Strange Bedfellows: The Relationship Between the International Criminal Court and the United States

Abstract

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

Keywords: International Criminal Court; International Criminal Law; Public International Law; Sovereignty; Rule of Law; United States of America

I Introduction

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

The United States' refusal to join the ICC has inhibited the Court in achieving its long-term goal of having every global state become a member of the Court. The importance of universal membership was identified even before the ICC was formalized. The *ad hoc* committee set up by the UN General Assembly in 1995 to review the Draft Statute for an International Criminal Court asserted that universal participation in the court was necessary to further the interests of the international community.[1] The Court continued to pursue that goal after coming into being. In 2006, the ICC's Assembly of States Parties adopted a plan of action for achieving universality and full implementation of the Statute.[2] That plan remains under review and a report is prepared annually about the efforts being made to reach universal ratification.

While the United States is not alone amongst states that are non-members of the ICC, its absence is significant. Its intelligence, military, and financial power could be a great asset

[1] Report of the Ad Hoc Committee on the Establishment of the International Criminal Court, UN Doc A/50/22 (supp 22) (September 6, 1995) at 3, https://www.legal-tools.org/doc/b50da8/pdf (last visited June 13, 2022).
[2] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November to 1 December 2006 (ICC-ASP/5/32), Part III, ICC-ASP/5/Res.3, annex I.

to the Court if the country were to become a member. Evidence of this can be found in several past interactions between the US and the ICC, particularly the role that United States's intelligence and military assistance played in facilitating the surrender and transfer of Bosco Ntaganda and Dominic Ongwen to the ICC.[3] American military intelligence has also been instrumental in allowing the United States to conclude that Russian troops have committed war crimes during the 2022 invasion of Ukraine.[4] That determination has led to greater cooperation between the US and the ICC in investigating possible war crimes committed in Ukraine.[5] Further, if the United States' were to become a member of the ICC, its global influence could encourage other non-members to join the Court.

For much of its history, the possibility of the United States joining the ICC has seemed remote. The reaction of successive American presidents to the Court has ranged from wary to openly hostile and at no time has it appeared that their concerns about the Court were likely to be overcome. That has changed slightly following Russia's invasion of Ukraine and the United States subsequent willingness to cooperate with the ICC's investigation into possible Russian criminality. This is being seen by some as an opportunity for the United States to join the Court so that it can provide even greater support to the ongoing accountability efforts being made in the Ukrainian context.[6]

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[3] Stephen J Rapp, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (November 21, 2013), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2013/218069.htm (last visited June 7, 2022); Ned Price, 'Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity' (February 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/ (last visited June 23, 2022).

[4] Anthony Blinken, Secretary of State, Press Statement: War Crimes by Russia's Forces in Ukraine (March 23, 2022), https://www.state.gov/war-crimes-by-russias-forces-in-ukraine/ (last visited June 23, 2022).

[5] Beth van Schaack, War Crimes and Accountability in Ukraine (June 15, 2022), https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine (last visited June 16, 2022).

[6] H.R. 1058, 117th Cong. (April 14, 2022); H.R. 7523, 117th Cong. (April 14, 2022).

Numerous efforts have been made to convince the United States to join the Court.[7] The United States has resisted those calls, citing the same problems with the Statute that prevented it from voting for the Statute at the Rome Conference. Much of the commentary on the issue of whether the United States should become a member of the ICC has taken it as a given that the Court would welcome United States membership should the country wish to join. That perspective overlooks the fact that the United States wants the Court to function in a way that is fundamentally different from what was agreed at the time of its formation. Therefore, to welcome the United States as a member would likely require the Court to make fundamental changes that may be incompatible with its object and purpose.

This article examines whether the ICC should be willing to accept the United States as member. It will do that in two parts. First, it will track the different positions each American presidential administration has taken towards the Court and discuss the objections raised by different administrations. It will also consider whether some compromise position might be found that could overcome those objections making the ICC and the United States more harmonious partners. The second part will examine the *travaux preparatoires* to the Statute and the text of the Statute itself in an effort to identify the Court's purpose. It will then assess whether that purpose is compatible with what how the United States wants the ICC to function. It concludes that while universal ratification is desirable to ensure maximum accountability, the ICC should not compromise its basic principles to achieve it. Should it do so, it will undermine its core mission and essentially render itself ineffective.

II. The Position of the United States Towards the ICC

[7] E.g. Ben Ferencz, 'Remarks Made at the Opening of the ICC' (March 2003), https://benferencz.org/articles/2000-2004/remarks-made-at-the-opening-of-the-icc/ (last visited August 10, 2022; H.R. 855, 116th Cong. (February 12, 2000); Human Rights Watch, 'The US Should Respect the ICC's Founding Mandate (Human Rights Watch, May 19, 2021), https://www.hrw.org/news/2021/05/19/us-should-respect-iccs-founding-mandate (last visited August 11, 2022).

There have been five Presidents of the United States since the ICC was created in 1998. All five have opposed the idea of the United States becoming a member of the Court. The vehemence of that opposition has varied, with some condemning the ICC as a rogue organization that threatens American sovereignty to others who sought a more cooperative relationship with the Court. These differences belie the fact that all five presidential administrations had the same objections about the Court. Each was concerned that the Statute, as written, could allow the ICC to exercise its jurisdiction in a way that might result in the prosecution of American citizens or the citizens of its allies. Of particular concern to the United States was its inability, either as a non-state party to the Rome Statute or as a permanent member of the UN Security Council, to halt those possible prosecutions. The next section will look at the ways each presidential administration voiced those concerns and the arguments used to support their positions. It will also consider the validity of their objections and whether some compromise position might be found.

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

Bill Clinton may have been the American president most interested in supporting the ICC. Throughout his presidency, Clinton represented himself as a staunch advocate of establishing a permanent international criminal court. In his 1997 address to the General Assembly of the United Nations, he called on the nations of the world to establish such an international criminal court by the end of the 20th century.[8] Clinton reiterated his support for such a court in the months leading up to Rome Conference, suggesting that it was the best way to guarantee that future *génocidaires* would be held accountable for their actions.[9] Clinton viewed a permanent international criminal court as an extension of his overall approach to

[8] William J. Clinton, Address by President Bill Clinton to the UN General Assembly (September 22, 1997), https://2009-2017.state.gov/p/io/potusunga/207553.htm (last visited May 31, 2022).

[9] William J. Clinton, Text of Clinton's Rwanda Speech (March 25, 1998), https://www.cbsnews.com/news/text-of-clintons-rwanda-speech/ (last visited May 31, 2022).

foreign policy and his emphasis on the importance of rule of law enforcement and the protection of human rights.[10]

Despite President Clinton's enthusiasm for a permanent international criminal court, the decision was ultimately made that the United States could not support the ICC's Statute in the form agreed during the Rome Conference. As a result, it was one of seven countries present to vote against the Statute's adoption. David Scheffer, the United States' chief negotiator at the Rome Conference, later explained that the United States' chief objection to the Statute lay in the provisions relating to jurisdiction found in Article 12.[11] Scheffer would called Article 12 'the single most problematic part of the Rome Statute' and he felt that resolving the issues contained in it was the key to overcoming American opposition to joining the ICC.[12] Those objections to Article 12 were shared by subsequent presidential administrations. Both the Bush and Trump Administrations contended that the article's jurisdictional approach did not align with American constitutionalism and as such was a threat to the nation's sovereignty.[13] The jurisdictional arrangement found in Article 12 remains the most significant barrier to United States' membership in the Court.

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[10] David J. Scheffer, 'An International Criminal Court: The Challenge of Enforcing International Humanitarian Law', An Address Before the Southern California Working Group on the International Criminal Court (February 26, 1998), https://1997-2001.state.gov/policy_remarks/1998/980226_scheffer_hum_law.html (last visited June 23, 2022).

[11] David J. Scheffer, Testimony Before the Senate Foreign Relations Committee (July 23, 1998), https://1997-2001.state.gov/policy_remarks/1998/980723_scheffer_icc.html (last visited May 31, 2022).

[12] David J. Scheffer, 'International Criminal Court: The Challenge of Jurisdiction', Address at the Annual Meeting of the American Society of International Law (March 26, 1999), https://1997-2001.state.gov/policy_remarks/1999/990326_scheffer_icc.html (last visited June 1, 2022); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L. L. 12, 19 (1999).

[13] Marc Grossman, Remarks to the Center for Strategic and International Studies (May 6, 2002), https://2001-2009.state.gov/p/us/rm/9949.htm (last visited June 27, 2022); *see also* John Bolton, Full Text of John Bolton's Speech to the Federalist Society (Aljazeera, September 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html (last visited September 22, 2022).

The United States specific concerns about Article 12 centered on subsection 2, which permits the ICC to exercise jurisdiction when either: 1) crimes are allegedly committed in the territory of a state party or that of a state that has accepted the jurisdiction of the Court; or 2) the alleged perpetrator is a national of a state party or state that has accepted the ICC's jurisdiction.[14] The United States disagreed with the decision to allow the Court to exercise jurisdiction if only one of the Article 12(2) conditions were met, taking the position that both should exist before the Court could proceed against a suspect.[15] It felt that individual nations should have greater control over when, and if, its citizens were prosecuted by the ICC.[16]

The United States also challenged Article 12 of the Rome Statute on the basis that it violates Article 34 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT").[17] The VCLT was adopted in 1969 for the purpose of codifying the rules to be applied when interpreting international treaties.[18] Article 34 of the VCLT states that a treaty cannot bind or obligate a third state unless that state consents to the treaty.[19] The United States claimed that Article 12(2) of the Rome Statute did just that by authorizing the ICC to investigate and prosecute citizens of non-state parties who were alleged to have committed crimes on territory controlled by a state party.[20] This was interpreted as an effort to impose jurisdiction on citizens of states that had not joined the court so as to give the ICC a type of quasi-universal jurisdiction over international crimes.[21]

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[14] Article 12(2), Rome Statute of the International Criminal Court (last amended 2010).
[15] *See* Sheffer *supra* note 11.
[16] *See* Sheffer, The United States *supra* note 12 at 19.
[17] Id. at 18.
[18] Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44(2) VA. J. INT'L. L. 431, 437 (2004).
[19] Article 34, Vienna Convention on the Law of Treaties, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol 1155, at 331.
[20] Id.
[21] *See* Sheffer, The United States *supra* note 12 at 18.

There are several flaws with the argument advanced by the Americans. First, as Article 1 of the VCLT makes clear, it is designed to govern the treaty relations between states.[22] There is nothing in the VCLT to support the suggestion that it is applicable to individuals or that it can protect them from international treaty obligations. This is further borne out in Article 2 of the VCLT, which defines a 'third state' as a state that is not party to a treaty.[23] It contains no language that could be reasonably construed to mean that individuals might be considered 'third states' for Article 34 purposes. As Article 34 specifically states that a treaty cannot create obligations or rights for a third state absent consent, it cannot possibly also protect individuals under the same provision.[24] The VCLT also does not stand for the proposition that individuals are relieved of treaty rights or obligations when their nation of origin has not signed the relevant treaty. If there were, it could make rights and obligations, which are held by individuals, dependent on one's nationality. Therefore, the American's argument in opposition to Article 12 of the Rome Statute based on the Vienna Convention is without merit. This conclusion is further reinforced by the fact that the United States has not ratified the VCLT. It is rather hubristic to try and claim the benefits of Article 34 of the VCLT, in this case protection from the jurisdictional provisions of the Rome Statute, without actually joining the treaty regime that would entitle the United States to those protections.

Article 12(2)(a) of the Rome Statute is better understood as an expression of the territorial principle of jurisdiction rather than one based in treaty law. Considered the most basic jurisdictional principle in international law, the territorial principle is the concept that a state has the sovereign right to exercise jurisdiction over any crimes that occur or are committed

[22] *See supra* note 19 at Article 1.
[23] Id. at Article 2.
[24] Id. at Article 34.

on its territory, regardless of the nationality of the perpetrator.[25] That means that if a crime is committed in a state, regardless of who committed it, the state has the right to investigate and prosecute that crime.[26] There is nothing controversial about this proposition and the United States practices the same principle when foreign nationals commit crimes in the territory of the United States.

In addition to being able to exercise jurisdiction over crimes committed on its territory, a state also possesses the sovereign power to voluntarily delegate some of its territorial jurisdiction to international organizations or international tribunals.[27] The ICC derives the right to exercise territorial jurisdiction in relation to atrocity crimes occurring on the territory of a state party or of a state that makes such a delegation. When a state delegates some part of its jurisdiction to an international organization that entity can then exercise jurisdiction in a way that is consistent with the power previously held by the state and in accordance with the agreement that instigated the delegation. In essence, the ICC's exercise of jurisdiction under Article 12(2)(a) is an extension of the delegating states already existing authority over its territory and its right to investigate and prosecute crimes that occur on that territory. The state has simply allotted part of that right to the ICC by ratifying the Statute and granting the Court a portion of the power to investigate and prosecute atrocity crimes that was previously held exclusively by the state. No new right or obligation has been created, instead Article 12(2) constitutes the expression of an already existing right. As such, there is no need for third party consent under Article 34 of the Vienna Convention.

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[25] Cedric Ryngaert, JURISDICTION IN INTERNATIONAL LAW (2008), at 42; Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME III: INTERNATIONAL CRIMINAL PROCEDURE (2016), at 211.

[26] Kenneth S. Gallant, INTERNATIONAL CRIMINAL JURISDICTION (2022), at 181.

[27] Monique Cormier, *Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?*, 16(5) J. INT'L. CRIM. JUST. 1043, 1053 (2018); Alexandre Skander Galand, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT (2019), at 16.

David Scheffer recognized the relevance of the territoriality principle to Article 12(2) when explaining the United States' reasons for not joining the ICC, but dismissed it as 'the blind application of territorial jurisdiction.'[28] Quoting from the work of Madeline Morris, Scheffer argues that it is dubious whether a state can delegate to another state the authority to try a suspect without the consent of the accused's state of nationality.[29] From that Scheffer (and Morris) extrapolate that it is even less clear whether a state can delegate that authority to an international court.[30] Scheffer, again relying on Morris, notes that there is no precedent in international law of a state delegating territorial jurisdiction to an international court and that doing so has no basis in the customary international law of territorial jurisdiction.[31] What Scheffer's argument boils down to is that because the jurisdictional arrangement at the ICC has no existing basis it is presumptively invalid.[32]

Of course, the same could be said of the Nuremberg Tribunal. Its jurisdictional basis was defined in the 1945 London Agreement, in which it was agreed that trials should be held to prosecute and punish war criminals acting on behalf of the Axis powers, and in the Charter of the International Military Tribunal, establishing the rules by which the Nuremberg trials were held.[33] The Charter granted the Tribunal jurisdiction to try and to punish the 'major war criminals' of the European Axis countries for crimes against peace, war crimes and crimes

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[28] Sheffer, The United States *supra* note 12 at 18.
[29] David J. Scheffer, Address at the Annual Meeting of the American Society of International Law (March 26, 1999) https://1997-2001.state.gov/policy_remarks/1999/990326_scheffer_icc.html (last viewed June 1, 2022); *citing* Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-State Parties,* 64(1) LAW AND CONTEMPORARY PROBLEMS 13 (2001). Scheffer's comments were based on a pre-publication draft of Professor Morris' article. The wording of the published version differs somewhat from the version Scheffer relied on; however, the crux of the arguments is identical in both.
[30] Id.
[31] Id.
[32] Michael P Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of The U.S. Position,* 64(1) LAW AND CONTEMPORARY PROBLEMS 67, 71 (2001).
[33] TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, vol 22 (1947), at 460.

against humanity.[34] This was seen, at the time, as a legitimate exercise of the right of any state to prosecute and punish individuals accused of committing war crimes and crimes against humanity.[35] However, the Nuremberg Tribunal was not the result of a single state exercising jurisdiction over war crimes, it was formed through the cooperation of multiple states jointly exercising the sovereignty granted to them as occupying powers following Germany's unconditional surrender.[36] In so doing, they were acting in place of the then defunct German government, making the establishment of the Nuremberg Tribunal a delegation of the criminal jurisdiction of German domestic courts to an international court. While the Tribunal never referred to itself as an international court, US President Harry Truman did, when he called the Nuremberg Tribunal 'the first international criminal assize in history.'[37] As Truman's statement makes clear, the Tribunal was unique and as such would not have met the test Scheffer imposed on the ICC.

The United States also objected to Article 12 out of a fear that it could discourage non-state parties from participating in peacekeeping activities. It was particularly concerned that Article 12 might expose the servicemembers of non-state parties to politically motivated prosecutions launched by belligerent states.[38] It felt that greater protections should be afforded when those individuals were engaging in 'official actions' attributable to the non-party state.[39] In addressing this point, David Scheffer later clarified that 'official state actions' included humanitarian interventions, peacekeeping solutions or defensive actions to eliminate weapons

[34] Article 6, Charter of the International Military Tribunal (1945).
[35] Willard B Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. J. 177, 218 (1945).
[36] *See* Trial of the Major War Criminals *supra* note 33 at 460.
[37] Quincy Wright, *Law of the Nuremberg Trial*, 41(1) AM. J. INT'L. L. 38, 38 (1947); Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L. CRIM. JUST. 38, 39 (2004).
[38] *See supra* note 11.
[39] Id.

of mass destruction.[40] Adopting the American perspective on this would essentially mean that troops from non-state parties could commit Rome Statute crimes on the territory of state parties without facing any sort of accountability for their actions so long as they were engaging in an official state action when the violation occurred. Creating that sort of exception to the ICC's jurisdiction would be antithetical to the entire purpose of the ICC.

That approach ignores the obvious answers to that problem; either the American government could make more of an effort to prevent its soldiers from committing Rome Statute crimes or it could adequately investigate and prosecute those crimes when they are committed. As is made clear in the Preamble to the Rome Statute, the jurisdiction of the International Criminal Court is complementary to national jurisdiction.[41] That means that domestic courts retain primary jurisdiction over crimes that fall under the Rome Statute.[42] Under this system, the International Criminal Court can only exercise its jurisdiction in the absence of meaningful action on the part of state-run justice institutions.[43] This principle is fully explained in Article 17 of the Statute, which sets out the four grounds for finding that a case is inadmissible at the International Criminal Court because of a lack of complementarity. They are when: 1) the case is being investigated or prosecuted by a state with jurisdiction over the alleged conduct; 2) a case has been investigated by a state and it chose not to prosecute; 3) the person concerned has already been tried by a state for the same conduct described in the complaint against them; and 4) the case is not of sufficient gravity to justify further action.[44] Under this principle, citizens of the United States suspected of committing Rome Statute crimes would only be vulnerable to investigation and prosecution by the ICC in the absence of meaningful domestic

[40] David Scheffer, Address at American University (September 14, 2000), https://1997-2001.state.gov/policy_remarks/2000/000914_scheffer_au.html (last viewed May 31, 2022).
[41] *See* ICC Statute *supra* note 14 at Preamble.
[42] William A. Schabas, THE INTERNATIONAL CRIMINAL COURT: COMMENTARY ON THE ROME STATUTE (2nd Edn., 2016), at 447.
[43] *See* ICC Statute *supra* note 14 at Article 17.
[44] Id.

proceedings. To prevent this, all the United States need do is investigate crimes that may have been committed and prosecute the suspected perpetrators if warranted.

Instead, the United States dismissed the complementarity regime described in Article 17 as deficient.[45] It is suggested that even if the United States were to investigate crimes allegedly committed by its troops, the Court could still find those efforts inadequate and launch its own investigation.[46] While it is true that the ICC could still proceed following an inadequate investigation, there are no examples in more than 20 years of ICC practice of the Court dismissing a legitimate national investigation and launching their own proceedings against an accused. To the extent this ever was a legitimate reason for criticizing Article 17, it no longer seems to be a reasonable basis for challenging the Article's approach to jurisdiction.

Despite the numerous and varied objections the Clinton Administration had to the Rome Statute, it decided to sign it prior to the December 31, 2000 signing deadline.[47] In the statement accompanying the signing of the Statute, President Clinton identified the importance of holding accountable those individuals accused of committing crimes falling under the Rome Statute and the United States' 'tradition of moral leadership' when it comes to those efforts.[48] He also highlighted that the ICC is a Court of complementary jurisdiction, although his explanation of how complementarity works was somewhat lacking. Despite these positive aspects of the Statute, President Clinton also identified several negatives that he felt militated against the US signing the Statute. These included a fear that the Court would prosecute citizens of non-member states (i.e., the United States) and that trials at the Court could become politicized. He counselled his successor, George W Bush to exercise future caution about the

[45] Sheffer, The United States *supra* note 12 at 19.
[46] Id.
[47] William J. Clinton, Statement on Signature of the International Criminal Court Treaty (December 31, 2000), https://1997-2001.state.gov/global/swci/001231_clinton_icc.html (last visited June 1, 2022).
[48] Id.

ICC, and suggested that President Bush not submit the Statute to the Senate for ratification until the United States' myriad concerns were addressed.

2. President Bush's Stance Against the ICC

Clinton's successor, George W. Bush, shared Clinton's concerns about the ICC and quickly established himself as a firm opponent of the Court. The Bush Administration's first significant policy decision about the ICC was to inform the United Nations that the United States had no intention of becoming a member of the ICC.[49] It viewed this declaration as effectively undoing the decision of the Clinton Administration to sign the Statute in December 2000.[50] When announcing that the United States was 'unsigning' the Rome Statute, a Bush Administration official identified a number of different beliefs that the administration held about the Court. These included the ideas that: the Court's approach to jurisdiction threatens American sovereignty; the ICC undermines the role of UN Security Council; the power of the ICC Prosecutor is unchecked; and the ICC is built on a flawed foundation that leaves it open to exploitation and politically motivated prosecutions.[51] All four of the Bush Administration's stated reasons for rejecting membership in the Court are interconnected and they all relate to the worry that the United States would be unable to prevent its citizens from being prosecuted by the Court.

Much of the Bush Administration's argument against Article 12 jurisdiction runs along the same lines as the Clinton Administration's critiques of the Rome Statute. Like its predecessor, the Bush Administration claimed to be concerned that jurisdiction could be exercised against American citizens in the absence of the United States agreeing to be bound by the Rome Statute.[52] The administration also suggested that any exercise of jurisdiction by

[49] *See* Grossman *supra* note 13.
[50] Id.
[51] Id.
[52] Id.

the ICC is presumptively invalid because there is no precedent for an international organization to do so in the absence of a Security Council mandate.[53] This unease about the lack of potential oversight from the Security Council would become a running theme in statements made by administration officials about the ICC. The Bush Administration did little to expand on its reasons for taking these positions beyond what had already been expressed by Clinton Administration officials.

The Bush Administration's remaining concerns were more novel and relate to the fear that the Rome Statute dilutes the power of the Security Council by assuming some of its authority of peacekeeping activities. [54] In particular, the administration felt that the Rome Statute permitted the Court to identify threats to, and infringements of global peace, despite the fact that Article 39 of the UN Charter grants that authority exclusively to the United Nations Security Council (hereinafter 'UNSC').[55] Further, the administration also believed that the Prosecutor's ability to conduct investigations of their own volition (*proprio motu*) created the possibility that they would seek to interfere with the work already being done by the Security Council.[56] Their objection to the Prosecutor's *proprio motu* power was compounded by a concern that the Prosecutor would misuse it by engaging in politically motivated investigations aimed at the United States.[57] From the United States' standpoint, the Statute did too little to prevent this from happening and the lack of greater UNSC oversight over the Court meant that insufficient external control existed to thwart vexatious prosecutions.

Under-Secretary of State for Arms Control, John Bolton played a formative role during George Bush's first term as president in determining the nation's policy towards the ICC.

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[53] Id.
[54] Id.; *see also* John R. Bolton, Remarks to the Federalist Society (November 14, 2002), https://2001-2009.state.gov/t/us/rm/15158.htm (last visited June 24, 2022).
[55] Id.; *see also* Article 39, United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI.
[56] Id.
[57] Id.

Bolton was already an outspoken critic of the Rome Statute before joining the Bush Administration with his opposition against the court arising out of the beliefs that the Rome Statute is incompatible with 'American standards of constitutional order' and that it constitutes a 'stealth approach to erode [American] constitutionalism.'[58] These rather grandiose claims are consistent with Bolton's general worldview; that a global agenda exists to constrain the United States through the application of international law.[59]

Bolton's arguments about the Court rest on the assertion that the ICC is both substantively and structurally flawed.[60] His substantive complaints focus on the belief that the Court's authority is not clearly defined in the Rome Statute and that its powers to interpret the meaning of different crimes are so broad as to make them political and legislative in nature.[61] The structural weaknesses identified by Bolton are largely related to what he considers an incoherent constitutional arrangement that does not clearly delineate how laws are made, adjudicated or enforced.[62] In his view, this is all made worse by the fact that the Court's Prosecutor and judiciary are not subject to popular accountability or an elected executive or legislative branch, which he interprets as meaning there is no check on their power.[63]

Bolton's criticisms of the Court's structure do not really engage with the several statutory safeguards that exist to prevent the Prosecutor or individual judges from abusing their power. The Rome Statute contains explicit provisions whereby the Assembly of States Parties can remove the prosecutor or a judge from office for serious misconduct or the breach of their

[58] John R Bolton, *The Risks and Weaknesses of The International Criminal Court from America's Perspective*, 64(1) LAW AND CONTEMPORARY PROBLEMS 167, 169 (2000).
[59] John R Bolton, *Is There Really Law in International Affairs*, 10 TRANSNAT'L L & CONTEMP PROBS 1, 48 (2000).
[60] *See* Bolton Remarks *supra* note 54; *see also* Bolton, *Risk and Weaknesses supra* note 58 at 169.
[61] *See* Bolton Remarks *supra* note 54
[62] Id.
[63] Id.

duties.[64] The Statute also includes a mechanism for disqualifying the Prosecutor or a Judge from acting in individual cases should there be any questions about their impartiality in the matter.[65] Further, the Statute has a provision prohibiting the Court from initiating or continuing an investigation or prosecution in a particular situation for 12 months following the Security Council's adoption of a resolution requesting the Court to defer those activities.[66] Despite the existence of these very clear checks on the power of the Prosecutor and the judges the Bush Administration felt they offered insufficient protections. President Bush himself made that clear in a 2002 speech delivered to active members of the United States Army when he explicitly referenced the ICC's perceived lack of accountability.[67]

Like the Clinton Administration before it, the Bush Administration's approach to the ICC appears motivated by the concern that the Court could be used as a tool to hold American citizens accountable for their actions.[68] The United States felt that responsibility was solely a domestic one, and that matters concerning possible American criminality were the exclusive domain of the country itself.[69] The Bush Administration also feared that the prospect of investigation and prosecution by the ICC could impair America's 'global security commitments.'[70] This argument is connected to the worry raised during the Clinton era that the effectiveness of the United States military would be compromised if some of the security decisions it made would later be subject to international investigation and prosecution.[71]

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[64] *See* ICC Statute *supra* note 14 at Article 46.
[65] Id. at Article 41(2)(a) and Article 42(7).
[66] Id. at Article 16.
[67] George W. Bush, Remarks to the 10th Mountain Division at Fort Drum, New York (July 19, 2002), https://www.presidency.ucsb.edu/documents/remarks-the-10th-mountain-division-fort-drum-new-york (last visited June 1, 2002).
[68] Id.
[69] Id.
[70] United States President, The National Security Strategy of the United States of America (September 2002), at 31, https://2009-2017.state.gov/documents/organization/63562.pdf (last visited June 1, 2022).
[71] *See* Scheffer Testimony *supra* note 11.

However, the Bush Administration took that argument a step further by alleging that its principal concern was that US military leaders would be exposed to prosecution as part of an 'agenda to restrain American discretion'.[72] They believed that the danger of this would only be exacerbated when those prosecutions arose out of actions considered legitimate under the United States' domestic constitutional system.[73]

With that in mind, President Bush specifically rejected the idea that the ICC could exercise jurisdiction over American citizens and announced a two-fold plan to protect them from prosecution by the Court.[74] The first part was to negotiate and conclude more than 100 bilateral agreements with other states, commonly referred to as Article 98 agreements in reference to the relevant portion of the Rome Statute.[75] The Article 98 agreements were designed to prevent the surrender of Americans to the ICC should an arrest warrant be issued against them. State parties to the ICC are expected to comply with requests made by the Court to arrest and surrender individuals in the territory of the state that are sought by the Court.[76] Article 98(2) prevents the ICC from making those requests when an obligation contained in an international agreement prevents the surrender of the individual without the surrendering state first agreeing to it.[77] A typical Article 98 agreement, which qualifies as an international agreement for the purposes of the Rome Statute, contains a clause under which states agreed not to extradite American citizens to the ICC, or to a third state that might then transfer the person to the ICC, without first receiving the express permission of the United States.[78] These

[72] *See* Bolton Remarks *supra* note 54.
[73] Id.
[74] Id.
[75] The United States Department of State maintains a database of the Article 98 Agreements. It can be found here: https://www.state.gov/subjects/article-98/ (last visited June 1, 2022).
[76] *See* ICC Statute *supra* note 14 at Article 89(1).
[77] Id. at Article 98(2).
[78] e.g., Article 98 Agreement between the United States and the Republic of Chad (March 26, 2003), https://guides.ll.georgetown.edu/ld.php?content_id=38317421 (last viewed June 1, 2022).

agreements effectively solved the jurisdictional problem that prevented the Clinton Administration from joining the ICC by making the exercise of jurisdiction over American citizens contingent on American consent. They also run-in direct opposition to the ICC's stated goal of ending impunity as they protect American citizens from being held accountable for their actions.

The second part of the United States' plan involved adopting a piece of domestic legislation titled the 'American Servicemembers Protection Act' ('ASPA'). Signed by President Bush in August 2002, the ASPA prohibited United States' Federal Courts, state and local courts and state and local governments from cooperating with any requests for cooperation made by the ICC.[79] The ASPA also included a provision forbidding the direct or indirect transfer of national security information or law enforcement information to the ICC for the purpose of facilitating an investigation, arrest or prosecution.[80] This section of the ASPA was not limited to information that might be used to investigate and prosecute Americans for atrocity crimes but extended to all investigations and prosecutions. That means that no part of the United States government, at any level, could provide the ICC with information that might help to convict any individual accused of Rome Statute crimes regardless of whether they or their alleged crimes have any connection to the United States. Both provisions represent a significant obstruction of accountability efforts as they prioritize interfering with the ICC's work and ability to successfully conclude investigations and prosecutions.

Perhaps the most controversial part of the ASPA is the provision which authorizes the President to use 'any means necessary' to bring about the release of American servicemembers, US government officials or other government employees being detained by the ICC or at its

[79] American Servicemembers Act (2002) 22 U.S.C. §7423.
[80] Id. at 22 U.S.C. §7425.

request.[81] Those powers also extend to freeing people occupying similar positions within NATO and other allied states.[82] The term 'any means necessary' as used in this clause is limited only to the extent that the Act specifically prohibits the President from using bribery to effectuate the release of Americans or citizens of its allies.[83] This would seem to allow the President to authorize military action against the seat of the Court in the Netherlands should doing so prove necessary to further the aims of the ASPA.[84] This led some to refer to the ASPA as 'the Hague Invasion Act'.[85] Not surprisingly, this angered the Netherlands who felt it represented unwarranted intimidation, particularly considering its long-term alliance with the United States and the Netherlands support for the US-led war in Afghanistan.[86]

The ASPA also limited American military involvement in a variety of different contexts. In a clause that was later repealed, the ASPA prohibited the US military from assisting any country, including financially, that was a party to the Rome Statute unless it was in the US national interest to do so, the state had entered into an Article 98 agreement with the United States or the state was allied with the United States.[87] American soldiers were also prevented from being deployed in international peacekeeping missions unless: 1) the Security Council resolution authorizing the action specifically exempted them from prosecution by the ICC; 2) none of the states involved in the operation were members of the Court or had accepted its jurisdiction; 3) those states that were subject to the ICC's jurisdiction had concluded Article

[81] Id. at 22 U.S.C. §7427; *see also* 22 U.S.C. §7432(4).
[82] Id.
[83] Id.
[84] Lilian V. Faulhaber, *American Servicemembers Protection Act of 2002*, 40 HARVARD J. LEGISLATION 537, 546 (2003).
[85] Id.; *see also* H.R. 7523, 117th Cong. (April 14, 2022).
[86] Giles Scott-Smith, *Testing the Limits of a Special Relationship: US Unilateralism and Dutch Multilateralism in the Twenty-First Century*, in John Dumbrell and Axel R Schäfer (eds.) *AMERICA'S SPECIAL RELATIONSHIPS: FOREIGN AND DOMESTIC ASPECTS OF THE POLITICS OF ALLIANCE* (2009) 119.
[87] 22 U.S.C. §7426; *repealed* Pub. L. 110–181, div. A, title XII, § 1212(a) (January 28, 2008) 122 Stat. 371.

98 agreements with the United States; or 4) the national interests of the US justify its involvement in the absence of any protections against prosecution.[88] These latter two provisions were used by the United States as a way to get states to agree to enter into Article 98 agreements with it. In the end, a number of states were cajoled into agreeing to Article 98 agreements to ensure the continued cooperation and participation of the United States military. Through this, the Bush Administration significantly reduced the threat of American servicemembers being prosecuted by the ICC by limiting the likelihood that they might be held accountable for the commission of any Rome Statute crimes.

The hardline stance taken by the Bush Administration against the ICC continued throughout his first term in office. While its efforts were primarily directed at protecting Americans from investigation and prosecution by the Court, some measures were also adopted that had the tendency to disrupt the function of the court in general. However, the administration's approach to the ICC began to soften slightly following Bush's re-election. This can be seen in the decision not to oppose the Security Council's referral of the situation in Darfur to the ICC.[89] In so doing, the United States voiced its support for justice in Darfur and the need to hold accountable those individuals committing war crimes and genocide.[90] The decision not to veto the resolution should not, however, be seen as an implicit endorsement of the ICC. In explaining its decision not to exercise its veto, The United States made clear that it disagreed with the choice of the ICC as a venue in which to pursue accountability, and that it was only acting as it did because it was important for the Security Council to speak with one voice on the issue.[91] The United States then reiterated its objection to the ways in which the

[88] Id. at 22 U.S.C. §7424.
[89] UN Security Council, Transcript of 5158th Meeting, Doc No S/PV.5158 (March 31, 2005), at 3.
[90] Id.
[91] Id.

ICC can exercise its jurisdiction and indicated that it only abstained in voting because the resolution contained language protecting US nationals from prosecution.[92]

Although the United States' statement during the Security Council debate on the Darfur resolution unequivocally rejected the authority of the ICC, the language it used in doing so represented something of a shift from some of the administration's earlier assertions about the ICC. While it contained a brief mention about the danger of politically motivated investigations and trials, there was no reference to the 'unaccountable' prosecutor or their 'unchecked' powers.[93] Instead, most of the focus was on the jurisdictional issues first raised during the Clinton Administration and the protection from prosecution granted to US nationals in the text of the Security Council resolution.[94] The United States also advanced the idea that all future investigations of citizens of non-state parties should only occur following the agreement of the state of which the individual is a national or by Security Council resolution.[95] This would give the United States the control over prosecutions it has been looking for and allow it to thwart any actions taken against American citizens. The administration's concerns about the ICC's alleged lack of accountability, and the accompanying danger that the Court could be politicized, were apparently less pressing when there was no risk that American citizens or the citizens of its allies might be prosecuted.

The United States did not entirely back away from its criticisms of the ICC during Bush's second term, but it certainly moderated them and gave some indication that it could work with the Court under the right circumstances. This continued in the following years, which saw changes to the ASPA including relaxing and later repealing the prohibition against providing financial support to the militaries of governments who did not enter into Article 98

[92] Id.
[93] Id.
[94] Id.
[95] Id.

agreements.[96] Bush administration officials recognize that in some instances, like Darfur, the United States wished to see the ICC succeed and that it could have an interest in facilitating and assisting the Court's work in that area.[97] Although these changes in approach did not signal acceptance of the ICC, it does suggest a move towards developing a constructive relationship with the Court more akin to what existed under the Clinton Administration. This should come as no real surprise as the sticking points for the Bush Administration by the end it time in office were almost identical to those that impeded Clinton from agreeing that the United States should become a member state of the ICC.

3. President Obama Builds Bridges with the Court

Even before taking office, the Obama Administration signaled its intent to work more closely with the ICC than had his predecessor. During the process of being confirmed as Obama's Secretary of State, Hillary Clinton indicated that the administration would end hostility towards the ICC and encourage the Court to act when doing so would promote the interests of the United States.[98] The administration continued to demonstrate this new found commitment to cooperation with the ICC during the first two years of the Obama presidency. In that time, the United States directly participated in ICC activities by attending the ICC's Assembly of States Parties as an observer and participating in the Review Conference of the Rome Statute held in Kampala, Uganda.

During the Assembly of States Parties in 2009, Stephen J Rapp, the Ambassador-at-Large for War Crimes Issues, set out the new administration's support for international

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[96] 22 U.S.C. §7426; *repealed* Pub. L. 110–181, div. A, title XII, § 1212(a) (January 28, 2008) 122 Stat. 371.

[97] John Bellinger, Legal Adviser to the Bush Administration, Remarks to the DePaul University College of Law (April 25, 2008), https://2001-2009.state.gov/s/l/rls/104053.htm (last viewed June 6, 2022).

[98] Walter Pincus 'Clinton's Goals Detailed' (Washington Post, January 19, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/01/18/AR2009011802268.html (last viewed June 7, 2022).

tribunals as accountability mechanisms.[99] He stated that there are times when international cooperation is necessary to combat criminality and to do that the United States needed to better understand how the ICC worked and the issues it faced.[100] The Obama Administration was somewhat more tepid in its support of the ICC the following year in its National Security Strategy ('2010 NSS').[101] While the 2010 NSS again recognized the importance of accountability and the need to support institutions that achieve that goal, it qualified its support for the ICC.[102] Rather than back all ICC prosecutions, it limits its support to those that 'advance US interests and values' and that are in compliance with US law.[103] This approach to the ICC is more in keeping with previous administrations and shows a preference for international accountability that does not apply to American citizens.

The United States again participated in an ICC meeting in 2010, when it attended the ICC Review Conference in Kampala, Uganda. The United States was actively involved in the discussions around how the crime of aggression should be defined so that the Court's jurisdiction over acts of aggression could be activated. In a statement delivered at the conclusion of the conference, a legal advisor to the Secretary of State, Harold Koh, made the somewhat remarkable claim that the United States does not commit acts of aggression and therefore it was extremely unlikely an American would be prosecuted for the crime of aggression.[104] This viewpoint is instructive in understanding the United States' interpretation about how the Rome Statute should be applied. Despite the extensive evidence to the contrary,

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[99] Stephen J Rapp, Address to Assembly of States Parties (November 19, 2009), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2009/133316.htm, (last viewed June 7, 2022).
[100] Ibid.
[101] United States President, National Security Strategy (May 2010) at 48, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (last viewed June 7, 2022).
[102] Id.
[103] Id.
[104] Harold Koh, Special Briefing: U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm (last viewed June 7, 2022).

this comment reflects a belief that American troops are responsive to the atrocity crimes of others but that they do not initiate them. From this, the United States has apparently concluded that atrocity crimes that are responsive to aggressive crimes are of lesser severity and should not result in investigation and prosecution by the Court. Put differently, their position appears to be that crimes committed in an effort to stop other crimes are excusable and should not be subject to criminal sanction. How this formulation of the purpose of the ICC conforms to other interpretations will be explored in greater detail later in this paper.

The United States continued its engagement with the ICC throughout the remainder of the Obama presidency. In so doing, it directly supported the Court in trying to hold accountable individuals who were either enemies of the United States or about whom the United States was largely indifferent. In 2011, the United States voted in favor of a unanimous Security Council resolution referring the situation in Libya to the ICC.[105] Susan Rice, then the United States Ambassador to the United Nations, described it as an example of the world speaking with one voice, echoing the statement made by the United States when it abstained from voting for the Darfur resolution.[106] Later that year, President Obama deployed US military personnel to Uganda to assist local forces in finding Joseph Kony, who was (and still is) subject to an ICC arrest warrant. Obama did not directly connect the deployment to the ICC's efforts to arrest Kony, although Stephen Rapp did in a statement to the Court's Assembly of States Parties.[107] This signaled a new commitment by the United States to assisting in the apprehension of

[105] UN Security Council, Resolution 1970, No S/Res/1970 (February 26, 2011).
[106] UN Security Council, Transcript of the 6491st Meeting, Doc No S/PV.6491 (February 26, 2011), at 3.
[107] Barack Obama, 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 (October 14, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore (last viewed June 7, 2022); *see also* Stephen J Rapp, U.S. Statement to the Assembly of States Parties of the International Criminal Court' (December 14, 2011), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2011/179208.htm (last viewed June 7, 2022).

suspects wanted by the ICC. In 2013, Obama authorized the expansion of the State Department's Awards Program and enhanced the government's ability to offer monetary rewards for information leading to the arrest and conviction of individuals wanted by international criminal tribunals.[108] The United States was later involved in facilitating the surrender and subsequent transfer into ICC custody of Bosco Ntaganda and Dominic Ongwen, two suspects for whom rewards were offered.[109]

Despite these efforts to positively cooperate with the Court, the Obama Administration did not always support the work of the ICC. In 2014, following the deployment of American troops as peacekeepers in Mali, President Obama issued a memorandum in which he asserted that those troops would not be subject to criminal prosecution or other assertions of the ICC's jurisdiction due to an existing Article 98 agreement between the USA and Mali.[110] This accorded with the approach set out in the National Security Strategy in 2015 ('2015 NSS'). The 2015 NSS supported the work of the ICC in holding accountable those responsible for 'the worst human rights abuses'.[111] It qualified that support to by stating that it must be consistent

[108] Barack Obama, 'Statement by the President on Enhanced State Department Rewards Program' (January 15, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/01/15/statement-president-enhanced-state-department-rewards-program (last viewed June 7, 2022).

[109] Stephen J Rapp, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (November 21, 2013), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2013/218069.htm (last viewed June 7, 2022); Ned Price, 'Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity' (February 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/ (last viewed June 23, 2022).

[110] Barack Obama, Presidential Memorandum -- Certification Concerning U.S. Participation in the United Nations Multidimensional Integrated Stabilization Mission in Mali Consistent with Section 2005 of the American Servicemembers' Protection Act (January 31, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/31/presidential-memorandum-certification-concerning-us-participation-united (last viewed June 7, 2022).

[111] United States President, National Security Strategy (February 2015) at 22, https://history.defense.gov/Portals/70/Documents/nss/NSS2015.pdf?ver=TJJ2QfM0McCqL-pNtKHtVQ%3d%3d (last viewed June 7, 2022).

with the United States' commitment to protecting its own personnel.[112] This is reminiscent of earlier policies designed to protect American citizens from being held accountable for their actions.

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

4. President Trump's Strident Opposition to ICC

In a departure from the Bush Administration's antagonistic relationship with the ICC and the Obama Administration's more cooperative approach, the Trump Administration chose to be openly hostile to the Court. Initially, the administration had little to say about the ICC. It was not mentioned in the 2017 National Security Strategy and the administration made no major statements about the Court prior to 2018. That all changed, however, following the appointment of John Bolton as National Security Advisor in March 2018.[113] On 10 September 2018, Bolton launched a blistering attack against the Court, calling it "illegitimate" and

[112] Id.

[113] Mark Landler and Maggie Haberman, 'Trump Chooses Bolton for 3rd Security Adviser as Shake-Up Continues' (New York Times, March 22, 2018), https://www.nytimes.com/2018/03/22/us/politics/hr-mcmaster-trump-bolton.html (last viewed June 7, 2022).

claiming that "for all intents and purposes, the ICC is already dead to us."[114] The substance of his comments was largely a replay of his Bush-era allegations, although the rhetoric used to express them was even more inflammatory. Bolton described the ICC as an assault on the Constitution and the sovereignty of the United States and the "worst nightmare come to life" of the country's founders.[115] He also set out the framework for the Trump Administration's approach to the ICC in no uncertain terms. Bolton invoked the language of the ASPA and declared that the United States would use "any means necessary" to protect Americans and the citizens of its allies from prosecution by the ICC.[116] He also announced that the United States would not cooperate with, engage with, fund or assist the Court in any way.[117] He then proceeded to threaten the ICC by suggesting that the administration would ban the Court's judges and prosecutors from entering the country, sanction any financial assets they held in the United States and prosecute them criminally in American courts.[118] He extended those threats to any company or state that assisted the ICC in investigating or prosecuting American citizens.[119] Bolton's extreme response showed that a new and all-together negative phase was beginning in the relationship between the United States and the ICC. Trump reinforced Bolton's contentions in his address to the United Nations General Assembly two weeks later. There he asserted that 'the ICC has no jurisdiction, no legitimacy and no authority.'[120]

[114] John Bolton, Full Text of John Bolton's Speech to the Federalist Society (Aljazeera, September 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html (last viewed June 8, 2022).
[115] Id.
[116] Id.
[117] Id.
[118] Id.
[119] Id.
[120] Donald Trump, Remarks by President Trump to the 73rd Session of the United Nations General Assembly (September 25, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/ (last viewed June 8, 2022).

The United States followed through on some of Bolton's threats in 2019. In April, Secretary of State Michael Pompeo revoked the entry visa of ICC Prosecutor, Fatou Bensouda, effectively barring her from entering the United States.[121] The Trump Administration further escalated its attack on the Court in 2020, when it introduced economic and travel sanctions against Bensouda and Phakiso Mochochoko, the Head of the Court's Jurisdiction, Complementarity and Cooperation Division.[122] The administration justified the sanctions on the basis that Bensouda and Mochochoko were engaging in the 'politically motivated' targeting of American soldiers who served in Afghanistan.[123] The sanctions order called the investigation 'unjust and illegitimate' without elaborating as to either claim.[124] However, an earlier Executive Order issued by Trump authorizing the use of sanctions against ICC employees linked sanctions to the ICC's assertion of jurisdiction over possible criminality occurring in Afghanistan, a state party to the Rome Statute.[125]

The decision to impose sanctions on Bensouda and Mochochoko was driven by the decision of the ICC Appeals' Chamber to authorize the Prosecutor to investigate the Situation in Afghanistan.[126] That decision infuriated the Trump Administration, and particularly the Secretary of State, Mike Pompeo, because it carried with it the possibility that the Court might

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[121] Marlise Simons and Megan Specia, 'U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes' (The New York Times, April 5, 2019), https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html (last viewed June 8, 2022).

[122] Michael Pompeo, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (September 2, 2020), https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html (last viewed June 8, 2022).

[123] Id.

[124] Id.

[125] Donald Trump, Executive Order 13928—Blocking Property of Certain Persons Associated with the International Criminal Court (June 11, 2020), https://www.presidency.ucsb.edu/documents/executive-order-13928-blocking-property-certain-persons-associated-with-the-international (last viewed June 8, 2022).

[126] *Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) Doc. No. ICC-02/17 OA4, A Ch (March 5, 2020).

scrutinize the possible criminality of American soldiers.[127] Following the opinion's release, Pompeo referred to the ICC as an "unaccountable political institution masquerading as a legal body" and as a renegade court.[128] The following day, he called the Court a "crazy, renegade body" and 'this thing they call a court.'[129] Two months later he would refer to the ICC as "corrupted".[130] All of this vitriol made clear that the Trump Administration, like the Obama and Bush Administrations, saw the Court as an entity designed to prosecute rogue political regimes and not countries like the United States.[131] When viewed from that perspective, any effort by the ICC to hold Americans accountable would necessarily be illegitimate as doing so would transcend the Court's purpose.

Pompeo's statements also suggest that the Trump Administration, much like earlier administrations, did not understand the ICC's complementarity regime. In the aftermath of the ICC Appeals Chamber's Afghanistan decision, Pompeo repeatedly stated that American servicemembers accused of crimes committed in the context of military operations are investigated and prosecuted within the context of the American justice system.[132] To the extent that is true, then the United States has nothing to worry about from the ICC. The ICC is a court of complementary jurisdiction and as long as a genuine investigation is being carried out by a

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[127] Michael Pompeo, Secretary Pompeo's Remarks to the Press (March 5, 2020), https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/index.html (last viewed June 8, 2022).
[128] Id.
[129] Michael Pompeo, Secretary Michael R. Pompeo with Steve Doocy, Jedediah Bila, and Pete Hegseth of Fox and Friends (March 6, 2020), https://2017-2021.state.gov/secretary-michael-r-pompeo-with-steve-doocy-jedediah-bila-and-pete-hegseth-of-fox-and-friends/index.html (last viewed June 8, 2022).
[130] Michael Pompeo, Transcript of Secretary Michael R. Pompeo with Marc Thiessen and Danielle Pletka of AEI's 'What The Hell Is Going On' Podcast' (May 29, 2020), https://2017-2021.state.gov/secretary-michael-r-pompeo-with-marc-thiessen-and-danielle-pletka-of-aeis-what-the-hell-is-going-on-podcast/index.html#footnote1 (last viewed June 8, 2022).
[131] Id.
[132] *See* Pompeo Remarks *supra* note 127; *see also* Pompeo with Steve Doocy et al. *supra* note 129.

state then the case will be inadmissible before the ICC.[133] Despite this, Pompeo felt that the investigation carried with it the implication that the United States was failing to properly investigate the actions of its own servicemembers and that the ICC was going to 'haul these men and women in' into court.[134] That attitude disregards the fact that simply because an investigation is being conducted does not mean it will lead to charges or prosecution. The Prosecutor can decline to proceed with a case following an investigation on both substantive and procedural grounds, including on a finding that it lacks jurisdiction due to complementarity.[135] The existence of an investigation also does not prevent individual suspects or states with jurisdiction over the matter from challenging its admissibility.[136] Therefore, it is an error to presume that an investigation will necessarily result in arrest and prosecution.

The Trump Administration's belligerence towards the ICC seems more deeply rooted in politics than in law. The administration was likely attempting to cast the Court as an independent, multinational international entity that stood in direct opposition to Trump's 'America First' mantra. Rather than develop meaningful criticisms of the ICC, it chose to portray it as an existential threat to the sovereignty of the United States and its Constitutional form of government. As a result, it departed from the approaches Trump's predecessors took to the ICC and instead placed itself in opposition to the Court's very existence. Instead of advocating for the country's interests as past presidents had done, the Trump presidency chose to try and de-legitimize the ICC. This may have played well to Trump's political base, but it failed to meaningfully disrupt the Court's work or to advance the United States' existing concerns about the Rome Statute.

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[133] *See* ICC Statute *supra* note 14 at Article 17.
[134] *See* Pompeo Transcript *supra* note 130.
[135] *See* ICC Statute *supra* note 14 at Article 53(2).
[136] Id. at Article 19.

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

Until recently, there has been little in the history of the relationship between the United States and the ICC to suggest that the United States maintains much interest in becoming a member of the Court. However, the likelihood of the United States seeking membership in the Court has increased in the months following the Russian invasion of Ukraine in 2022. Within a month of the invasion, President Joe Biden identified Russian President Vladimir Putin as a 'war criminal', a claim he reiterated several weeks later.[137] Biden also publicly indicated that there was a need to gather evidence to be used during a 'war crimes' trial.[138] Biden followed that statement with a declaration that Putin was committing a genocide in Ukraine, and that it would be up to international lawyers to decide whether Putin's actions legally qualified as genocide.[139]

Despite this, Biden has stopped short of explicitly endorsing greater cooperation between the United States and the ICC despite using the language of the Court when calling for Putin's prosecution as a war criminal. Further, officials in his administration have sent mixed messages about the extent to which the United States wishes to engage with the Court in efforts to conduct trials from crimes committed in the Ukrainian context. One of Biden's deputy national security advisers, Jon Finer, called holding trial at the ICC "a challenging

[137] ''Unforgivable': Russia decries Putin 'war criminal' allegation' (Aljazeera March 17, 2022), https://www.aljazeera.com/news/2022/3/17/unforgivable-russia-decries-putin-war-criminal-allegation (last viewed June 16, 2022); 'Bucha atrocities show Putin is 'war criminal', Biden says' (Aljazeera April 4, 2022), https://www.aljazeera.com/news/2022/4/4/bucha-atrocities-show-putin-is-war-criminal-biden-says (last viewed June 16, 2022).
[138] *See* Bucha Atrocities *supra* note 137.
[139] Julien Borger, 'Joe Biden accuses Vladimir Putin of committing genocide in Ukraine' (The Guardian April 13, 2022), https://www.theguardian.com/world/2022/apr/13/joe-biden-accuses-vladimir-putin-of-committing-genocide-in-ukraine (last viewed June 16, 2022).

option", citing jurisdictional and membership issues as roadblocks.[140] Conversely, Beth van Schaack, the United States' Ambassador-at-Large for Global Criminal Justice, has stated that the administration is prepared to assist the Ukrainian government should it wish to pursue accountability efforts at the ICC.[141] The United States has also joined with the European Union and the United Kingdom to create the Atrocity Crimes Advisory Group ('ACAG"), a mechanism designed to coordinate their support for accountability efforts.[142] While the stated aim of the ACAG is to support the accountability efforts being pursued by the Ukrainian Office of the Prosecutor General, the group is working in conjunction with a variety of other groups, including the ICC, to gather evidence.[143] The statement made when the ACAG was formed, also expressly indicates that the United States and its partners support a range of accountability efforts, including those being conducted by the ICC.[144] This suggests that while there is some ongoing hesitancy on the part of the administration to directly collaborate with the Court, it is willing to support the Court's efforts through, and in conjunction with, other partners.

Perhaps more significantly, the war in Ukraine has broken down some of the pre-existing Congressional opposition to the ICC. On March 15, 2022, the United States Senate unanimously passed a resolution calling on the member states of the ICC to petition the Court to investigate war crimes and crimes against humanity being committed by and at the direction

[140] National Public Radio, The U.S. Insists that Russia Should be Held Accountable for War Crimes (NPR April 5, 2022), https://www.npr.org/2022/04/05/1090992292/the-u-s-insists-that-russia-should-be-held-accountable-for-war-crimes?t=1655393068640 (last viewed June 16, 2022).
[141] Beth van Schaack, War Crimes and Accountability in Ukraine (June 15, 2022), https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine (last viewed June 16, 2022).
[142] US Department of State, The European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group (ACA) for Ukraine (May 25, 2022), https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/ (last viewed June 16, 2022).
[143] Id.
[144] Id.

of Vladimir Putin.[145] The resolution was sponsored by Senator Lindsey Graham, a self-described 'conservative problem-solver'.[146] In the weeks following the vote, Graham proclaimed that Putin had 'rehabilitate[d] the ICC in the eyes of the Republican party and the American people.'[147] This is an important development as American conservatives have traditionally rejected the ICC as an impermissible intrusion on American sovereignty. Former Republican Senator Jesse Helms, one of the early architects of conservative opposition to the Court, once commented during a sub-committee hearing of the Senate Committee on Foreign Relations that the ICC represents a threat to the national interests of the United States and that the country should actively oppose the ICC ever coming into being.[148] During the same meeting, another conservative, Senator Rod Grams, referred to the Court as 'a monster' that needed to be slain.[149] These views reflect the thinking of many American conservatives about the ICC, and the criticisms levelled against the Court during the Bush and Trump Administrations were largely an espousal of that long-standing position. For a self-described conservative to sponsor a resolution supporting the ICC, as Senator Graham did, indicates the severity with which the situation in Ukraine is being viewed in Washington and a willingness amongst conservatives to engage with an entity that they had traditionally shunned.

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[145] A resolution expressing the sense of the Senate condemning the Russian Federation, President Vladimir Putin, members of the Russian Security Council, the Russian Armed Forces, and Russian military commanders for committing atrocities, including alleged war crimes, against the people of Ukraine and others, S.R. 546, 117th Cong. (March 15, 2022).

[146] Biography, US Senator Lindsey Graham, https://www.lgraham.senate.gov/public/index.cfm/biography, (last viewed June 16, 2022).

[147] Charlie Savage, 'U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities' (New York Times, April 11, 2022), https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html (last viewed June 27, 2022).

[148] United States Senate, Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations (July 23, 1998), at 6, https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf (last viewed June 16, 2022).

[149] Id. at 4.

The House of Representatives has also shown an interest in supporting investigations into war crimes committed in Ukraine. Several weeks after the Senate Resolution was passed, the House passed its own bill with bilateral support, directing the President to report on efforts the United States was making to collect, analyze and preserve evidence of Russian crimes committed in Ukraine for use in any future domestic, foreign or international proceedings.[150] While the Bill does not refer directly to the International Criminal Court, one of the bills' co-sponsors, Representative Ilhan Omar stated in a Press Release that the Bill would help support proceedings at the ICC.[151] Representative Omar is a long-standing supporter of the ICC, having introduced a resolution in 2020 encouraging the United States to ratify the Rome Statute.[152] She followed that up by introducing additional legislation in April 2022, once again calling on the United States to join the ICC and to repeal the ASPA.[153]

Clearly, the current mood in the United States is in favor of greater cooperation with the ICC. For the time-being, the Court is being viewed as a tool that can be used to punish Russian officials, including President Putin, for their perceived misdeeds in Ukraine. While there is no consensus as to what form that cooperation might take, it has been suggested in some quarters that the United States should join the ICC so that the US might play a greater role in the accountability efforts being made in the context of Ukraine. The problem with this

[150] Ukraine Invasion War Crimes Deterrence and Accountability Act, HR 7276, 117th Congress (April 6, 2022).
[151] Ilhan Omar, Press Release (April 5, 2022), https://omar.house.gov/media/press-releases/rep-omar-statement-ukraine-war-crime-deterrence-and-accountability-act (last viewed June 16, 2022).
[152] Expressing the sense of the House of Representatives that the United States should ratify the Rome Statute and join the International Criminal Court, H.R. 855, 116th Cong. (February 12, 2000).
[153] Expressing the sense of the House of Representatives that the United States should accede to the Rome Statute and become a full member of the International Criminal Court, H.R. 1058, 117th Cong. (April 14, 2022); *see also* Repeal Hague Invasion Act, H.R. 7523, 117th Cong. (April 14, 2022).

suggestion is that it does not propose how to address the United States' long-standing objections to Article 12(2) of the Rome Statute.

The United States' jurisdictional disagreement with the ICC remains intractable as the United States' position on Article 12 is in direct opposition to the plain text of the Rome Statute. Resolving this matter would require one of three things to happen: the United States accepts the jurisdiction of the Court as currently formulated; the Statute is amended to conform with the American position; or Article 12 is given a meaning not supported by its text. None of these three things seem are likely in the current climate. The United States has maintained the same position for twenty years and has offered no indication to suggest it is likely to change. Amendments to the Statute have been rare, and those that were made tended to increase, rather than decrease, the court's jurisdiction over certain types of crime.[154] Amending or interpreting the Statute in-line with the American position would result in changing the fundamental meaning of it so that a states' non-membership in the ICC would shield its citizens from ICC prosecution. Constructing the Statute in that way could disincentive states from joining, or remaining members of, the Court. If accepted, this approach would increase impunity, decrease the ICC's membership, and undermine the Court's very *raison d'être*. Therefore, other options must be pursued if the ICC and the United States are to find sufficient common ground to enable the United States to become a member of the Court.

B Understanding the Purpose of the ICC

Much of the United States' opposition to the ICC relates to what it understands the purpose of the Court to be. The ICC was founded on the principle of ending impunity for

[154] *See* ICC Assembly of States Parties, Resolution RC/Res.6 (June 11, 2010) Doc. No. RC/11; ICC Assembly of States Parties, Resolution ICC-ASP/16/Res.4 (December 14, 2017) Doc. No. ICC-ASP/16/20; ICC Assembly of States Parties, Resolution ICC-ASP/18/Res.5 (December 6, 2019) Doc. No. R5-E-270820.

individuals committing war crimes, crimes against humanity, genocide and the crime of aggression regardless of their official position or national affiliation.[155] The principle of ending impunity can be found in the Preamble to the Rome Statute which states that the states parties to the ICC are determined to end impunity for the perpetrators of unimaginable atrocities that deeply shock the conscience of humanity and threaten the peace, security and well-being of the world.[156] The Statute further elaborates on its purpose in Articles 1 and 5, which indicate that the ICC has the power to exercise its jurisdiction over individuals accused of having committed 'the most serious crimes of international concern' as set out in the Statute.[157] The only statutory limitations on the Court's jurisdiction are that the crimes alleged must have occurred after the Statute came into force, that they took place either on the territory of a state party or state accepting the jurisdiction of the Court or the person accused of the crimes are a national of a state party or a state accepting the Court's jurisdiction, and no other court with jurisdiction over the matter is investigating or prosecuting the matter.[158] From the ICC's perspective, it can achieve its purpose by investigating and prosecuting individuals thought to have committed the types of crimes over which it has jurisdiction without limit as to the context in which the crime was committed.

This differs from what the United States understands the purpose of the Court to be. Officials representing several different presidential administrations have espoused the position that American troops should not be subject to ICC investigation or prosecution. David Scheffer best exemplified this perspective in a statement made the week after the Rome Statute was agreed, in which he called it 'untenable' for a US soldier to have to face accusations of war

[155] *See* ICC Statute *supra* note 14 at Preamble and Article 27.
[156] Id. at Preamble.
[157] Id. at Article 1 and Article 5.
[158] Id. at Article 11, Article 12 and Article 17.

crimes committed when fighting to halt a genocide.[159] This position was reiterated by the Bush Administration, when it indicated that American troops should be protected from ICC prosecution due to their 'unique role and responsibility to help preserve international peace and security.'[160] A second Bush Administration official later asserted that it was not the purpose of the ICC to subject US peacekeepers on UN-sanctioned missions to the jurisdiction of the Court.[161] The Trump Administration implicitly made a similar point, when Attorney-General Mike Pompeo said, 'the United States has consistently sought to uphold good and punish evil' and that it did not intend to let the threat of ICC prosecution prevent it from doing so.[162] The common thread running between these statements is the apparent concern that American soldiers could be held criminally responsible for crimes committed during peacekeeping missions or when acting to halt or otherwise respond to the atrocity crimes of others.

All of these statements, to varying or lesser degrees, advance the idea that the ICC's purpose is limited and that some atrocity crimes are justified and should be excused. This contradicts the ICC's stated purpose of ending impunity which does not, on its face, seem to accommodate the limitations suggested by the United States. Settling this dispute, and identifying a constructive way forward for the relationship between the United States and the ICC, necessitates an inquiry into the *travaux preparatoires* of the Rome Statute to determine whether there is any basis for the United States' position. This will focus on three different textual issues that could provide the support necessary for the United States' position. They

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[159] David Scheffer, 'Statement Before the Congressional Human Rights Caucus (September 15, 2000), https://1997-2001.state.gov/policy_remarks/2000/000915_scheffer_hrcaucus.html (last viewed June 27, 2022).
[160] *See* Grossman *supra* note 13.
[161] John Negroponte, Statement in the UN Security Council (July 10, 2002), https://2001-2009.state.gov/p/io/rls/rm/2002/11756.htm, (last visited June 27, 2022).
[162] Michael Pompeo, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (September 2, 2020), https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html (last visited June 27, 2022).

are whether: 1) the purpose of the ICC is to only prosecute and punish aggressive crimes; 2) the gravity requirement found in Article 17 of the Rome Statute prevents prosecution for defensive atrocity crimes; or 3) certain defenses can limit criminal responsibility for defensive crimes.

1. THE OVERARCHING PURPOSE OF THE ICC

Little evidence exists in the *travaux preparatoires* to the Rome Statute to suggest that the ICC was designed to only punish aggressive forms of criminal behavior. The United Nations' efforts to establish an international criminal court began in earnest in 1947 when the UN General Assembly passed a Resolution creating the International Law Commission ('ILC').[163] The ILC was initially assigned two tasks: 1) to formulate the Nürnberg Principles of international law; and 2) prepare a draft code of offences against the peace and security of mankind.[164] Soon after, the General Assembly passed a resolution establishing the Committee on International Criminal Jurisdiction (hereinafter "CICJ").[165] The CICJ was charged with preparing proposals and a preliminary draft conventions for the establishment of an international criminal court.[166]

The first drafts of the ILC's code of offences against the peace and security of mankind and the CICJ's statute for an international criminal court were presented in 1951.[167] The ILC's

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[163] UN General Assembly, Resolution 174(II) (November 21, 1947) OFFICIAL RECORDS OF THE SECOND SESSION OF THE GENERAL ASSEMBLY, 1947: RESOLUTIONS (United Nations 1948), at 105; *see also* UN General Assembly, Resolution 177(II) (November 21, 1947) *OFFICIAL RECORDS OF THE SECOND SESSION OF THE GENERAL ASSEMBLY, 1947: RESOLUTIONS* (United Nations 1948), at 111.

[164] Id. The International Law Commission used the German spelling of Nürnberg rather than the anglicized spelling of Nuremberg. The principles authored by the ILC will be referred to in this article as the Nürnberg Principles as that was their official name. Nuremberg will be used in all other instances in this article.

[165] UN General Assembly, Resolution 489(V) (December 12, 1950) UNITED NATIONS RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY DURING THE PERIOD 19 SEPTEMBER TO 15 DECEMBER 1950 (United Nations 1951), at 77.

[166] Id. at 78.

[167] International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1951, VOL II (United Nations

draft code outlines what constitutes a crime against peace and security and does not contain a blanket exemption from prosecution for individuals accused of committing atrocity crimes in response to crimes being committed by others.[168] Instead, it focuses on identifying the sorts of behavior that does constitute international criminality. For example, the article on war crimes simply states that "acts in violation of the laws or customs of war" constitute a crime.[169] It is not qualified in a way that excludes any group from prosecution, making clear that anyone committing a war crime can be held liable for their actions. The CICJ's draft statute takes a similar approach. It indicates that the purpose of the proposed permanent international criminal court is to "try persons accused of crimes under international law" as identified in treaty law or by agreement amongst the parties to the Statute.[170] The ability of the prospective court to act is in no way limited to suspects thought to have committed aggressive criminal acts.

The approaches taken by the ILC and the CICJ are consistent with the Nürnberg Principles identified by the ILC in 1950. The purpose of the Nürnberg Principles was to determine what principles of international law were established in the Charter and Judgment of the Nuremberg Tribunal.[171] Principle 1 unequivocally states that 'any person who commits an act which constitutes a crime under international law is responsible therefor (sic) and liable for punishment.'[172] The commentary appended to the principles recognizes that Principle 1 draws from the text of Article 6 of the Nuremberg Charter.[173] Although Article 6 specifically

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1951), at 133; *see also* Committee on International Criminal Jurisdiction, REPORT OF THE COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION ON ITS SESSION HELD FROM 1 TO 31 AUGUST 1951 (United Nations 1952), at 21.

[168] *See* International Law Commission *supra* note 167 at 135.

[169] Id.

[170] Committee on International Criminal Jurisdiction, Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951 (United Nations 1952) 21.

[171] UN General Assembly, Resolution 177(II) (November 21, 1947) OFFICIAL RECORDS OF THE SECOND SESSION OF THE GENERAL ASSEMBLY, 1947: RESOLUTIONS (United Nations 1948) 111.

[172] Principle 1, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1950, VOL II (United Nations 1950), at 174.

[173] Id.

limits criminality to people acting in the interests of the European Axis powers, the commentary explains that the principle has been expressed in general terms 'as a matter of course.'[174] The ILC felt it was appropriate to broaden the scope of the Article and expand it to include the criminality of all sides to a conflict so as to avoid the perception that trials like those held at Nuremberg were nothing more than victor's justice.[175]

The Americans' position on the purpose of the ICC may be rooted in this discrepancy between the Nürnberg Principles and the Charters of the Post-World War II Tribunals. Limiting the personal jurisdiction of those individuals who could be tried by the Nuremberg Tribunal to people acting in the interests of the European Axis countries meant that the Tribunal lacked the competence to try citizens of the Allied countries for any crimes they may have committed during the war.[176] Like the Nuremberg Charter, the Charter of the Tokyo Tribunal also contained on jurisdictional limit, albeit one worded in a somewhat confusing way. Article 1 of the Tokyo Charter states that the Tribunal was established for the purpose of trying and punishing "the major war criminals in the Far East."[177] The phrase "major war criminals in the Far East" can be understood in two ways. Broadly interpreted, it could refer to anyone alleged to have committed war crimes in the Pacific theatre of the war. When given a narrower meaning it may refer to individuals accused of war crimes who are nationals of a country located in the Far East. It would seem the latter reading is more likely the correct one when read in conjunction with other parts of the Charter, particularly Article 5 which states the Tribunal has

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[174] Id.

[175] International Law Commission, Report on the 43rd Meeting of the International Law Commission, *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1950: VOL 1* (United Nations 1950), at 22.

[176] Article 6, United Nations, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL – ANNEX TO THE AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS ("LONDON AGREEMENT"), AUGUST 8, 1945.

[177] Article 1, United Nations, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (1946).

the power to try and punish "Far Eastern war criminals".[178] Although the meaning of this term is not definitive, it lends itself to being understood to refer to people of Far Eastern origin. Perhaps even more persuasive is the fact that all of the accused at the Tokyo Tribunal were of Japanese dissent. While it may be possible that the Charter permitted the Tribunal to prosecute crimes committed by people from outside of the Far East, it was never used in that way. These distinctions about who could be tried by the Post-World War II Tribunals suggests a qualitative difference between crimes committed by the Axis countries and those committed by the Allied ones. Distinguishing the criminality of people acting on behalf of the Axis powers from those working to further Allied interests, and making only the Axis side subject to prosecution, suggests their crimes were of such severity that they require a legal response. It also absolves citizens of Allied countries of responsibility for crimes they may have committed during the war even where those crimes may have been aggressive in nature. As a result, it leads to conclusion that liability only lies with one side of the conflict as they were primarily responsible for the war. This understanding of post-conflict prosecutions aligns with the United States' interpretation of the ICC's purpose.

The practice of limiting who might be exposed to criminal prosecution was carried forward into the *ad hoc* tribunals set up for Rwanda and the former Yugoslavia. The International Criminal Tribunal for Rwanda avoided investigating and prosecuting crimes committed by members of the Tutsi ethnic group, and it also did not consider any possible criminality arising from the inaction of international peacekeeping forces during the genocide.[179] Prosecutions at the International Criminal Tribunal for the former Yugoslavia were similarly limited, as the Tribunal did not investigate crimes allegedly committed by

[178] Id. at Article 5.
[179] Megan A Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34(1) CAL. W. INT'L. L. J. 47, 57-8 (2003); Barrie Sander, DOING JUSTICE TO HISTORY: CONFRONTING THE PAST IN INTERNATIONAL CRIMINAL TRIALS (2021), at 265.

NATO or the role played by the Dutch government in the Srebrenica genocide.[180] This should come as no surprise as the United States was heavily involved in establishing both *ad hoc* Tribunals and generally approves of the idea that only certain parties should be subject to their jurisdiction. It logically follows that if the United States believed in limited accountability in the context of Nuremberg, Tokyo, and the *ad hoc* Tribunals, that it would also be interested in having the ICC pursue a similar approach.

The states negotiating the Rome Statute do not appear to have followed the lead of the international criminal courts and tribunals that preceded the ICC. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court began in Rome on June 15, 1998 ('the Rome Conference'). UN Secretary-General Kofi Annan opened the conference with a speech in which he indicated that people all over the world were interested in a court where anyone committing atrocity crimes could be held accountable regardless of their official position in the government or military.[181] These comments largely accorded with his earlier thoughts on the court, in which he expressed his desire for a court that would ensure no state, army, ruler or junta could commit human rights violations with impunity and which would provide a venue for all such crimes to be punished.[182] The Secretary-General clearly envisioned a court that would prosecute all types of human rights violations regardless of the reason they may have been committed. This viewpoint was further reinforced during the opening of the Rome Conference when its President, Giovanni Conso proclaimed that the

[180] Victor Peskin, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS (2008), at 33-4; Ronen Steinke, THE POLITICS OF INTERNATIONAL CRIMINAL JUSTICE: GERMAN PERSPECTIVES FROM NUREMBERG TO THE HAGUE (2012), at 16; Janine Natalya Clark, *The Limits of Retributive Justice*, 7(3) J. INT'L. CRIM. JUST. 463, 472 (2009).

[181] United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/13 (vol 2), at 61.

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

establishment of the ICC was important to ensure that justice would no longer be selective.[183] This too suggests that the purpose of the ICC is to try all crimes falling under its jurisdiction.

This opinion was shared by the leaders of some of the national delegations to the Rome Conference. Boris Frlec, the Slovenian representative, and Didier Opertti of Uruguay both suggested that the perpetrators of atrocity crimes must be brought to justice without qualification.[184] Along similar lines the Syrian representative, Mohammad Said Al Bunny believed that all individuals violating international law should be prosecuted.[185] Implicit in these statements is the idea that all perpetrators of atrocity crimes should be eligible for prosecution by the Court. By comparison, the Japanese representative, Hisashi Owada and Elena Zamifrescu of Romania took the position that prosecutions should be reserved for "the most heinous crimes", while other delegates spoke of prosecuting the most serious violations of international law.[186] These assertions suggest that the purpose of the ICC may be more limited and that the severity of the crimes alleged is important when determining whether the Court is authorized to act.

The latter viewpoints prioritizing the severity of crimes seems to align with the text of the Rome Statute. The Statute repeatedly refers to the idea that the Court's jurisdiction extends to "the most serious crimes of international concern" and that it has a responsibility to ensure that those crimes do not go unpunished.[187]

Two important and related questions arise from these statements and statutory provisions. First, is the severity of the crime being referenced in the sense that the crimes falling under the Statute are necessarily severe and therefore investigations and prosecutions are appropriate whenever such a crime is committed? Or are they suggesting that prosecutions

[183] *See* UN Diplomatic Conference *supra* note 181 at 63.
[184] Id. at 70.
[185] Id. at 83.
[186] Id. at 67, 76, 91.
[187] *See* ICC Statute *supra* note 14 at Preamble, Article 1 and Article 5.

should only take place when the statutory crimes are committed in a particularly severe manner? If it is the former, then the statements are of the same type as those made without qualification and simply reflect a desire to ensure that anyone who commits an atrocity crime can be subject to prosecution. However, if it is the latter, it could be offer support for the United States' position to the extent that crimes committed in response to other crimes are often less severe than the acts they are responding to. As a result, crimes committed during peacekeeping operations or in response to other crimes may not be sufficiently grave to warrant attention from the ICC. While there is no clear evidence in the Rome Statute to conclude that the ICC is only intended to prosecute international crimes resulting from aggressive behavior, the requirement that crimes may have to be particularly serious to be eligible for prosecution may bolster the United States' interpretation of the Court's purpose.

2. Gravity of the Crimes

The seriousness of alleged crimes may be an important consideration when determining which perpetrators should be prosecuted by the ICC. In the parlance of ICC's Statute, this is referred to as the gravity of the crime.[188] The notion of gravity was first introduced in 1994 in the draft statute for an international criminal court adopted by the ILC.[189] The draft statute references gravity briefly in Article 35, which states that the Court may decide not to proceed with a case if it is not of sufficient gravity to justify further action.[190] The commentary to Article 35 instructs that the gravity of a crime is to be determined by referencing the purposes of the draft statute as stated in the Preamble.[191] Unfortunately, the Preamble to the draft statute is not

[188] Id. at Article 53(1)(c) and Article 17(1)(d).
[189] International Law Commission, Draft Statute for an International Criminal Court, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1994: VOL II, PART 2 (United Nations 1997) 52.
[190] Id.
[191] Id.

particularly instructive in this regard. It simply indicates that the court's jurisdiction is limited to "the most serious crimes of interest to the international community as a whole."[192]

Instead, reference is necessary to Article 20 of the draft statute, which identifies the crimes over which the proposed court would have jurisdiction. They include: genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity and a catch-all provision encompassing treaty-based crimes of particular seriousness.[193] While the article itself is silent about gravity, the use of the adjective "serious" to modify the crimes of violating the laws of war and the catch-all provision relating to treaty-based crimes indicates that not all acts are of sufficient seriousness and that a severity threshold must be met before being eligible for investigation and prosecution. This is more explicitly reinforced in the commentary to Article 20, which indicates that not all war crimes are of sufficient gravity to be subject to the jurisdiction of the court.[194] Further, the term 'serious violations' was used intentionally to avoid confusion with the term 'grave breaches' as employed by the 1949 Geneva Conventions and the 1977 Additional Protocol thereto when describing contraventions of the laws of war.[195] The ILC wanted to make the point that the terms are not synonymous and pointed out that not all grave breaches are also serious violations.[196] The commentary does not, however contain an explanation of how to identify those violations that are sufficiently grave so as to warrant attention from the court.

The gravity requirement in Article 35 of the ILC's draft statute was retained in future drafts and was ultimately included in the ICC Statute itself. Article 17 of the ICC Statute contains a provision under which the Court can decide that a matter is inadmissible because it

[192] Id. at 27.
[193] Id at 38.
[194] Id at 39.
[195] Id.
[196] Id.

lacks sufficient gravity to justify further action.[197] There appears to have been little discussion about the gravity principle during the Rome Conference. The delegations that did address it mostly questioned the inclusion of the provision in the final statute, with the Chilean delegation suggesting that the term "gravity" was vague and in need of further explanation.[198] Despite these objections, the provision incorporated into the Statute is almost identical to the one first introduced by the ILC in 1994.[199]

The Rome Conference also failed to offer much clarity as to what threshold must be met to demonstrate that criminal behavior is sufficiently grave to fall under the jurisdiction of the ICC. Several delegates made reference during the conference to the need to establish responsibility for serious crimes threatening international peace or that are of the greatest concern to the international community.[200] This could be interpreted to mean that those two criteria should be the base line against which gravity should be judged and that criminality can only be investigated and prosecuted if at least one of them is met. Alternatively, other delegations took the position that the gravity of a crime relates to the circumstances surrounding its commission. Bill Richardson, the American Ambassador to the United Nations, spoke during the conference about the need for the ICC to focus on 'atrocities of significant magnitude'.[201] Similarly, Ljerka Hodak of Croatia insisted that the matters brought before the ICC must be of 'sufficient gravity and significance' so as not to burden the Court with 'minor

[197] *See* ICC Statute *supra* note 14 at Article 17(1)(d).
[198] *See* UN Diplomatic Conference *supra* note 181 at 215; *see also* United Nations: proposal regarding a single provision covering issues currently governed by articles 31 to 34, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/13 (vol 3) 27, fn 49.
[199] Id.; *see also* International Law Commission, Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission 1994: Vol II, part 2* (United Nations 1997), at 52.
[200] *See* UN Diplomatic Conference *supra* note 181 at 102, 196, 115.
[201] Id. at 95.

violations.'[202] This approach adds a contextual consideration to gravity missing from other interpretations of the gravity threshold.

Other delegations argued that the crimes contained in the Rome Statute were already of sufficient gravity which was signaled by the decision to include them in the Rome Statute. That reading of the gravity requirement was exemplified by the Moroccan representative, Moustafa Meddah, when he indicated that the Statute should only include crimes of extreme gravity, suggesting that all of the crimes included in the Statute met the gravity requirement of Article 17.[203] Didier Opertti from the Uruguayan delegation felt that at least two categories of crimes, genocide and war crimes, were of similar gravity, and left open the possibility that other types of crimes could also be grouped with them.[204] He also insisted that no international crime rising to that level of gravity should go unpunished.[205] Not all of the delegations agreed that a crime's inclusion in the Statute demonstrated the requisite gravity to warrant investigation and prosecution. Israel voted against the Statute because it felt that the war crime of an occupying state transferring its own citizens into occupied territory was not of sufficient gravity to warrant inclusion in the Statute.[206] This suggests that, at least from the perspective of some delegations, the crimes contained in the Statute are not of equal gravity.

This diversity of opinions from the delegates indicates that there was no consensus view at the Rome Conference about how or when the gravity threshold was meant to apply. However, the very existence of the threshold tends to signify that the severity of a particular crime is relevant. Different Pre-Trial Chambers have confirmed this and attempted to make sense of the gravity threshold. In the *Lubanga* case, Pre-Trial Chamber I considered the

[202] Id. at 94-95.
[203] Id. at 298.
[204] Id at 116.
[205] Id.
[206] Id. at 123.

meaning of the Article 17(1)(d) gravity threshold.[207] There, the Pre-Trial Chamber found that the gravity threshold found in Article 17(1)(d) is in addition to the inherent gravity of the crimes contained in the Statute, and that to meet that threshold requires a showing that the conduct under consideration is 'especially grave'.[208] To meet that standard, conduct must be either systematic or large-scale and due consideration needs to be given to the social alarm the behavior caused in the international community.[209] However, the inquiry does not end there. Pre-Trial Chamber I went on to explain that gravity considerations are not limited to the nature of the conduct but are also concerned with the identity of the person alleged to have engaged criminal behavior.[210] In particular, gravity requires that the person against whom charges may be brought is a senior leader in the situation under investigation and that they are most responsible for alleged criminality.[211]

Pre-Trial Chamber II followed a similar approach when considering whether crimes committed in the context of the *Situation in Kenya* were of sufficient gravity to warrant prosecution.[212] It found that all of the Rome Statute crimes are severe and the purpose of the gravity threshold is to prevent the ICC from pursuing matters that fall under the Statute but are peripheral to other matters.[213] As a result, gravity is to be assessed by considering whether the people who are likely to be the object of the investigation are most responsible for the crimes committed and through an evaluation of the context in which the crime was committed.[214] The context should be understood both quantitatively and qualitatively, which can include

[207] *Prosecutor v Lubanga* (Decision on the Prosecutor's Application for Arrest, Article 58) Doc. No. ICC-01/04-01/-06-8-Corr., PT Ch I (February 10, 2006).
[208] Id. at para. 45.
[209] Id. at para. 46.
[210] Id. at para. 50.
[211] Id. at para. 63.
[212] *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09, PT Ch II (March 31, 2010).
[213] Id. at para. 56.
[214] Id. at paras. 59-61.

aggravating factors like the scale of the crimes; the nature of their commission; the means by which they were committed; and their impact.[215]

The approaches to gravity taken by Pre-Trial Chambers I and II tend to support the United States' position that crimes committed by peacekeeping forces, or that are otherwise responsive to atrocity crimes, are not the International Criminal Court's intended focus. Those crimes can be seen as being peripheral to other crimes in the sense that they are not the dominant source of criminality but are meant as a response to that criminality. When considering the factors applied by the Court, it is entirely possible that responsive atrocity crimes may lack sufficient gravity rendering them appropriate for investigation or prosecution. That conclusion should not, however, lead to the assumption that individuals committing Rome Statute crimes for defensive purposes will necessarily avoid ICC scrutiny. Any future Chamber confronted with crimes of this nature must still consider the factors identified by Pre-Trial Chambers I and II before reaching a decision about whether a case will proceed leaving open the possibility that an individual committing responsive atrocity crimes will be held accountable for them.

3. Grounds for Excluding Responsibility

The idea of creating an international criminal court largely became moribund between the 1950s and the early 1980s. Interest in international criminal justice saw something of a revival in 1981, when the General Assembly invited the ILC to resume its work on the draft code of offences against the peace and security of mankind.[216] Doudou Thiam, a Senegalese lawyer and diplomat, was appointed Special Rapporteur to lead the project, and in 1983 he produced a report raising a number of issues for discussion about how to reform the existing

[215] Id. at para. 62; *see also* Margaret M deGuzman, SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW (2020), at 14-5.
[216] UNGA Res 26/106, GAOR 36th Session, Vol 1, at 239.

draft code.[217] Thiam's report touched on a wide-range of topics, including whether under international law responsive behavior like self-defense could be used as a basis to excuse otherwise criminal behavior.[218] The report did not reach a conclusion on the issue nor did it clarify whether it would extend to all of the forms of self-defense discussed in Article 51 of the UN Charter.[219] During the ensuing debate, some ILC members suggested that the draft code should contain a separate section addressing exceptions to criminal responsibility arising out of self-defense or actions taken pursuant to decisions made under Chapter VII of the UN Charter.[220] Thiam prepared a subsequent report in 1984 in which he revisited the issue of exculpatory pleas.[221] There, he explained that pleading self-defense or the defense of others would not relieve the accused of criminal responsibility but that it could mitigate their punishment should they be convicted.[222]

In 1991, the ILC provisionally adopted its draft code of offences against the peace and security of mankind. This version contained an article permitting trial courts to decide what defenses would be applicable during trial and how to take extenuating circumstances into account during sentencing.[223] The ILC intentionally chose to leave this provision vague as it was unable to find more specific wording about which there was any consensus amongst the Committee's members.[224] It left the possibility open that more specific wording would be

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[217] International Law Commission, First Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1983: VOL II, PART 1 (United Nations 1985), at 134.
[218] Ibid. at 147.
[219] Ibid.
[220] International Law Commission, Report of the International Law Commission on the Work of its Thirty-Fifth Session, UN Doc A/CN.4/L.369 (January 30, 1984) at 29.
[221] International Law Commission, Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1986: VOL II, PART 1 (United Nations 1988) at 70.
[222] Id. at 73.
[223] International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1991: VOL II, PART 2* (United Nations 1994), at 95.
[224] Id. at 100.

agreed as to what sort of defenses and extenuating circumstances might be relevant, although it again reiterated the need to consider criminal law concepts including: self-defense, necessity, *force majeure*, coercion and error.[225]

An effort was made to identify that more specific wording in the years leadings up to the Rome Conference. In 1995, the UN General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court to expedite the creation of a permanent international criminal court.[226] Through its Working Group on General Principles of Criminal Law, the Preparatory Committee explored a number of different ways to formulate the concepts of self-defense and the defense of others.[227] The Preparatory Committee was not able to reach a conclusion and it remained an open issue for the delegates at the Rome Conference to resolve.

Unlike the gravity provision, the clause on excluding criminal responsibility was a topic of significant discussion during the Rome Conference. This is highlighted by a note in the draft article on this topic that was transmitted by the Committee on to the Committee of the Whole. It indicated that the draft article "was the subject of extensive negotiations" and that the wording of it was the result of "quite delicate compromises."[228] The United States submitted a particularly contentious proposal during those discussions that was designed to expand the types of behavior for which criminal responsibility could be excluded.[229] In addition to the provisions on self-defense and the defense of others that appeared in earlier drafts of the

[225] Id.
[226] UNGA Res 50/46, UN Doc A/RES/50/46 (December 18, 1995) at 2.
[227] Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997 (December 18, 1997) Doc. No. A/AC.249/1997/L.9/Rev.1, at 16-17.
[228] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/13 (vol 3) at 256, fn. 69.
[229] United States of America: proposal regarding a single provision covering issues currently governed by articles 31 to 34, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/13 (vol 3) at 259.

Statute, the United States also proposed excluding the criminal responsibility of people serving as members of the armed forces whose actions were the result of a government or military order.[230] Under this proposal, a member of the military would be excluded from criminal responsibility, unless they knew the orders were unlawful or where the orders were manifestly unlawful.[231] Ultimately, the decision was made not to adopt this sweeping provision permitting the defense of superior orders. The delegates to the Rome Conference opted instead to include a more limited form of the defense of superior orders in Article 33 of the final statute.[232] While it contains some of the same limitations proposed by the United States, it is framed in negative terms forbidding the assertion of superior orders unless certain exceptions apply.[233] Self-defense and the defense of others were retained as defenses in the agreed Statute.[234]

Had the United States' proposal been adopted, it would have gone a long way toward creating the sort of exception from prosecution the United States continues to advocate for. That the delegates to the Rome Conference had the opportunity to incorporate an expansive principle of protecting military personnel acting under orders from prosecution, and chose not to, has the tendency of undermining the United States' argument that it is outside the ICC's purpose to prosecute members of the military who commit defensive atrocity crimes. This is further reinforced by the plain language of Article 31(1)(c). It states that an individual is not excluded from responsibility under the Statute solely by virtue of their involvement in a defensive operation at the time of their alleged criminality.[235] This clearly rejects the notion that ICC's purpose is limited to only prosecuting aggressively-committed atrocity crimes.

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[230] Id.
[231] Id.
[232] *See* ICC Statute *supra* note 14 at Article 33.
[233] Id.
[234] Id. at Article 31(1)(c).
[235] Id.

While it is apparent that the ICC's purpose may include prosecuting members of the military engaged in defensive operations, the existence of the defenses of self-defense and the defense of others could still shield them from responsibility in some circumstances. Self-defense and the defense of others are described in the Rome Statute as 'grounds for excluding criminal responsibility', the existence of which means that when either is adequately proven they protect the accused from being held accountable for their otherwise criminal acts.[236] These defences are established through the presentation of testamentary and documentary evidence proving three different elements: 1) the accused was protecting themselves or another (or property under certain circumstances); 2) from imminent and unlawful attack; and 3) the actions taken in defense were proportionate to the degree of danger threatened.[237] Whether that burden has been met is decided by the Chamber of the Court considering the matter, and that assessment can only be made during the confirmation of charges hearing or the trial itself.[238] That means a case must be initiated and proceed at least to the confirmation of charges hearing before criminal responsibility can be excluded on these grounds. This also shows that the the requirements of Article 31(1)(c) fall short of the total immunity from prosecution the United States has been advocating for.

4. Conclusion

The ICC's aim of ending impunity for all serious crimes of international concern is seemingly at odds with the United States' depiction of it as a Court only for 'would-be tyrants and mass murderers.'[239] The *travaux preparatoires* describes a court with jurisdiction over war crimes, crimes against humanity and genocide with the possibility of expanding its jurisdiction

[236] Id.; *see also* Kai Ambos, *Defences in International Criminal Law*, in Bartram S Brown (ed) RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW (2011), at 307.
[237] Id.
[238] *See* ICC Statute *supra* note 14 at Article 31(2); *see also* Rule 80 and Rule 121(9), ICC Rules of Procedure and Evidence (last amended 2013).
[239] *See* UN Diplomatic Conference *supra* note 181 at 95.

in the future to include crimes of aggression. No effort is made to rank those crimes or to suggest that any one is objectively more serious than the others. This leaves open the possibility of investigating and prosecuting anyone committing a Rome Statute crime. This undermines the American position that the ICC's purpose is to prosecute individuals associated with rogue regimes who commit aggressive criminal acts and not those people committing responsive atrocity crimes.

That being said, some support for the United States' position that the ICC's jurisdiction is limited to aggressive crimes can be found in the *travaux preparatoires* and the Statute itself. The gravity provision in Article 17(1)(d) demonstrates that the severity of the alleged criminal behavior must be considered before the Court can exercise jurisdiction over a matter. It can be argued that defensive crimes are inherently less severe than offensive ones and are therefore less likely to meet the gravity threshold. However, the crimes alleged must be evaluated against all of the gravity criteria and the fact that they may be defensive will not necessary mean that a prosecution will not result.

Article 31's provision on excluding liability could also support the position taken by the United States. It confirms that an accused acting in self-defense or the defense of others may be shielded from responsibility for their otherwise criminal acts. That being said, it does not prevent the Court from investigating and prosecuting them and it does not offer a member of the military protection from prosecution solely due to their involvement in a defensive operation. Determining whether someone acted in self-defense or the defense of others is a judicial one made during the trial or the confirmation of charges hearing. That means a proceeding must first be instituted before an accused can benefit from Article 31. This undermines the argument that the ICC's purpose is limited to only prosecuting atrocity crimes resulting from aggressive acts.

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

IV. Conclusion

Since its inception, the ICC has sought universal ratification of its Statute. In that context, significant emphasis has been placed on convincing the United States to join the Court. The United States has consistently resisted those calls, citing a host of concerns about the Court's Statute and the perceived dangers it poses to American citizens. Despite this longstanding opposition to ICC membership, it seems more likely now than at any time in recent history. The Russian invasion of Ukraine has seen American sentiment shift in favor of the ICC, manifesting itself in a somewhat sympathetic presidential administration and a measure of bilateral support from Congressional Republicans and Democrats. However, calls for American membership in the Court have largely failed to consider whether the ICC should want the United States as a member.

The United States' long-standing concerns about the Court would need to be resolved before it could be considered a viable member of the ICC. That leaves the Court with a choice if it wants to accomplish its stated goal of achieving universality. It can either change its mission to secure American membership by adopting mechanisms shielding some people from prosecution or stay the course and give up its hope for universal ratification. Were it to pursue the former it would likely receive greater political, intelligence and financial support from the United States, making it easier for the Court to conduct investigations and prosecutions. In exchange, it would almost certainly need to institute a policy exempting American citizens from prosecution in at least some situations. This could lead other states, particularly those that also regularly participate in peacekeeping efforts, to seek similar protections for their own citizens. That would result in the ICC developing a two-tiered jurisdictional structure under which individual criminal responsibility would depend as much on the citizenship of the accused as the circumstances surrounding their alleged criminality. The Court's other option is to continue on its present path and accept that the United States is not a good candidate for membership and that it should remain outside of the ICC structure. Should the Court follow that path it will maintain its integrity while also missing out on receiving additional support from the United States that could help it further its mission in other areas. Neither is a perfect solution, and whichever route the ICC chooses to take will keep its overarching goal of ending impunity stubbornly out of reach.