investigations and 66 substantiated cases"), 304 ("2006 report of the DOD Office of the Inspector General on DoD Directed Investigations of Detainee Abuse reported that 653 criminal investigations related to the treatment of detainees were ongoing or completed as of January 2006, primarily involving alleged assault, murder and theft."). *See also id.*, para. 307 ("global review by a group of NGOs into 330 cases of alleged ill-treatment of detainees in US custody in Afghanistan, Iraq and Guantanamo Bay from 2001–2006 involving over 600 US personnel found that 54 persons were known to have been convicted by court-martial, of which 40 received prison sentences . . .").

410 *Id.*, paras. 290–95. For a critique of this approach and conclusion, see William Lietzau & Ryan Vogel, *Uncomplimentary Complementarity and the Int'l Criminal Court's Afghanistan Probe*, Just Security (Apr. 12, 2018).

411 Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, para. 300.

412 *Id.*, paras. 245 ("In summary, compared to the localised approval of certain interrogation techniques within the US military command structure in Afghanistan, the CIA's use of the interrogation techniques described above was authorized as official policy."), 355 ("[T]he acts allegedly committed were serious both in their number and in their effect, and although implemented pursuant to authorised interrogation policies adopted locally rather than at headquarters level, implicated personal responsibility within the command structure.").

413 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85, 113

414 Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009).

415 Under United States law, the Office of Legal Counsel has delegated authority to render opinions on questions of law. The underlying statutory authority to render such opinions dates to the Judiciary Act of 1789 and is now codified at 28 U.S.C. §§ 511–513 and 28 CFR § 0.25. *See* Department of Justice, Office of Professional Responsibility, Investigation into the Office of Legal Counsel's Memorandum Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 29, 2009) ("The OLC provides written opinions and oral advice in response to requests from the Counsel to the President, agencies of the Executive Branch, and offices within the Department [of Justice]. OLC opinions are binding on the Executive Branch.").

416 U.S. Dep't of Justice, Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012). More generally, the U.S. Attorney's Manual of the Department of Justice specifically provides that "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact." *See* U.S. Attorney's Manual, 9–77.220, Principles of Federal Prosecution, Grounds for Commencing or Declining Prosecution.

417 Such restrictions on sharing, for example, the results of the grand jury process—which have long existed as part of the common law, separate from any concerns about the ICC—are designed to protect an array of interests, including the protection of the rights of witnesses who testify before grand juries without benefit of counsel and the privacy and related interests and rights of those accused but not charged to be protected from public opprobrium. *See* United States Department of Justice, Criminal Division, Office of International Affairs, Letter from Mary Ellen Warlow and Kenneth Harris to Ms. Paula Mongé Royo, "Re: Request for Assistance from Spain in the Matter of Addington, David; Bybee, Jay; Feith, Douglas; Haynes, William; Yoo, John; and Gonzalez, Alberto; Spanish Reference Number: 002342/2009-CAP" (Mar. 1, 2011) ("legal restrictions on disclosure of investigative information, including rules of grand jury secrecy" limit ability of U.S. Government to provide details); Federal Rules of Criminal Procedure, Rule 6(e) (strict secrecy rules applicable to grand jury matters); Cong. Res. Serv., Federal Michael A. Foster, Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight, R45456 (Jan. 10, 2019).

418 In contrast, some international courts do draw adverse inferences when states that are party to the relevant treaty or declaration fail to provide information, especially when such information is within the exclusive knowledge, possession, or control of that state. *See, e.g.*, Rules of Procedure of the Inter-American Commission on Human Rights, Art. 39 ("The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.").

419 *See, e.g.*, UN Committee Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, paras. 12 et seq., UN Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014); Human Rights Watch, *No More Excuses: A Roadmap to Justice for CIA Torture* (Dec. 1, 2015).

420 *See, e.g.*, Dan Baer, *The Haspel Nomination and the Torture Question: What Her Confirmation Would Mean for Obama's Delicate Bargain*, For. Aff. (Apr. 12, 2018).

421 The McCain-Feinstein bill (enacted as an amendment to the National Defense Authorization Act for Fiscal Year 2016, Section 1045) built on the earlier Detainee Treatment Act, but went further including by ensuring that the Army Field Manual on Interrogations be applied to interrogations by all agencies (not just the Department of Defense); requiring that the Manual be regularly reviewed to ensure that the interrogation approaches that it includes are lawful, humane, and effective; and by mandating that the International Committee of the Red Cross be granted access to all detainees. *See* Cong. Rec., Proceedings and Debates of the 114th Congress, 1st Sess., at S7186–S7189 (Oct. 7, 2015); Center for Victims of Torture, *McCain-Feinstein Anti-Torture Amendment: Strengthens U.S. Ban on Torture* (Nov. 2015).

422 *See* Dan Froomkin, *Holder, Too Late, Calls for Transparency on DOJ Torture Investigation*, The Intercept (Oct. 15, 2015).

423 *See, e.g.*, Jeffrey Rosen, *Conscience of a Conservative*, N.Y. Times (Sept. 9, 2007); Michael Scharf, *The Torture Lawyers*, 20 Duke J. Comp. & Int'l L. 389 (2010).

424 Office of Professional Responsibility, Investigation into the Office of Legal Counsel's Memorandum Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, *supra* note 415, at 11.

425 *See* Memorandum from David Margolis to the Associated Deputy Attorney General, Memorandum of Decision Regarding the Objections of the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memorandum Concerning Issues Related to the CIA's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010).

426 Letter from Mary Ellen Warlow and Kenneth Harris to Ms. Paula Mongé Royo, "Re: Request for Assistance from Spain in the Matter of Addington, David; Bybee, Jay; Feith, Douglas; Haynes, William; Yoo, John; and Gonzalez, Alberto, *supra* note 417, at 2.

427 *See* David J. Barton, Acting Assistant Attorney General, Office of Legal Counsel, Memorandum for Attorneys of the Office, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) ("OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position" of the Executive.).

428 *See, e.g.*, David Cole, *They Did Authorize Torture, But . . .*, N.Y. Rev. Books, (Apr. 8, 2010); David Luban, *David Margolis Is Wrong: The Justice Department's Ethics Investigation Shouldn't Leave John Yoo and Jay Bybee Home Free*, Slate (Feb. 22, 2010); Marc Ambinder, *"Poor Judgment"—Yoo, Bybee, and the Torture Memos*, Atlantic (Feb. 19, 2010); Jens D. Ohlin, *The Torture Lawyers*, 51 Harv. Int'l L.J. 193 (2010).

429 Rome Statute, *supra* note 69, Art. 17(1)(b), (2)(a).

430 *See, e.g.*, Clark, *supra* note 372; Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 Harv. Int'l L.J. (2019) 1. For considerations on the extent to which the current provisions enable a broader consideration of non-penal responses, with a focus on Northern Uganda, see Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 Va. J. Int'l L. 107 (2009); Gregory S. Gordon, *Complementarity and Alternative Forms of Justice*, *in* The International Criminal Court And Complementarity: From Theory to Practice (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

431 In this connection, Lietzau & Vogel, *supra* note 410, have stated as follows:

> It is worth noting that no country has ever self-investigated or self-reported its detention policies and practices more than the United States. Reports regarding U.S. detention operations include those of Brigadier General Jacoby; Vice Admiral Church, the Navy Inspector General; Major General Ryder, the Army Provost Marshal General; Lieutenant General Mikolashek, the Army Inspector General; Major General Miller; Major General Taguba; Major General Fay; Lieutenant General Jones; Brigadier General Formica; the independent panel led by former Secretary of Defense Schlesinger; the Senate Select Intelligence Committee; and the Senate Armed Services Committee. For the sake of transparency and accountability, many of these reports were released, at least in some form, to the public, demonstrating both the seriousness with which the United States takes these allegations and its willingness to address them publicly.

432 *See* Detainee Treatment Act of 2005 – Sec. 1001–1006 [Title X of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006], Pub. L. No. 109–148 (McCain-Feinstein) (legal reforms) and Exec. Ord. 13491 – Ensuring Lawful Interrogations (Jan. 22, 2009) (withdrawal of legal advice). Following this Executive Order, the Assistant Attorney General clarified that: "Four previous opinions . . . concerning interrogations by the Central Intelligence Agency are withdrawn and no longer represent the views of the Office." *See* David J. Barron, Acting Assistant Attorney General, Memorandum for the Attorney-General: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009). For more background on the importance of measures to prevent recurrence in addressing past crimes, see UN OHCHR, Statement by Pablo De Greiff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence at the Human Rights Council Thirtieth Session (Sept. 15, 2015).

433 *See*, *e.g.*, Situation in Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *supra* note 190, para. 47 (referring to "extensive reports authored by the US Senate Select Committee on Intelligence and the US Senate Armed Services Committee").

434 The Prosecutor's *Policy Paper on Case Selection and Prioritisation* (Sept. 15, 2016) includes such a "comparative assessment" of the potential cases in prioritizing those to pursue at any given time (para. 50(a)).

435 *Id.*, para. 50(d).

436 The ICC Prosecutor does consider the gravity of the crimes alleged to have been committed by U.S. personnel, though this analysis focuses more on the qualitative severity of the abuses than their quantitative scale: Situation in Afghanistan, OTP Application to Investigate, *supra* note 175, paras. 352–63.

437 Beth Van Schaack, *The Torture Convention and Appendix M of the Army Field Manual on Interrogations*, Just Security (Dec. 5, 2014); Beth Van Schaack, *Memo to President Obama: You Have Another Memo to Withdraw*, Just Security (Dec. 5, 2016).

438 Lisa Myers & Aram Roston, *CIA Accused of Detaining Innocent Man*, NBC News (Apr. 21, 2005).

439 Situation in Palestine, Ruling on Territorial Jurisdiction, *supra* note 234.

440 Antony J. Blinken, Press Statement, The United States Opposes the ICC Investigation into the Palestine Situation (Mar. 3, 2021), *supra* note 235.

441 Office of U.S. Senator for Maryland Ben Cardin Press Release, Cardin Says ICC Decision to Investigate Israel is Disturbing and Damaging to the Court's Credibility (Feb. 8, 2021); Senate Foreign Relations Committee Ranking Member, @SenateForeign, Twitter (Feb. 5, 2021, 6:30 P.M.).

442 Letter from Senator Benjamin L. Cardin and Senator Rob Portman to Secretary of State Michael R. Pompeo, *supra* note 239.

443 The majority decision of the Pre-Trial Chamber states that its "ruling [on jurisdiction] pursuant to article 19(3) of the Statute does not impair the right of a suspect or accused (or the relevant States) to subsequently challenge the jurisdiction of the Court under article 19(2) of the Statute." Situation in Palestine, Ruling on Territorial Jurisdiction, *supra* note 234, para. 77.

444 GA Res. 67/19, *supra* note 227.

445 Israel Ministry of Foreign Affairs Press Release, Prime Minister Netanyahu's Statement Regarding the ICC Decision (Feb. 6, 2021); *Gantz Says Hundreds of Israelis, Himself Included, Could Be in ICC's Crosshairs*, Times of Israel (Mar. 3, 2021).

446 Barak Ravid, *Scoop: Israel Will Ask Allies to Pressure ICC Prosecutor Against Opening War Crimes Investigations*, Axios (Feb. 7, 2021) (reporting that Israel's foreign Ministry instructed its Embassies to ask governments to "'send a discreet message to the prosecutor asking her not to move forward with the investigation against Israeli and not give this case a high priority'").

447 Jacob Magid, *ICC Has Jurisdiction to Probe Israel, Hama for War Crimes, Pretrial Judges Rule*, Times of Israel (Feb. 5, 2021).

448 Antony J. Blinken, Press Statement, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, *supra* note 219.

449 Lewis, *supra* note 143.

450 IER Report, *supra* note 259, para. 646.

451 *Id.*, para. 953.

452 2020 OTP Report on Preliminary Examinations, *supra* note 166, paras. 265, 289.

453 IER Report, *supra* note 259, para. 650.

454 *Id.* at 209 et seq. (in particular para. 650).

455 Todd Buchwald, *Part I: What Kinds of Situations and Cases Should the ICC Pursue? The Independent Expert Review of the ICC and the Question of Aperture*, Just Security (Nov. 30, 2020); Todd Buchwald, *Part II: What Kinds of Situations and Cases Should the ICC Pursue? The Independent Expert Review of the ICC and the Question of Aperture*, Just Security (Dec. 1, 2020); Todd Buchwald, *Part III: What Kinds of Situations and Cases Should the ICC Pursue? The Independent Expert Review of the ICC and the Question of Aperture*, Just Security (Dec. 2, 2020).

456 *See, e.g.*, Carsten Stahn, *Admissibility Challenges Before the* ICC: *From Quasi-primacy to Qualified Deference?*, *in* The Law and Practice of the International Criminal Court (Carsten Stahn ed., 2015); Kevin Jon Heller, *Radical Complementarity*, 14 J. Int'l Crim. Just. 637 (2016). The proposals to reconsider the approach of the ICC to complementarity are not limited to opening of investigations and cases, but also to the role of complementarity in completion strategies, as well. *See* Open Society Justice Initiative & Amsterdam Center for International Law/Department of Criminal Law, Amsterdam Law School, *supra* note 249, at 14–15.

457 *See* ICC OTP, Policy Paper on the Interests of Justice, *supra* note 298, at 8.

458 UN Press Release, Secretary-General Urges "Like-Minded" States to Ratify Statute of International Criminal Court, SG/SM/6686 (Sept. 1, 1998).

459 Situation in Afghanistan, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *supra* note 196, para. 60 ("the Prosecutor must carry out an investigation into the situation as a whole"). The Prosecutor has taken a similar position. *See, e.g.*, Prosecutor's *Policy Paper on Case Selection and Prioritisation*, *supra* note 434, para. 24 ("the selection of cases for investigation within an existing situation should not be confused with decisions to initiate an investigation into a situation as a whole . . ."); *see also id.*, para. 4.

460 Luis Moreno-Ocampo, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (Oct. 14, 2005).

461 Secretary Michael R. Pompeo at a Press Availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien, *supra* note 147.

462 Bellinger, *supra* note 285.

463 White House, Inaugural Address by President Joseph R. Biden, Jr. (Jan. 20, 2021).

464 Executive Order on the Termination of Emergency with Respect to the International Criminal Court, *supra* note 219.

465 UN Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review, United States of America, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review, para. 21, UN Doc. A/HRC/46/15/Add.1 (Mar. 4, 2021).

466 For a discussion, see Stephen J. Rapp, *Overcoming Obstacles to Funding ICC Investigations in UN Security Council Referred Cases*, Int'l Crim. J. Today (Dec. 10, 2015) (discussing options for overcoming resistance to UN funding for ICC investigations following Security Council referrals).

467 *See* Rome Statute, *supra* note 69, Art. 115(b):

> The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

468 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 18th Meeting of the Committee of the Whole, Summary Record, para. 47, UN Doc. A/CONF.183/C.1/SR.18.

469 Under Article 17 of the UN Charter, it is "the expenses of the Organization"—meaning the United Nations itself, and not independent organizations like the ICC—that are borne as part of the UN budget. With respect to the statutory restrictions on U.S. funding for the ICC, see notes 54–55 *supra* and accompanying text, including *Text Box* - FRAA *Restriction on Funding the* ICC.

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The Future of the Int'l Criminal Court: What Follows After Removal of the Prosecutor

By Rebecca Hamilton and Alex Whiting

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On Friday, the Assembly of States Parties (ASP) of the International Criminal Court (ICC) voted 82-13, with 15 abstentions, to remove Karim Khan from his position as Prosecutor of the ICC. Khan was removed for sexual misconduct against a junior staff member in his immediate office (see details here) and his dismissal is effective immediately (Rule 31 of the ICC Rules of Procedure and Evidence). Mr. Khan's lawyers have pledged to challenge the outcome "through all available legal mechanisms," though neither the Rome Statute nor any of the other governing ICC legal texts provides any avenue to do so.

The vote by the states to remove Mr. Khan was decisive and based on an extensive and lengthy investigation. That said, the episode has exposed deep problems within the Court's internal governance structure and fractured its various constituencies, all amid the most challenging period in the Court's existence. If the Court is going to fulfil its mission of justice for victims and survivors of the gravest crimes, much hard work lies ahead.

Moving Beyond the ASP Vote

The process leading to Mr. Khan's removal became highly politicized and contested. Some of Mr. Khan's supporters claimed or clearly suggested, without evidence, that the sexual misconduct allegations were an Israeli-sponsored fabrication, concocted to destroy Mr. Khan for seeking an arrest warrant for Israeli Prime Minister, Benjamin Netanyahu. Others, by portraying Mr. Khan as someone uniquely prepared to fight for justice in Gaza, suggested that states were seeking to remove Mr. Khan because he brought warrants in the Palestine case. Putting aside the fact that these warrants were approved by three ICC judges and remain in place, there is no evidence that the ultimate outcome was driven by the cases brought by Mr. Khan. At a different moment in time, such a narrative may not have taken hold. Yet it landed in a context where, not only is the Israeli government opposing the Court's arrest warrants against its officials, but the United States is seeking to dismantle the Court entirely. The result is that for some, the internal workplace complaint by a junior staff member was conflated with attacks on the Court by states.

In the end though, states focused on the actual allegations against Mr. Khan – which were serious and well-grounded – and concluded that he could no longer lead the Office of the Prosecutor. The overwhelming vote of the states should now be given respect and accepted. Here, Palestine's

Mission to The Netherlands provides a strong, early example of a measured and appropriate response, stating: "The vote by the Assembly of States Parties to remove the Prosecutor was not a political proxy vote on any Situation before the ICC, an assessment on prosecutorial strategy, or a broad institutional referendum. It was a statutory vote based on the Rome Statute." This is exactly the approach that will be essential for the Court to move past this period and resume work on its core mission.

The Work Ahead for the ICC and International Community

First, states must concretize the process for adjudicating allegations of misconduct, especially against senior court officials. At the end of the day, the allegations against Mr. Khan were thoroughly investigated, he and his lawyers were given more than ample opportunities to challenge the evidence, and the states voted to remove him following the process set forth in Article 46 of the Rome Statute. That is what is required, and it was done. Yet, the process was not clearly set out from the beginning, and procedures were improvised mid-course. Further, the court failed to communicate clearly on the processes at each step of the way. These shortcomings created opportunities for Mr. Khan and his supporters to try to turn the tables and claim that he was being victimized by the process and further that the procedural missteps could only be explained by a nefarious political campaign. This defense strategy caused real and lasting harm, both to the complainant as an individual, and to the Court as an institution. In light of this experience, states should urgently appoint a committee to clarify, strengthen, and streamline the process for reporting, investigating, and deciding on such complaints.

Second, and relatedly, this episode underscores the significant work still to be done to improve workplace culture at the court. Before Mr. Khan was elected, the states commissioned a group of experts to review the workings of the court, and that body concluded that bullying and sexual harassment were significant problems within the Office of the Prosecutor. In his campaign for prosecutor and after being elected, Mr. Khan pledged to address these problems and to enforce a policy of zero tolerance, stating at his swearing in, "This office should be the best place in the world for anybody who believes in the rule of law, human rights, international relations to work, and you have a right to work in a harassment-free working environment." To be sure, Mr. Khan took steps within the Office to address these issues, but he did not go far enough and his own behavior on multiple levels undermined the effort. Changing workplace culture is tough. It starts from the top and requires sustained commitment from the entire leadership of the Office.

Third, Mr. Khan's removal now requires the election of a new Prosecutor. The statement of the ASP on Mr. Khan's removal says that the Deputy Prosecutors will continue to run the Office, but the Court will need to start the process of electing a new Prosecutor without significant delay. Given what has just unfolded, it will be important to ensure that the new Prosecutor is unimpeachably a person of "high moral character," as required by the Statute. Moreover, in addition to ensuring that any

prospective candidate would be highly competent as a prosecutor in a complex geopolitical environment, states would be wise to consider whether candidates have the skills and temperament to establish and maintain a strong and healthy working environment inside the Office.

Further, the election of a new prosecutor is an opportunity for the states to take stock. Since Mr. Khan was elected, the Office has brought arrest warrants against Vladimir Putin and other senior Russian officials in the Ukraine case and against Benjamin Netanyahu and Yoav Gallant in the Palestine case (as well as Hamas leaders who have since been killed). Rodrigo Duterte, the former President of the Philippines, has been surrendered to the court and trial is set to start in November. Four states (Mali, Niger, Burkino Faso, and now Venezuela) have announced their intention to leave the court, and the United States has imposed severe sanctions on the then-Prosecutor, Deputy Prosecutors, and eight judges, and announced a campaign to dismantle the court. Around the world, states are turning away from international institutions and solutions, creating a challenging environment for the ICC, which is dependent on state cooperation to conduct its work.

In other words, both the ICC and the world have changed dramatically since Mr. Khan became prosecutor four years ago. These new realities require the states to face many difficult questions as they choose a new Prosecutor, but the overarching one is simple: How can the ICC keep the flame of international justice burning through these difficult times? In the coming weeks and months, we and others will debate visions for the future of the Court. But in truth, the Court always has, and always will face political pressure by those states who seek impunity for their nationals or others. It is also true that the Court always has, and always will, rely on other states to support the pursuit of accountability in the face of these pressures. To bend the arc in favor of justice, the Court needs states who support its mission to redouble their efforts to assist the Court. This means funding it, cooperating in its investigations, executing its warrants, and speaking out in favor of the rule of law. The next Prosecutor will shape the future direction of the court in these challenging years ahead, but it is not something that person can do alone.

FEATURED IMAGE: The International Criminal Court forecourt, entrance and sign. The Hague, Netherlands. (via Getty Images)

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U.S. Policy and the International Criminal Court

David J. Scheffer*

The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court. We have long contemplated an international criminal court. Such a court can both deter and punish those who might escape justice in national courts. As head of the U.S. Delegation to the International Criminal Court (ICC) talks since mid-1997, I can confirm that the United States has had an abiding interest in supporting an ICC that would operate efficiently, effectively, and appropriately within a global system that also requires our constant vigilance to protect international peace and security. However, based on international law and the reality of our international system, we refused to support the final draft of the Treaty in Rome last summer.

On December 8, 1998, we joined the consensus in the U.N. General Assembly to adopt a resolution creating the Preparatory Commission on the ICC (PrepCom), the first session of which met in New York under the expert leadership of Philippe Kirsch, the Legal Adviser of the Canadian Ministry of Foreign Affairs. Last month I led the U.S. Delegation in the critical work of the PrepCom to develop the Elements of Crimes and the Rules of Procedure and Evidence. This summer the PrepCom will afford an opportunity to address concerns we and others have had about the effectiveness and acceptance of the ICC. This is an important opportunity. We believe the problems in the Rome Treaty that prevent us from signing it can be solved, and that it is in the interest of all governments to address those problems now so that we can all be active partners in the ICC. There is far more to lose in the effectiveness of the ICC if the United States is not a Treaty Partner than there is to gain from its current dubious regime of jurisdiction. As I said at the United Nations last October, we do not pretend to know all the answers. We surely hope some creative thinking can be generated in the months ahead.

At the Rome conference last summer, the U.S. Delegation worked with other delegations to achieve important objectives. One major objective was a strong complementary regime, namely, deferral to national jurisdiction. A key purpose of the ICC should be to promote observance and enforcement of international humanitarian law by domestic legal systems. There-

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* Ambassador at Large for War Crimes Issues. Remarks at the Cornell International Law Journal 1999 Symposium, March 5, 1999, Ithaca, New York. The Cornell International Law Journal has added citations to the major statutes referred to by Ambassador Scheffer. Portions of this Article derive from David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

fore, we were pleased to see the adoption of Article 18 (preliminary rulings regarding admissibility),[1] drawn originally from a U.S. proposal, and its companion Articles 17 and 19.[2] We considered it only logical that, when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under reasonable guidelines by the court to investigate their own nationals or others within their jurisdiction.

Our negotiators successfully preserved appropriate decision-making for sovereigns that are obligated to cooperate with the court. Some delegates were tempted to require unqualified cooperation by States Parties with all court orders, notwithstanding relevant national judicial procedures. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only in the United States but in many other States. Part 9 of the Statute[3] represents hard-fought battles in this respect. The requirement that States Parties "shall ensure that there are procedures available under their national law"[4] is pragmatic and legally essential for the successful operation of the court. We were pleased that participating delegations discussed the Rules of Procedure and Evidence with a constructive attitude at the February session of the PrepCom. Some progress was made, and we trust that the groundwork has now been laid to accelerate the work on the Rules in the months ahead.

The procedures established for the International Criminal Tribunal for the Former Yugoslavia show that some sensitive information collected by a government could be made available as lead evidence to the prosecutor, provided that these detailed procedures are strictly followed. We applied this experience to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination on the release of all national security information requested from a government. This argument is inconsistent with the Rome Statute since Article 72[5] states that a national government must have the right of final refusal if the request pertains to its national security. In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council.

The United States helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity shall include acts in internal armed conflicts and acts in the absence of armed conflict. We argued successfully that there had to be a reasonably high threshold for such crimes. The same standard should apply in war crimes. A major achievement of Article 8 of the Treaty is its application to war crimes committed during internal armed conflicts.[6] In order to widen acceptance of the

1. Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999, 1012.
2. *Id.* at 1012-14.
3. *Id.* at 1051-61.
4. *Id.* at 1052.
5. *Id.* at 1043.
6. *Id.* at 1006.

application of the Statute to war crimes committed during internal armed conflicts, the United States helped negotiate language that excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

The U.S. Delegation insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements and intent of military objectives during combat. We had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC. We believe the definition arrived at serves our purposes well: "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[7]

One of the more difficult, but essential, issues to negotiate was the treatment of crimes against women, either as a crime against humanity or as a war crime. The U.S. Delegation worked hard to include explicit references to crimes relating to sexual assault in the text of the Statute. Such crimes include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude. We were also instrumental in creating acceptable definitions of command responsibility that reach into civilian chains of command and the defense of superior orders.

Our emphasis on the Elements of Crimes resulted in Article 9 of the Treaty,[8] which requires their preparation – a task that governments have now undertaken in the PrepCom. This task is critical in order to transform international norms into individual criminal culpability. We have to balance the rights of the accused and due process with the interests of international justice. Despite some early criticism directed at U.S. motivations, we are pleased that work on the Elements progressed well during the first session of the PrepCom and that there is now a very good basis for making more progress. We look forward to more constructive and cooperative work with delegations in the months ahead. We trust that early skepticism about the intent behind our draft Elements has been put to rest and that serious professional work can now continue in order to complete the work on Elements of Crimes as soon as possible.

These accomplishments and others in the Rome Treaty are significant. However, the U.S. Delegation was not prepared at any time during the Rome Conference to accept text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away unique security requirements or our need to uphold basic principles of international law even if some of our closest allies reached their own level of satisfaction with the final Treaty. The

7. *Id.*
8. *Id.* at 1009.

United States made compromises throughout the negotiations in Rome but always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire Treaty and the integrity of the court would be imperiled.

The theory of universal jurisdiction for genocide, crimes against humanity, and war crimes seized the imagination of many delegates negotiating the ICC Treaty. They appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts to prosecute any individuals, including non-nationals, who commit one or more of these crimes. Some governments have enacted such laws, which theoretically, but rarely in practice, make their courts arenas for international prosecutions. The problem for any national government seeking to exercise such universal jurisdiction is to exercise personal jurisdiction over the suspect. Without custody, or the prospect of it through an extradition proceeding, a national court's claim of universal jurisdiction is necessarily and rightly limited.

Admittedly, many recent international treaty regimes, including those directed at terrorism, have used universal jurisdiction as a means of enforcement. Under such a treaty, criminals involved in airplane hijacking, airplane bombings, and attacks on diplomats as internationally protected persons, can be tried in the courts of any treaty signatory, no matter the place of the offense or the nationality of the victim. The treaties against hostage-taking and torture also provide for universal jurisdiction, as the lawyers for General Augusto Pinochet have recently learned. However, the exercise of universal jurisdiction is limited to treaty parties. Additionally, use of universal jurisdiction in the operational law of war has been halting. The 1949 Geneva Conventions make use of it for grave breaches of the conventions, but these four conventions are limited to the deliberate mistreatment of civilians, prisoners of war, the wounded, and the shipwrecked.[9] The Hague regulations and the laws and customs of war which establish the limits on war do not directly provide for universal jurisdiction. Protocol I of 1977 to the Geneva Conventions defines as a grave breach any disproportionate use of force, or the use of force in environmentally objectionable ways, but the United States and a number of other countries have not yet ratified Protocol I. Thus, the universal jurisdiction created by the Rome Conference would mean something new, at least for U.S. troops stationed abroad.

The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. A fundamental principle of interna-

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

tional treaty law is that only states that are party to a treaty should be bound by its terms. Yet Article 12 of the ICC Treaty reduces the need for ratification of the treaty by national governments by providing the ICC with jurisdiction over the nationals of a non-party state.[10] Under Article 12, the ICC may exercise such jurisdiction over anyone, anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents.[11] Ironically, the Treaty exposes non-parties in ways that the parties themselves are not exposed.

Why is the United States so concerned about the status of non-party states under the ICC Treaty? Why not, as many have suggested, simply sign and ratify the Treaty and thus eliminate the problem of non-party status? First, fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state's obligations vis-à-vis a treaty regime. While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law.

Second, even if the Clinton Administration were in a position to sign the Treaty, U.S. ratification could take many years and stretch beyond the date of entry into force of the Treaty. Thus, the United States could have non-party status under the ICC Treaty for a significant period of time. The crimes within the court's jurisdiction also go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create "new" and unacceptable crimes. Moreover, the ability to withdraw from the Treaty, should the court develop in unacceptable ways, would be negated as an effective protection.

Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence imposed by Article 12, particularly for non-parties to the Treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.

We clearly recognize the dilemma posed by the limitations of Article 12, namely that it will exclude from the court's jurisdiction strictly internal atrocities committed by non-consenting non-party states, absent a Security Council referral. On the one hand, we object to any presumption that sixty ratifications of the Treaty, and its entry into force, automatically exposes every individual everywhere in the world to the ICC's jurisdiction unless

10. Rome Statute of the International Criminal Court, *supra* note 1, at 1010.
11. *Id.*

the Security Council exercises its Chapter VII powers. We always envisaged this Treaty regime's reach to grow as more states ratify it. However, we did not envisage the Security Council giving the court the ability to leap-frog over jurisdictional barriers. On the other hand, we are open to considering ways to address the most obvious manifestation of contemporary illegality, namely the self-inflicted atrocity by the rogue regime. The obvious procedure is the Security Council referral.

In Rome, the U.S. Delegation offered various proposals to correct the jurisdictional problem. The other permanent members of the Security Council joined us in a compromise formula during the last week of the Rome conference. One of our proposals was to exempt from the ICC's jurisdiction conduct that, in the absence of a Security Council referral, arises from the official actions of a non-party state acknowledged as such by that non-party. This would require a non-party state to acknowledge official responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other serious violations of international humanitarian law. In contrast, the United States would confirm as a matter of course its participation in international peacekeeping and enforcement actions. It is likely that there would be odious non-party regimes that would not blink at admitting genocide as an official state policy. However, that simply reflects the fact that the ICC cannot pretend to cover everyone everywhere under every circumstance if the Security Council fails to act. Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed draft of the Treaty was so fragile that if any part were reopened, the conference would fall apart.

The final text of the Treaty includes the crime of aggression, albeit undefined until a Review Conference seven years after entry into force of the Treaty will determine the meaning of aggression. This political concession to the most persistent advocates of a crime of aggression without a consensus definition and without the linkage to a prior Security Council determination that an act of aggression has occurred, should concern all of us. The PrepCom is addressing the issue, however, and we hope it will proceed responsibly in the years ahead. If handled poorly, this issue alone could fatally compromise the ICC's future credibility.

I will not belabor the final hours of the conference except to say that it could have been done differently and the outcome might have been far more encouraging. While we firmly believe that the true intent of national governments cannot be that which now appears reflected in a few key provisions of the ICC Treaty, the political will remains within the Clinton Administration to support a treaty that is fairly and realistically constituted. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized.