

**“NEVER AGAIN” MUST NOT BE A MEANINGLESS MANTRA:  
THE CASE FOR U.S. SUPPORT OF THE INTERNATIONAL  
CRIMINAL COURT**

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INTRODUCTION

According to Judge Chile Eboe-Osuji, the well-known words “never again” should not be a meaningless mantra.<sup>1</sup> The International

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1. *Reflections of the President of the ICC, Judge Chile Eboe-Osuji, on the 75th Anniversary of Auschwitz Liberation: ‘Never Again’ Must Not Be a Meaningless*

Criminal Court (“ICC”) is the world’s permanent criminal court that investigates and prosecutes individuals for the “gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.”<sup>2</sup> The Court was created when 120 countries signed an agreement on July 17, 1998, in what would become known as the “Rome Statute.”<sup>3</sup> The Court then became operational in July 2002 and currently is based in the Hague, Netherlands.<sup>4</sup>

During the late 1990s, the United States participated in numerous conferences leading to the establishment of the ICC and then-President Bill Clinton publicly advocated for its creation.<sup>5</sup> Although the U.S. initially voted against the Rome Statute, even after helping draft much of the document, the President signed in 2000. In a turn, however, Clinton chose not to send the Rome Statute to the Senate for ratification, instead commenting that the U.S. still had reservations about the Court, and the U.S. “should have the chance to observe and assess the functioning of the court over time before choosing to become subject to its jurisdiction.”<sup>6</sup>

The action of President Clinton in first signing the Rome Statute, but then declining to send the treaty to the Senate for ratification may have seemed contradictory. Nevertheless, his public statements on the

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*Mantra.*, INT’L CRIM. CT. (Jan. 27, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=200127-statement-president>.

2. Am. Bar Ass’n, *About the ICC*, INT’L CRIM. CT. PROJECT, <https://www.aba-icc.org/about-the-icc/about-the-icc/> (last visited Oct. 3, 2021); *About the Court*, INT’L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Oct. 3, 2021).

3. Am. Bar Ass’n, *Evolution of International Criminal Justice*, INT’L CRIM. CT. PROJECT, <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> (last visited Oct. 3, 2021).

4. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute].

5. *The United States and International Criminal Justice: A Complex and Challenging Relationship*, Posting to *International Law and Human Rights Programme: Campaign for the Universality and Effectiveness of the Rome Statute of the International Criminal Court (ICC) System*, PARLIAMENTARIANS FOR GLOB. ACTION (Sept. 6, 2021), <https://www.pgaction.org/ilhr/rome-statute/united-states-and-international-criminal-justice.html>.

6. *Clinton’s Statements on War Crimes Court*, BRIT. BROAD. CORP. NEWS (Dec. 31, 2000), <http://news.bbc.co.uk/2/hi/1095580.stm>.

ICC could not have been more accurate regarding the importance of U.S. support for the Court: "I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead."<sup>7</sup>

As the ICC approaches its 20<sup>th</sup> anniversary, this article argues that the need for U.S. support for the Court is apparent now more than ever. Part I explains why the ICC needs to strengthen its presence within the international community. Part II describes the Court's jurisdiction, structure, and past successes and failures. Part III analyzes the relationship of the United States to the Court. Part IV makes a case for why America should robustly support the ICC. The United States, the ICC, and the international community need to work together to build a path towards full U.S. participation within the ICC. Additionally, although the ICC needs modification and refinement to ensure greater effectiveness and international support, much of the recent U.S. criticism of the ICC has been without merit.

#### I. THE NEED FOR THE INTERNATIONAL CRIMINAL COURT

The "never again" spirit of the ICC refers to the Holocaust of World War II and the ICC's commitment to ensure such atrocities never happen again. However, genocide and war crimes have continued, and the ICC has been no more effective at stopping these crimes than any national criminal court has been at preventing murder or other unconscionable crimes. Even though a person who might commit crimes against humanity is not likely to consider the consequences of being prosecuted, the effectiveness of deterrence should not distract us from the need for a mechanism to ensure justice is carried out.

While the world will hopefully never see a genocide on the scale of the Holocaust again, crimes against humanity continue to this day. Although genocide has existed in human history since biblical times, the term "genocide" itself is new.<sup>8</sup> Genocide was first coined by

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7. *Id.*

8. See generally *Numbers* 21:2-3; *Deuteronomy* 20:17; and *Joshua* 6:17, 21 (biblical references to acts of genocide).

Polish lawyer Raphael Lemkin in his 1944 book on Nazi crimes, combining the Greek word for race or tribe (“genos”) and the Latin suffix for killing (“cide”).<sup>9</sup> Genocide has been called the “crime of crimes,” and a threat to humanity itself.<sup>10</sup>

Lemkin advocated for a global ban on genocide, which became one of the first international laws passed by the United Nations under the 1948 “Convention on the Prevention and Punishment of the Crime of Genocide.”<sup>11</sup> Eventually 149 states ratified the Convention, including the United States.<sup>12</sup> While the United States signed the Convention on December 11, 1948, the United States would not ratify it until 1988.<sup>13</sup> The Convention did not create a court to prosecute matters of genocide, but rather left the responsibility to bring those accused of genocide to trial by a “competent tribunal of the State in the territory of which the act was committed,” or by an international tribunal.<sup>14</sup> Even though no specific court was created to prosecute matters of genocide, the Convention did dictate that any dispute between a party to the Convention would be resolved in the International Court of Justice. The obvious flaw in the Convention is that the primary responsibility for prosecuting acts of genocide is in the country where the act occurred and officials in that country may often be complicit in the crime or unable to prosecute it.

Although acts of genocide and war crimes have existed since ancient times, in the modern day some of the first genocides occurred in Africa perpetrated by European colonizers. Between 1885 and 1908, as many as 15 million Congolese were murdered by Belgians in

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9. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* xi (1944).

10. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 16 (Int’l Crim. Trib. for Rwanda Sep. 4, 1998).

11. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-1.en.pdf>.

12. *The Genocide Convention*, U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited Oct. 3, 2021).

13. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 11, at 3.

14. *Id.* art. VI.

the Congo under the reign of King Leopold II.<sup>15</sup> This is just one of many European atrocities in Africa whose long-term effects linger to this day.

The failed precursor to the United Nations, the League of Nations, contemplated creating a permanent international criminal court.<sup>16</sup> The League of Nations only existed for twenty-six years, and its lack of support from the United States—who never joined it—might be a reason for its demise.<sup>17</sup> If this supposition is true, the ICC might also be in danger of not achieving its full impact without U.S. support and cooperation.

The Axis powers committed acts of genocide, aggression, and almost every manner of war crime imaginable during World War II. These atrocities laid the groundwork for what would become the world's first permanent court for the prosecution of individuals for war crimes and crimes against humanity—the International Criminal Court. Following World War II, numerous Nazi and Japanese war criminals were prosecuted in Nuremberg and Tokyo.<sup>18</sup> Interestingly, the Allies agreed to prosecute these crimes in the middle of the war with the signing of the Moscow Declaration in November of 1943.<sup>19</sup> Even though one of the first acts of the United Nations was to essentially outlaw genocide, the United Nations did not create a mechanism to prosecute genocide.<sup>20</sup>

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15. PETER FORBATH, *THE RIVER CONGO: THE DISCOVERY, EXPLORATION, AND EXPLOITATION OF THE WORLD'S MOST DRAMATIC RIVER* 278 (1977).

16. *Permanent Court of International Justice*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/pcij> (last visited Oct. 4, 2021).

17. *Senate Leaders: Henry Cabot Lodge: Senate Leader, Presidential Foe*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/generic/People\\_Leaders\\_Lodge.htm](https://www.senate.gov/artandhistory/history/common/generic/People_Leaders_Lodge.htm) (last visited Oct. 4, 2021).

18. *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, U.S. OF AM. DEP'T OF STATE OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/nuremberg> (last visited Oct. 4, 2021).

19. Yale L. Sch. Lillian Goldman L. Libr., *The Moscow Conference: October 1943*, Posting to *20th Century Documents: 1900-1999*, THE AVALON PROJECT DOCUMENTS IN L., HIST., AND DIPL., <https://avalon.law.yale.edu/wwii/moscow.asp> (last visited Oct. 4, 2021).

20. See generally Rome Statute, *supra* note 4 (outlawing genocide but not including a suggested mechanism for prosecution of genocide).

### A. *Ad Hoc Tribunals*

In the years between the Nuremberg Trials and the creation of the ICC, several international sanctioned war crime tribunals came into existence.<sup>21</sup> Most notably, the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).<sup>22</sup> Based on a request from the government of Rwanda, the U.N. Security Council established the ICTR through Resolution 955 on November 8, 1994.<sup>23</sup> The ICTR was established “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations.”<sup>24</sup>

The ICTR actively investigated and prosecuted cases from February 22, 1995 to December 20, 2012, which produced some significant results.<sup>25</sup> The ICRT was the first international tribunal to convict persons for genocide, the first tribunal to recognize rape as a means of perpetrating genocide, and the first tribunal to prosecute members of the media for “broadcasts intended to inflame the public

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21. Carolyn Kenney & John Norris, *International Justice on Trial?: Taking Stock of International Justice Over the Past Quarter Century*, Posting to *Issues: Foreign Policy and Security*, CTR. FOR AM. PROGRESS, (Mar. 28, 2018, 9:01 AM), <https://www.americanprogress.org/issues/security/reports/2018/03/28/448415/international-justice-trial/>.

22. Tove Rosen, *The Influence of the Nuremberg Trial on International Criminal Law*, Posting to *Resources: Robert H. Jackson Archive: Writings*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last visited Oct. 3, 2021). In 1994, about 800,000 ethnic Tutsi’s were murdered by ethnic Hutus. *Rwanda genocide: 100 days of slaughter*, BBC NEWS (Apr. 4, 2019), <https://www.bbc.com/news/world-africa-26875506>. From 1991 to 1999, over 100,000 people were killed along ethnic lines during a civil war former Yugoslavia. *Balkans War: A Brief Guide*, BBC NEWS (Mar. 18, 2016), <https://www.bbc.com/news/world-europe-17632399>.

23. Michael P. Scharf, *Statute of the International Criminal Tribunal for Rwanda*, AUDIOVISUAL LIBR. OF INT’L L. 1 (2008), [https://legal.un.org/avl/pdf/ha/ictf/ictf\\_e.pdf](https://legal.un.org/avl/pdf/ha/ictf/ictf_e.pdf).

24. *Id.*

25. *The ICTR in Brief*, Posting to *About the ICTR*, UNITED NATIONS INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org/en/tribunal> (last visited Oct. 4, 2021).

to commit acts of genocide.”<sup>26</sup> The ICRT’s detailed statistics included 93 indictments, 62 convictions, 14 acquittals, ten referrals to national jurisdictions for prosecution, two deceased before trial, two indictments withdrawn before trial, and three pending fugitives.<sup>27</sup>

The ICTR is currently completing one final appeal, and all of its remaining functions and records have been turned over to the United Nations International Residual Mechanism for Criminal Tribunals (“Mechanism”).<sup>28</sup> The Mechanism is mandated to carry out some of the following functions:

- track and prosecute remaining fugitives;
- conduct and complete appeals proceedings deriving from the last ICTR and ICTY cases;
- conduct any re-trials;
- conduct investigations, trials, and appeals for contempt and false testimony;
- supervise the enforcement of sentences for persons convicted by the ICTR, the ICTY, and the Mechanism; and
- assist national jurisdictions in investigating and prosecuting cases involving alleged war crimes and other violations of international law.<sup>29</sup>

These functions demonstrate how active and imperative the United Nation’s Mechanism has become for those who seek justice against genocide. The ICC could employ the same level of engagement with the support of the United States.

### *B. Extraterritorial Justice*

Some countries have made use of extraterritorial laws that criminalize acts occurring outside of their borders but have a direct impact on activities within the country. The United States has even indicted a head of state in a use of extraterritorial jurisdiction, as was seen in the 1990 prosecution in the Southern District of Florida of

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26. *Id.*

27. *Id.* at Individuals Indicted by the ICTR (illustration).

28. S.C. Res. 1966, ¶ 13, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

29. *Id.* at 1-19.

Panamanian President Manuel Noriega.<sup>30</sup> Israel has also exercised a great deal of extraterritorial jurisdiction to occasionally prosecute terrorists and war criminals.<sup>31</sup> Israel famously kidnapped Nazi leader Adolph Eichmann from Argentina and prosecuted him in Israel under the 1950 Israeli “Nazi and Nazi Collaborators Punishment Law.”<sup>32</sup>

On the other hand, the United States has made extensive use of “targeted killings” using drone strikes in Pakistan and several African nations as part of the war on terrorism.<sup>33</sup> The American Civil Liberties Union and Center for Constitutional Rights jointly sued the U.S. government in 2012, alleging that the killings of U.S. citizens, Anwar Al-Aulaqi, Samir Khan, and 16-year-old Abdulrahman Al-Aulaqi in Yemen, violated the Constitution’s fundamental guarantee against the deprivation of life without due process of law.<sup>34</sup> If the ICC were empowered and equipped to prosecute terrorists, the United States and Israel might be more enthusiastic in using these courts.

## II. THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

With the enactment of the Rome Statute on July 1, 2002, the ICC became the world’s first criminal court created for the investigation and prosecution of genocide, crimes against humanity, war crimes, and state aggression.<sup>35</sup> The date of the enactment of the Rome Statute is significant in that the ICC only has jurisdiction for crimes within its

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30. United States v. Noriega, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990), *aff’d*, 117 F.3d 1206 (11th Cir. 1997). Manuel Noriega was ousted from power by the U.S. military and prosecuted in the United States for drug trafficking. See Panama’s Noriega, *CIA spy turned drug-running dictator*, REUTERS (May 30, 2017), <https://www.reuters.com/article/us-panama-noriega-obituary/panamas-noriega-cia-spy-turned-drug-running-dictator-idUSKBN18Q0NW>.

31. Jennifer Szalai, ‘Rise and Kill First’ Shines Light on Israel’s Hidden Assassinations, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/books/review-rise-and-kill-first-israel-assassinations-ronen-bergman.html>.

32. Nazis and Nazi Collaborators Punishment Law, 5710-1950 (Isr.) Aug. 1, 1950), <https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20punishment-%20law-%20571.aspx>.

33. Pardiss Kebriac, *The Distance Between Principle and Practice in the Obama Administration’s Targeted Killing Program: A Response to Jeh Johnson*, 31 YALE L. & POL’Y REV. 151 (2012).

34. See Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014).

35. Rome Statute, *supra* note 4.



purview committed after July 1, 2002.<sup>36</sup> Article 6 defines genocide as any act committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.<sup>37</sup> Article 7 of the Rome Statute defines "crimes against humanity" as any act committed as part of a widespread or systematic attack directed against any civilian population, who has knowledge of the attack.<sup>38</sup> In addition, the ICC defines state aggression as "the planning, preparation, initiation or execution of a person in a position, exercising control over or directing the political or military action of a State."<sup>39</sup>

#### *A. Jurisdiction of the International Criminal Court*

However, the ICC does not have unlimited authority to investigate and prosecute these crimes. The crimes must have been committed by a State Party national in the territory of a State Party or in a State that has accepted the jurisdiction of the ICC by ratifying the Rome Statute.<sup>40</sup>

While the types of crimes the ICC may prosecute are identified, the ICC's jurisdiction is complicated because the defendant must be a citizen of a State Party or the crime must have occurred on the territory of a State Party.<sup>41</sup> State Parties can also refer cases to the ICC and the ICC Chief Prosecutor may initiate a *proprio motu* investigation with approval from the ICC's Pretrial Chamber.<sup>42</sup>

The ICC's personal and territorial jurisdiction can be expanded by a referral from the United Nations Security Council. Indeed, under Chapter VII of the United Nations Charter, an act of aggression by any country can be referred to the ICC Chief Prosecutor by the United Nations Security Council.<sup>43</sup> However, this has only happened twice,

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36. *Id.* art. 11.

37. *Id.* art. 6.

38. *Id.* art. 7.

39. *Id.* art. 8.

40. *Id.* art. 12(3).

41. *Id.* art 4

42. *Id.* art. 15.

43. Negotiated Relationship Agreement between the International Criminal Court and the United Nations, U.N.-ICC, art. 17, Oct. 4, 2004, 2283 U.N.T.S 195.

with the 2005 referral of the Darfur situation and the 2011 referral of the situation in Libya.<sup>44</sup>

The Rome Statute also provides that any permanent member of the ICC can veto a resolution and refer a matter to the International Criminal Court. This was the case in 2014 when Russia and China vetoed, referring the situation in Syria<sup>45</sup> to the International Criminal Court.<sup>46</sup> The ability of a single permanent member of the Security Council (China, France, Russia, the United States, and the United Kingdom) to block a referral to the ICC speaks not only to the power of the Security Council but also to the limits of power the Rome Statute gives to the International Criminal Court. Under the principle of complementarity, the ICC may only investigate and prosecute when a national jurisdiction is “*unwilling or unable*.”<sup>47</sup>

### *B. Structure of the International Criminal Court*

The ICC comprises four primary sections: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry.<sup>48</sup> The Presidency consists of three judges that serve as President and Vice Presidents of the Court, which are elected by the Court’s eighteen judges for a maximum of two, three-year terms.<sup>49</sup> The

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44. See S.C. Res. 1593, U.N.Doc.S/RES/1593 (Mar. 31, 2005); S.C. Res. 1970, U.N. Doc S/RES/1970 (Feb. 26, 2011). The situation in Libya escalated in 2011 after constant violent confrontation between the government and anti-government political groups. Because of concern for the safety of Libyan citizens the United Nations Security Council on February 26, 2011 voted unanimously to impose sanctions on Colonel Gaddafi’s regime, imposing an arms embargo, travel bans and asset freeze. The case was ultimately referred to the ICC. See *Libya: Unrest in the Libyan Arab Jamahiriya*, UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (Mar. 1, 2011), <https://www.unocha.org/story/libya-unrest-libyan-arab-jamahiriya>.

45. The Syrian conflict began as a peaceful uprising against the Syrian Government in 2011 but escalated to a civil war where numerous human rights violations were committed. See *Why has the Syrian war lasted 10 years?* BBC NEWS (Mar. 12, 2021) <https://www.bbc.com/news/world-middle-east-35806229>.

46. *Russia, China Block Security Council Referral of Syria to International Criminal Court*, UNITED NATIONS: UN NEWS: GLOBAL (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>.

47. Rome Statute, *supra* note 4, art. 17.

48. *Id.* art. 34, 38.

49. *Id.*

President is responsible for the overall operation of the Court with the exception of the Office of the Prosecutor.<sup>50</sup> The Court is divided into three chambers: pre-trial, trial, and appellate.<sup>51</sup> Judges are elected to the ICC by the Assembly of State Parties for a term of nine years and typically have extensive experience in international law and human rights.<sup>52</sup> Interestingly, no two judges may be citizens of the same State, which may help to ensure the Court's independence.<sup>53</sup>

The Chief Prosecutor of the ICC is also elected to a nine-year term by the Assembly of States Parties.<sup>54</sup> Since the ICC does not have a police force or an investigative arm, the Office of the Prosecutor is responsible for investigating crimes within its jurisdiction that are referred to the ICC by State Parties or the U.N. Security Council. The ICC Pre Trial Chamber has the authority to issue arrest warrants based on a reasonable ground standard.<sup>55</sup> This standard differs slightly from the probable cause standard for arrest in U.S. courts, however, the standard is still unclear. The ICC Appellate Chamber describes the standard as when "the only conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."<sup>56</sup> The reasonable grounds standard continues to be a subject of controversy in ICC cases.<sup>57</sup>

The ICC does not have its own detention center. Instead, the Court contracts with the government of the Netherlands to house defendants during the pre-trial and trial proceedings.<sup>58</sup> The ICC also lacks a prison, so it must rely on a State Party to agree to house a

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50. Rome Statute, *supra* note 4, art. 38.

51. *Id.*

52. *Id.* art. 35; 36.

53. *Id.* art. 36 (7).

54. *Id.* art. 42 (4).

55. *Id.* art. 58 (1)(a).

56. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-73, Judgment on the Appeal of the Prosecutor Against the Decision on the Prosecution's Application for a Warrant of Arrest Warrant, § 5 (Feb. 3, 2010).

57. See generally Prosecutor v. Ntaganda, Case No. ICC 01/04-02/06 (Jul. 8, 2019), <https://www.icc-cpi.int/drc/ntaganda>, and Prosecutor v. Ongwen, Case No. ICC ICC-02/04-01/15 (Deliberations pending), <https://www.icc-cpi.int/uganda/ongwen>.

58. Headquarters Agreement between the International Criminal Court and the Host State, ICC-Netherlands, July 6, 2007, ICC-BD/04-01-08.

sentenced defendant and carry out a sentence of incarceration.<sup>59</sup> In many cases, the State that is not able or willing to prosecute the defendant is given the responsibility for carrying out the sentence imposed by the International Criminal Court.<sup>60</sup>

Furthermore, Article 79 of the Rome Statute provides for a separate trust fund for victims, which seeks to “ensure victims’ rights to reparations and provide assistance in the international criminal justice system.”<sup>61</sup> The trust fund for victims has two missions: (1) to implement Court-ordered reparations, and (2) to provide physical and psychosocial rehabilitation or material support to victims of crimes that fall within the jurisdiction of the Court.<sup>62</sup> The trust fund for victims 2018 Annual Report credits assisting over 6,000 victims through physical rehabilitation, material support, and psychological support.<sup>63</sup> These results are truly impressive and something that the entire world could replicate in their victim assistance programs.

### C. Successes and Failures

All of the twenty-seven ICC trials to date have focused on conflicts in Africa.<sup>64</sup> The ICC’s first twenty years have seen some successful prosecutions but also several acquittals and vacated charges. The ICC’s low conviction rate might be seen as a sign of failure, but one could also argue the ICC applies the law properly and ensures that convictions only occur when the Court is “convinced of the guilt of the accused beyond a reasonable doubt.”<sup>65</sup>

*Chart 1. Summary of ICC Prosecutions.*<sup>66</sup>

Defendant	Nationalit	Alleged crime (s)	Status
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59. About the ICC Detention Centre, ICC (Apr. 15, 2020), <https://www.icc-cpi.int/iccdocs/PIDS/publications/DetentionCentreEng.pdf>.

60. *Understanding the International Criminal Court*, ICC (Oct. 4, 2021), <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>.

61. ICC Trust Fund for Victims, 2018 Annual Report (Mar. 10, 2020), <https://www.trustfundforvictims.org>.

62. *Id.*

63. *Id.*

64. ICC, Cases (Apr. 15, 2020), <https://www.icc-cpi.int/Pages/cases.aspx> [hereinafter ICC Open Cases].

65. Rome Statute, *supra* note 4, art. 66(3).

66. ICC Open Cases, *supra* note 64.

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Sylvestre Mudacumura	Rwanda	War Crimes and Crimes Against Humanity in D.R.C.	Fugitive as of July 13, 2012.
Ngudjolo Chui	D.R.C.	War Crimes and Crimes Against Humanity in D.R.C.	Acquitted on December 18, 2012, Upheld by Appeals Chamber.
Bosco Ntaganda	Rwanda	Eighteen counts of war crimes and crimes against humanity in the D.R.C.	Convicted on July 8, 2019, and sentenced to 30 years imprisonment.
Dominic Ongwen	Uganda	War crimes, crimes against humanity, and sexual enslavement in Uganda.	Trial completed on March 12, 2020, pending verdict from the Trial Chamber.
William Ruto and Joshua Sang	Kenya	Crimes against humanity and forcible transfer of population in Kenya.	Charges vacated on April 5, 2016.
Simone Gbagbo	Ivory Coast	Crimes against humanity in Ivory Coast.	Arrest warrant issued on February 29, 2012, pending extradition to the Hague.
Alfred Yekatom and Patrice Ngaissona	Central African Republic	War Crimes and Crimes Against Humanity in the Central African Republic.	In ICC custody pending trial.
Ble Goude and Laurent Gbagbo	Ivory Coast	Crimes against humanity in the Ivory Coast.	Acquitted on January 15, 2019, but pending release to a State Party with conditions of release.
Paul Gicheru and Phillip Bett	Kenya	Witness intimidation	Fugitives as of March 10, 2015.
Harun and Ali Kushayb	Sudan	Forty-two counts of war crimes and crimes against humanity in Darfur.	Fugitives as of April 27, 2007.
Abdul Raheem Hussein	Sudan	War Crimes and Crimes Against Humanity in Darfur.	Fugitive as of March 1, 2012.
Germain Katanga	D.R.C.	Fourteen counts of war crimes, one count of accessory to crimes against humanity, destruction of property and pillaging in the D.R.C.	Convicted on March 7, 2014 and sentenced to 12 years imprisonment.

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Francis Muthaura and Mohammad Ali	Kenya	Crimes against humanity in Kenya.	Charges were withdrawn on January 23, 2012.
Al-Tuhamy Khaled	Libya	War crimes and crimes against humanity in Libya.	Fugitive as of April 24, 2017.
Joseph Kony and Vincent Otti	Uganda	War crimes, crimes against humanity, and sexual enslavement in Uganda.	Fugitives as of October 13, 2005 (2 defendants are deceased).
Thomas Lubanga	D.R.C.	Conscripting child soldiers in D.R.C.	Convicted on March 14, 2012, and sentenced to 14 years imprisonment.
Callixte Mbarushimana	Rwanda	War Crimes and Crimes Against Humanity in D.R.C.	Charges vacated on December 23, 2011.
Bahar Idris Abu Garda	Sudan	War crimes in Darfur.	Charges vacated on February 8, 2010.
Omar Al Bashir	Sudan	Multiple counts of crimes against humanity, war crimes, and genocide in Darfur.	Fugitive as of March 4, 2009.
Al Hassan	Mali	Crimes against humanity in Timbuktu.	In ICC custody pending trial.
Al Mahdi	Mali	Crimes against humanity in Timbuktu.	Found guilty and sentenced to 9 years on September 27, 2016.
Mahmoud Al-Werfalli	Libya	War crimes in Libya.	Fugitive but believed to have been killed as of August 15, 2017.
Abdallah Banda and Saleh Jamus	Sudan	War Crimes and Crimes Against Humanity in Darfur.	Charges were dismissed against Jamus after his passing, and Banda is a fugitive as of September 11, 2014.
Walter Barasa	Kenya	Witness intimidation.	Fugitive as of October 2, 2013.
Bemba, Musamba, Kabango, Arido, and Wandu.	D.R.C. and Belgium	Perjury	Convicted and sentenced to six months-to-two years on March 27, 2017 and fined 330,000 Euros.
Jean-Pierre Bemba	DRC	War Crimes and Crimes Against Humanity in D.R.C.	Convicted on March 21, 2016 and sentenced to 18 years imprisonment but subsequently released on

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			appeal with conditions.
Saif Al-Islam Gaddafi and Mummar Gadaffi	Libya	War crimes in Libya.	Saif Gaddafi is a fugitive as of June 27, 2011. Muammar Gaddafi was killed on November 22, 2011.

Unlike almost all criminal courts in States around the world, the ICC posts its open investigations on a public website.<sup>67</sup> While this level of transparency may not be practical for most law enforcement or prosecutorial organizations, the ICC's commitment to making a global record of its open investigations can be seen as an attempt to ensure the Court is not being used to serve some type of political agenda.

The ICC is currently conducting preliminary examinations of a range of situations in a wide range of countries, showing the ICC prosecutor is willing to expand the Court's reach beyond the African Continent.<sup>68</sup> The examinations that have been closed by the ICC at this stage further demonstrate proper discretion from the ICC: no examination is continued when either evidence or law fails to indicate a crime within the Court's jurisdiction.<sup>69</sup>

*Chart 2. Summary of ICC Preliminary Examinations.*<sup>70</sup>

Country	Situation	Status
Colombia	Alleged war crimes.	Ongoing
Comoros, Greece, Cambodia	Registration of vessels (based on an Israeli raid on a humanitarian flotilla bound for Gaza).	Closed
Gabon	Alleged war crimes.	Closed
Guinea	Alleged crimes against humanity.	Ongoing

67. *Situations Under Investigation*, ICC, <https://www.icc-cpi.int/pages/situation.aspx> (last visited Oct. 3, 2021).

68. *Preliminary Examinations*, ICC, (Mar. 30, 2020), <https://www.icc-cpi.int/pages/pe.aspx>.

69. *Id.*

70. *Id.*

Honduras	Alleged crimes against humanity.	Closed
Iraq, United Kingdom	Alleged war crimes.	Closed
Nigeria	Alleged war crimes.	Ongoing
State of Palestine	Alleged crimes.	Ongoing
North Korea	Alleged hostility.	Closed
Republic of the Philippines	Alleged crimes in the 'war on drugs.'	Ongoing
Ukraine	Alleged crimes.	Ongoing
Venezuela	Venezuela I: Alleged crimes.	Ongoing
	Venezuela II: Referral from Venezuelan government regarding a situation at its borders.	Ongoing

Open ICC investigations still primarily center on African conflicts and many of these inquiries date back to the early 2000s.<sup>71</sup> More recently, the ICC prosecutor has shown an interest in investigating matters outside of Africa in places like Ukraine, Venezuela, Colombia, Israel, Afghanistan, Georgia, Bangladesh, and North Korea.<sup>72</sup>

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71. ICC Open Cases, *supra* note 64.

72. *Id.*



Chart 3. Summary of Open ICC Investigations.<sup>73</sup>

Location	Situation	Referral Source	Date Referred	Date Investigation Opened
Democratic Republic of Congo (D.R.C.)	Alleged war crimes and crimes against humanity in Eastern D.R.C., Ituri and Kivu Provinces.	D.R.C. Government	April 2004	June 2004
Uganda	Alleged war crimes and crimes against humanity in the conflict between the Lord's Resistance Army and Ugandan authorities.	Government of Uganda	January 2004	July 2004
Darfur, Sudan	Alleged genocide, war crimes, and crimes against humanity committed in Darfur, Sudan.	S.C. Resolution 1593	March 2005	June 2005
Central African Republic	Alleged war crimes and crimes against humanity in C.A.R. between 2002 and 2003.	Government of C.A.R.	December 2004	May 2007
Kenya	Alleged crimes against humanity in 2007-2008 during post-election violence.	<i>proprio motu</i> investigation by the Chief Prosecutor	n/a	March 2010

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73. *Id.*

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Libya	Alleged war crimes and crimes against humanity in Libya since February 15, 2011.	S.C. Resolution 1070	February 2011	March 2011
<i>Côte d'Ivoire</i>	Crimes within the jurisdiction of the Court committed in the context of post-election violence in <i>Côte d'Ivoire</i> , from 2002 to the present.	<i>proprio motu</i> investigation by the Chief Prosecutor	n/a	October 2011
Mali	Alleged war crimes committed in Mali since January 2012.	Government of Mali	July 2012	January 2013
Central African Republic (C.A.R.)	Alleged war crimes and crimes against humanity starting in C.A.R. in 2012.	C.A.R. Government	May 2014	September 2014
Georgia	Alleged crimes against humanity and war crimes committed in the context of an international armed conflict between July and October 2008.	<i>proprio motu</i> investigation by the Chief Prosecutor	n/a	January 27, 2016
Burundi	Alleged crimes against humanity committed in and outside Burundi by nationals of Burundi between 2015	<i>proprio motu</i> investigation by the Chief Prosecutor	n/a	October 25, 2017

	and 2017.			
Bangladesh/Myanmar	Alleged crimes of deportation, persecution, and any other crime within the ICC jurisdiction committed against the Rohingya people.	<i>proprio motu</i> investigation by the Chief Prosecutor	n/a	November 14, 2019
Afghanistan	Alleged war crimes and crimes against humanity.	<i>proprio motu</i> investigation by the Chief Prosecutor	n/a	3/20/2020 on appeal after denial by the pre-trial chamber in April 2019

The ICC has been criticized for unfairly prosecuting only crimes in African states.<sup>74</sup> While the ICC's current prosecutions do suggest a bias towards Africa, its preliminary examinations and open investigations clearly show the ICC prosecutor is willing to investigate all matters within the Court's jurisdiction, wherever they may be, however controversial. In addition, the argument of African bias discounts the influence of African conflicts in the 1980s and 1990s, such as the conflict in Rwanda, which have demonstrated the vital need for the ICC. Furthermore, the establishment and success of the ICTY—a similar international court functioning to address war crimes in the Yugoslavian conflict before the creation of the ICC—is a counter example of war crimes investigated on the European continent.

In fact, the ICC may have been a more effective means to prosecute the terrorists responsible for the September 11<sup>th</sup> attacks on the U.S. than the military tribunals at Guantanamo Bay, Cuba. Even though the word "terrorism" does not appear in the Rome Statute, its

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74. See generally, KAMARI MAXINE CLARKE, *AFFECTIVE JUSTICE, THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK* (2019) (describing general criticism of ICC bias toward prosecuting African cases).

definitions of “genocide” and “crimes against humanity” could easily apply to numerous recent terrorist attacks around the world.<sup>75</sup>

The Afghanistan inquiry is not only the most recent, but perhaps the most interesting use of the ICC Chief Prosecutor’s authority to date.<sup>76</sup> The ICC’s motion to the ICC Pre-Trial Chamber to authorize the investigation was denied on April 12, 2019 because it “would not be in the interest of justice.”<sup>77</sup> This denial was issued by the Court after not only a year-and-a-half of additional testimony, but also after evidence was reviewed by the chamber following Chief Prosecutor Bensouda’s request to initiate an investigation (filed November 20, 2017). The Court’s denial of authorization for further inquiry into the Afghanistan matter based on the interest of justice shows the ICC’s discretion in exercising its jurisdiction.

### III. UNITED STATES RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT

The United States has had a tumultuous relationship with the ICC and there is a clear divide between Republican and Democratic Presidents of the U.S. in their support of the International Criminal Court. As mentioned above, although the U. S. signed the Rome Statute under the Clinton Administration in 2000, the statute was not submitted to the Senate for ratification—a step required by the Constitution.<sup>78</sup> The subsequent President, George W. Bush, was initially almost hostile towards the ICC, but moved towards some level of acceptance in his second term.<sup>79</sup>

On August 2, 2002, the United States Congress virtually outlawed any cooperation with or assistance of the ICC via the American

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75. Rome Statute, *supra* note 4, art. 6 & 7.

76. In 2017, ICC Prosecutor Fatou Bensouda opened an investigation into Afghanistan due to the Taliban takeover raising concerns about the safety and rights of women and girls, ethnic, religious and sexual minorities, and allies of the former government. See Andrew Hilland and Catherine Gilfedder, *The International Criminal Court and Afghanistan*, JUST SECURITY (Sept. 3, 2021), <https://www.justsecurity.org/78080/the-international-criminal-court-and-afghanistan/>.

77. ICC Pre-trial Chamber Order on The Situation in the Islamic Republic of Afghanistan, ICC Case No. ICC-02/17, (Mar. 5, 2020).

78. U.S. Const. art. II, § 2.

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

Service Members Protection Act of 2002 ("ASPA").<sup>80</sup> The U.S. House of Representatives introduced this legislation in a supplemental appropriations act for further recovery from the September 11<sup>th</sup> terrorist attacks.<sup>81</sup> The bill later became law in a statute aptly named the "Prohibition on Cooperation with the International Criminal Court" within the American Service Members Protection Act.<sup>82</sup> The detailed law prohibits the U.S. government from actions such as: responding to any requests for assistance from the ICC, honoring extraditions for the ICC, or providing funding to the ICC, and additionally prohibits investigative activities by ICC agents on U.S. soil.<sup>83</sup>

The ASPA contains a section referred to as the "Invasion of the Hague Act," in which the ASPA authorizes the President of the United States to use "all means necessary and appropriate" to secure the release of any U.S. or allied person detained or imprisoned by the International Criminal Court.<sup>84</sup> Congress emphasized some of President Clinton's concerns about the ICC in the findings section of the ASPA, but also raised alternative constitutional rights concerns.<sup>85</sup> Specifically, Congress was concerned that an American could be deprived of constitutional protections such as a jury trial if they were prosecuted by the International Criminal Court.<sup>86</sup>

The U.S. opposition to the ICC's trial-by-judge as opposed to trial-by-jury trial makes little sense in light of the U.S.'s Status of Forces Agreements ("SOFA"), which allow a host country to exercise exclusive jurisdiction in the criminal prosecution of a U.S. service

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80. American Services Protection Act, 22 U.S.C. §§ 7421–7433 (2002).

81. 2002 Supplemental Appropriations Act for Further Recovery From And Response To Terrorist Attacks On The United States, Pub. L. No. PL 107–206, 116 Stat 820.

82. Restriction Relating to the United States Accession to the International Criminal Court, 22 U.S. Code § 7401 (1999).

83. *Id.*

84. Robert Marquand. *Dutch still wincing at Bush-era 'Invasion of The Hague Act*, CHRISTIAN SCIENCE MONITOR (Feb 13, 2009), <https://www.csmonitor.com/World/Europe/2009/0213/p05s01-woeu.html>; Authority to Free Members of the Armed Forces of the United States and Certain Other Persons Detained or Imprisoned by or on Behalf of the International Criminal Court, 22 U.S.C. § 7427 (2002).

85. 22 U.S.C. § 7421 (7).

86. U.S. Const. amend. VI.

member with no guarantee of a jury trial. For example, the U.S. SOFA with Japan gives Japanese authorities “jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.”<sup>87</sup> Japan does not make frequent use of jury trials for most criminal offenses, yet the U.S. has turned over custody of U.S. service members accused of crimes under Japanese law to Japanese authorities where they may be and have been prosecuted and imprisoned without the right to a jury trial.<sup>88</sup> Despite the apparent lack of U.S. constitutional protections afforded to U.S. service members in several SOFAs, there is no apparent movement in the U.S. government aimed at outlawing these SOFAs, as it did the ICC through the American Servicemembers’ Protection Act.<sup>89</sup>

Interestingly, the U.S. House of Representatives recognized the ICC’s authority to investigate and prosecute war crimes in Darfur in a resolution to provide support for the victims of the conflict.<sup>90</sup> This resolution was very clear in highlighting that the ICC’s authority to intervene in the Darfur situation came from a U.N. Security Council Resolution that the United States abstained from voting.<sup>91</sup> Even though the United States did not vote on the Resolution, its recognition in a U.S. House of Representatives Resolution might suggest the U.S. would be more willing to support the ICC if the

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87. U.S.–Japan Status of Forces Agreement, Jan. 19, 1960, 11 U.S.T. 1652 art. XVII (1)(b).

88. Teresa Watanabe, *Okinawa Rape Suspect’s Lawyer Gives Dark Account: Japan: Attorney of accused Marine says co-defendant admitted assaulting 12-year-old girl ‘just for fun’*, L.A. TIMES (Oct. 28, 1995), [http://articles.latimes.com/1995-10-28/news/mn-62075\\_1\\_japanese-girl](http://articles.latimes.com/1995-10-28/news/mn-62075_1_japanese-girl).

89. *Id.* at 74.

90. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). The Darfur crisis began in 2003 when Black citizens in the Southern Sudanese region of Darfur protested the country’s Muslim leadership and demanded better infrastructure. The government’s response violent and many labeled it as genocide or ethnic cleansing. *See Origins of the Darfur Crisis*, PBS NEWS (Jul. 3, 2008), [https://www.pbs.org/newshour/politics/africa-july-dec08-origins\\_07-03](https://www.pbs.org/newshour/politics/africa-july-dec08-origins_07-03); *See also*, Ahmad Sikainga, *The World’s Worst Humanitarian Crisis*, ORIGINS (Feb 1, 2009), <https://origins.osu.edu/article/worlds-worst-humanitarian-crisis-understanding-darfur-conflict>.

91. *Id.*; S.C. Res. 2470, U.N. Doc. S/RES/2470 (May 21, 2019).

Rome Statute were modified to limit the Court's jurisdiction to exclusively matters referred by the United Nations.<sup>92</sup>

President Bush also took steps to protect U.S. interests and preserve sovereignty by establishing Bilateral Immunity Agreements ("BIA") with countries under Article 98 of the Rome Statute. Article 98 (2) of the Rome Statute states:

The ICC may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>93</sup>

By December 2006, the U.S. had negotiated 102 BIAs, which essentially prevented countries from turning over current or former U.S. government or military officials (including military contractors) to the International Criminal Court.<sup>94</sup>

In 2004, then-Senator Barack Obama was asked if the U.S. should ratify the Rome Statute, and the answer was not a resounding yes, but rather a yes with some conditions: "The United States should cooperate with ICC investigations in a way that reflects American sovereignty and promotes our national security interests."<sup>95</sup>

However, President Obama did not send the Rome Statute to Congress for ratification but did send observer delegations to the Assembly of States Parties in 2009.<sup>96</sup> The U.S. then voted in favor of the U.N. Security Resolution to refer the Libya matter to the ICC.<sup>97</sup>

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92. Darfur Peace and Accountability Act of 2006, Pub. L. No 109-344, 120 Stat. 1869 (codified as amended at 22 U.S.C. 2151, 2364, 2394-1 and 2780).

93. Rome Statute, *supra* note 4, art. 98(2).

94. Status of Bilateral Immunity Agreements, COALITION FOR THE ICC (Dec. 11, 2006), [http://goodtimesweb.org/diplomacy/2015/CICCFs\\_BIAstatus\\_current.pdf](http://goodtimesweb.org/diplomacy/2015/CICCFs_BIAstatus_current.pdf).

95. American N.G.O. Coalition for the International Criminal Court, Obama Administration (Mar. 4, 2020), <https://www.amicc.org/obama-administration>.

96. David Clarke, *U.S. to attend Hague court meeting as observer*, REUTERS (NOV. 16, 2009, 6:37AM), <https://www.reuters.com/article/us-usa-icc/u-s-to-attend-hague-court-meeting-as-observer-idUSTRE5AF30A20091116>.

97. *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH, (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

The U.S. also delivered ICC fugitive Bosco Ntaganda<sup>98</sup> to the ICC after he turned himself into the U.S. Embassy in Rwanda.<sup>99</sup> President Obama also removed sanctions on countries that did not conclude bilateral immunity agreements with the U.S.<sup>100</sup>

In a shift of policy, President Donald Trump appeared to side with former National Security Advisor John Bolton in his views of the International Criminal Court. In a speech to the U.N. General Assembly on September 25, 2018, President Trump went so far as to condemn the ICC's jurisdiction:

So the United States took the only responsible course: We withdrew from the Human Rights Council, and we will not return until real reform is enacted. For similar reasons, the United States will provide no support in recognition to the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy.<sup>101</sup>

When President Biden took office, he changed policy once again and on April 2, 2021, made an important step toward recognizing the

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97. SECURITY COUNCIL REPORT, *Chronology of Events of Libya*, <https://www.securitycouncilreport.org/chronology/libya.php> (last visited Oct. 3, 2021).

98. Bosco Ntaganda was a commander of in the Forces Patriotiques pour la Libération du Congo who was sentenced to 30 years after his conviction on Jul. 8, 2019 by the ICC for 13 counts of war crimes and 5 counts of crimes against humanity committed in 2002-2003 in the Democratic Republic of the Congo. *See generally* Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06 (Mar. 30, 2021), <https://www.icc-cpi.int/drc/ntaganda>.

99. D.H., *A Surprising Surrender*, THE ECONOMIST (Mar. 19, 2013), <https://www.economist.com/baobab/2013/03/19/a-surprising-surrender>; Marlise Simons, *U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned*, N.Y. TIMES (Apr. 2, 2013), <https://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html>.

100. Exec. Order 13716, 81 C.F.R 3693 (2016).

101. President Trump, Remarks to the 73rd Session of the United Nations General Assembly, (Sep. 25, 2018, 10:38 AM) (Official White House transcript), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>.



ICC by issuing Executive Order 13928. This rescinded the visa restrictions and sanctions imposed by President Trump against key ICC officials, including the Chief Prosecutor, Fatou Bensouda.<sup>102</sup> In announcing the repeal of the sanctions, Secretary of State Anthony Blinken was careful to emphasize that the U.S. had some persistent concerns about the ICC: "We continue to disagree strongly with the ICC's actions relating to Afghanistan and Palestinian situations. We maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel."<sup>103</sup>

Secretary Blinken did recognize it was better to work with the ICC to resolve continuing disagreements through engagement as opposed to sanctions, which became a positive sign that increased U.S. support of the ICC may be on the horizon.

#### IV. THE CASE FOR UNITED STATES SUPPORT OF THE INTERNATIONAL CRIMINAL COURT

No one in the U.S. government has opposed U.S. support and cooperation with the ICC more vocally or more persistently than John Bolton. One of Bolton's major critiques of the ICC is that the Court lacks jurisdiction and is illegitimate.<sup>104</sup> However, the ICC is a legitimate court, as evidenced by the countries that have ratified the Rome Statute.<sup>105</sup> The ICC's jurisdiction is not absolute because the Court only has jurisdiction over crimes in the borders of State Parties,

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102. Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (2020); Anthony J. Blinken, *Sec'y State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court*, U.S. DEP'T OF STATE (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

103. Press Release, Secretary of State Antony J. Blinken, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (Apr. 2, 2021) (on file with author).

104. James A. Goldson, *Why John Bolton's Diatribe against the International Criminal Court Is Misleading, Misguided, and Wrong*, OPEN SOCIETY FOUNDATIONS (Sept. 14, 2018), <https://www.opensocietyfoundations.org/voices/why-john-bolton-s-diatribe-against-international-criminal-court-misleading-misguided-and>.

105. See 13. Agreement on the Privileges and Immunities of the International Criminal Court, Sept. 9, 2002, 2271 U.N.T.S. 40446.

crimes committed by citizens of State Parties, or matters referred by the United Nations Security Council.<sup>106</sup>

Bolton has also criticized the United Nations' effectiveness, but not its legitimacy. His dismissal of the U.N. legitimacy is inferred from his service as U.S. Ambassador to the United Nations from 2005 to 2006.<sup>107</sup> Bolton's assertion that the ICC lacks jurisdiction is also without merit when considering the ICTY was based on the same jurisdictional framework as the ICC and in that court, the U.S. government was responsible for capturing the majority of the war criminals indicted by the ICTY.<sup>108</sup>

The United States created the Office of Military Commission to prosecute terrorists in the aftermath of the September 11<sup>th</sup> attacks. These tribunals took place at the U.S. Naval Base at Guantanamo Bay, Cuba, and have been harshly criticized for detainee mistreatment, lack of due process, and overall ineffectiveness.<sup>109</sup> The Commissions have only successfully prosecuted six cases with far more convictions vacated, charges dismissed, and cases never prosecuted at all.<sup>110</sup> Terrorism could very well be a crime of genocide or crime against humanity within the jurisdiction of the ICC, and the world community could use the ICC to legally prosecute terrorists where existing court systems are unwilling or incapable of prosecuting.<sup>111</sup>

One of the key U.S. concerns about the ICC is that it might investigate and prosecute U.S. service members for alleged war crimes in places like Iraq and Afghanistan.<sup>112</sup> The ICC prosecutor conducted inquiries into both situations so that this fear may have

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106. *See generally* Rome Statute, *supra* note 4, at art. 1.

107. Krishnadev Calamur, *A Short Guide to John Bolton's Government Career*, THE ATLANTIC (Mar. 23, 2018), <https://www.theatlantic.com/international/archive/2018/03/john-bolton/556346/>.

108. Dave Mattingly, *A mission no one wanted...Bringing Bosnian War Criminals to Justice: #Reviewing The Butchers Trail*, THE STRATEGY BRIDGE (Sept. 14, 2016), <https://thestrategybridge.org/the-bridge/2016/9/14/a-mission-no-one-wantedbringing-bosnian-war-criminals-to-justice-reviewing-the-butchers-trail>.

109. *The Guantánamo Trials*, HUM. RTS. WATCH, <https://www.hrw.org/guantanamo-trials> (last visited Oct. 4, 2021).

110. *Id.*

111. *See supra* note 4.

112. Merrit Kennedy, *International Criminal Court Allows Investigation of U.S. Actions in Afghanistan*, NPR (Mar. 5, 2020, 3:57 PM), <https://www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan>.

some basis.<sup>113</sup> However, under the Rome Statute's principle of complementarity,<sup>114</sup> the ICC would have jurisdiction if a state was unwilling or unable to investigate and prosecute the offense.<sup>115</sup> The United States military has shown it is willing and able to investigate and, where warranted, prosecute war crimes committed by U.S. service members in Iraq and Afghanistan, as seen with the Abu Gharib, Haditha, Mahmudiya, and Bales incidents.<sup>116</sup>

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113. Office of the Prosecutor, Int'l Criminal Court, Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom (Dec. 9, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>.

114. The principle of complementarity provides that a case is inadmissible before the ICC if it is currently under investigation by a state with jurisdiction over it. Complementarity does allow for jurisdiction in situations when the state is unable or unwilling to proceed with an investigation or where the state investigation is conducted in bad faith such as when it is used to shield the person from criminal responsibility. Paul Seis, *Handbook on Complementarity*, INT'L CTR. ON TRANSITIONAL JUST., [https://www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf).

115. Rome Statute, *supra* note 4.

116. Seymour Hersch, *Torture at Abu Gharib*, THE NEW YORKER (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>; *Haditha Killings*, CNN (Mar. 1, 2021, 10:00 AM), <https://www.cnn.com/2013/10/30/world/meast/haditha-killings-fast-facts/index.html>; Kyle Rempfer, *Soldier Convicted Of Massacring 16 Afghans Seeks New Civilian Trial, Citing A Psychosis-Inducing Anti-Malarial Drug*, ARMY TIMES (Jun. 26, 2019), <https://www.armytimes.com/news/your-army/2019/06/26/soldier-convicted-of-massacring-16-afghans-seeks-new-civilian-trial-citing-a-psychosis-inducing-anti-malarial-drug>; Andrea Hopkins, *Tearful Soldier Tells Court of Iraq Rape-Murder*, REUTERS (Feb. 20, 2007, 4:02 PM), <https://www.reuters.com/article/us-usa-iraq-murder-idUSN2037158220070221>. *Abu Gharib* was a 2004 series of detainee abuse incidents committed by U.S. Army prison guards at Abu Gharib prison in Iraq that resulted in several Courts Martial. Seymour M. Hersh, *Torture at Abu Ghraib American Soldiers brutalized Iraqis. How Far Up Does the Responsibility Go?* NEW YORKER (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>; *Haditha* was a 2005 incident where 25 Iraqis were killed by U.S. Marines near Haditha, Iraq. Eight Marines were prosecuted after an extensive investigation that resulted in one conviction for dereliction of duty. *Haditha Killings Fast Facts*, CNN (Mar. 1, 2021), <https://www.cnn.com/2013/10/30/world/meast/haditha-killings-fast-facts/index.html> *Mahmudiya* was a 2006 incident that resulted in prosecutions of five U.S. soldiers for the rape and murder of a 14 year old Iraqi girl and murder of three of her family members near Mahmudiya, Iraq. Joshua Hammer, *Death Squad*, N.Y. TIMES (Mar. 11, 2010), <https://www.nytimes.com/2010/03/14/books/review/Hammer-t.html>. *The Bales Incident* was the murder of 16 Afghan civilians by U.S. Army Staff Sergeant Robert Bales, who was

If concern exists by Bolton or U.S. Presidents that the ICC could prosecute U.S. citizens, these arguments also have less credence when considering no past or current ICC inquiry has ever involved a U.S. citizen. Even the current ICC inquiry into Afghanistan focuses more on the actions of the Taliban and the Islamic State—Khorasan (ISIS-K<sup>117</sup>) as opposed to alleged war crimes by U.S. Servicemembers.<sup>118</sup> Even if a U.S. citizen has committed a prosecutable war crime, the ICC would very likely give the U.S. the opportunity to resolve the matter.<sup>119</sup> The ICC also has discretion not to prosecute a matter if there are “substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>120</sup>

Furthermore, based on the Rome Statute’s complementarity principle, the ICC prosecutor should only be permitted to investigate alleged war crimes committed by the U.S. military if there is evidence the U.S. government was unable or unwilling to do so. Furthermore, even if the ICC prosecutor was to develop sufficient evidence showing U.S. service members had committed war crimes, the U.S. government should be allowed to prosecute the matter or explain why it chooses not to prosecute.

#### CONCLUSION

The ICC will never be entirely successful without support and cooperation from the United States. The United States remains the

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sentenced to life in military prison. *Robert Bales Sentenced to Life in Prison for Afghanistan Massacre*, THE GUARDIAN (Aug. 23, 2013), <https://www.theguardian.com/world/2013/aug/23/afghanistan-massacre-robert-bales-trial>.

117. Khorasan is a reference to a historical region that encompassed parts of present-day Iran, Afghanistan, Turkmenistan in the 3<sup>rd</sup> century before the rise of Islam. Adam Taylor, *The Strange Story Behind the ‘Khorasan’ Group’s Name*, THE WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/09/25/the-strange-story-behind-the-khorasan-groups-name/>.

118. Press Release, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan (Sept. 27, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

119. Wesley Clark, *John Bolton is Dead Wrong*, WASH. POST. (Sept. 21, 2018), <https://www.washingtonpost.com/news/global-opinions/wp/2018/09/21/john-bolton-is-dead-wrong-the-u-s-has-every-reason-to-cooperate-with-the-international-criminal-court/>.

120. Rome Statute, *supra* note 4, art. 53 (1)(c).

world's dominant superpower. In many cases, the U.S. is the only country capable of capturing the most dangerous war criminals, as was the case with the numerous persons indicted for war crimes by the ICTY.<sup>121</sup> Contrary to all the criticism that the ICC has a bias toward Africa and is ineffective, some believe the ICC investigation into the situation in Colombia arguably brought about an end to a long civil war in 2016.<sup>122</sup> The ICC also likely promoted European countries to prosecute terrorists and government officials who fled Syria.<sup>123</sup>

The Rome Statute allows for the Assembly of State Parties to modify the Court's structure and jurisdiction, such as when the Assembly voted to give the ICC jurisdiction over the crime of state aggression in 2017.<sup>124</sup> The Rome Statute already gives the ICC jurisdiction over crimes against humanity, including murder and "other inhumane acts of a similar character intentionally causing great suffering or serious bodily mental injury."<sup>125</sup> Thus, it is not a stretch to formally expand the Court's jurisdiction to these crimes.<sup>126</sup>

In practice, the ICC Prosecutor should not be able to investigate a citizen of a State Party without first allowing that country to investigate and prosecute where warranted. Suppose the country

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121. Julian Borger, *The Manhunt*, INT'L BAR ASS'N. (2016), <https://www.ibanet.org/article/A8AFA84A-811B-45E7-8251-502D15202F93>; Malcolm Forbes, *The Manhunt for the Butchers of the Balkans*, DAILY BEAST (Apr. 21, 2017, 4:31 PM), <https://www.thedailybeast.com/the-manhunt-for-the-butchers-of-the-balkans>; Mattingly, *supra* note 108.

122. See—René Uruña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017*, 111 AM. J. INTL. L. 104 (2017). In June, 2004, the ICC Chief Prosecutor (OTP) opened a preliminary examination regarding alleged killings, torture and other crimes against humanity committed by the Colombian government and rebel groups. See Colombia, Coalition for the ICC, <https://www.coalitionfortheicc.org/fr/node/870> (last visited Nov. 20, 2021).

123. Mia Swart, *National Courts Lead the Way in Prosecuting Syrian War Crimes*, ALJAZEERA (Mar. 15, 2021), <https://www.aljazeera.com/news/2021/3/15/national-courts-lead-the-way-in-prosecuting-syrian-war-crimes>. See also *Why has the Syrian war lasted 10 years?*, *supra* note 44.

124. Article 5(d) of the Rome Statute allowed for the ICC to have jurisdiction over aggression once the State Parties agreed on a definition of the crime. The Assembly defined aggression and activated the ICC's jurisdiction over the crime by resolution in December 2017. Press Release, ICC, Assembly Activates Court's Jurisdiction Over Crime of Aggression, I.C.C. (Dec. 15, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>.

125. Rome Statute, *supra* note 4, art. 7.

126. *Id.*

cannot investigate or is unwilling to prosecute and the ICC prosecutor believes the evidence warrants it. In that case, there needs to be a judicial review process by independent judges where a representative from the defendant's government may be heard. This procedure will help ensure sovereignty while preventing impunity.

It is in every nation's best interest for the United States to support and cooperate with the ICC. The Court will never achieve its full deterrent and just effect without the support of all nations, especially a superpower like the United States. The United States, the ICC, and the United Nations should seek agreements to address valid American concerns about the ICC while ensuring no one, not even a U.S. citizen, can commit the *crime of crimes* with impunity.