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Resolved: The United States should accede to the Rome Statute of the International Criminal Court.

Public Forum 2025 February Brief*

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1 Topic Analysis by Lawrence Zhou

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1.1 Introduction

I don't think we've ever had a moment where the current Lincoln-Douglas resolution (Resolved: The United States ought to become party to the United Nations Convention on the Law of the Sea and/or the Rome Statute of the International Criminal Court) is the exact same topic area as the current Public Forum topic.

Consequently, I expect prep to be pilfered from the LD wiki.[1] Some of this prep will likely be fairly good, some less so. The issue is that if you look through the wiki pages of the debaters that performed the best at the Blake[2] and Strake[3] tournaments, you'll notice that most of the debaters in outrounds were reading affirmative cases about the Law of the Sea or UNCLOS, while very few debaters were defending the Rome Statute.

I suspect a large part of this to be because the UNCLOS portion of the topic got to bigger impacts faster, namely those related to the South China Sea, but I also suspect this is in

[1] https://opencaselist.com/hsld24
[2] https://www.tabroom.com/index/tourn/results/bracket.mhtml?tourn_id=33300&result_id=361803
[3] https://www.tabroom.com/index/tourn/results/bracket.mhtml?tourn_id=33541&result_id=361755

part because of the more politically sensitive nature of the Rome Statute given that it has made headlines recently regarding the Israel Gaza war. In terms of debate strategy, the obvious issue is that the ICC portion of the topic links to more objections, such as inviting potential backlash from Russia and Israel.

Despite the fact that the Rome Statute part of the topic hasn't yet come to dominate the LD meta, I would keep my eye out on the wiki pages of LDers in case anything new gets broken.

Overall, I think this is a nice and timely topic that invites interesting discussions about international law and what role of international law ought to play in American foreign policy, particularly in one where Trump will likely do lasting damage to the liberal order.[4] The topic literature is perhaps a little slim, but I think more than adequate to sustain a month of debate.

1.2 Background

The International Criminal Court (ICC) is a permanent judicial institution based in The Hague created by the Rome Statute in 1998 and which commenced activities in 2002 following ratification.[5] Its mandate is to investigate, prosecute, and try individuals charged with genocide, war crimes, and crimes against humanity. The court has the authority to impose prison sentences on those found guilty of such offenses. The court consists of 18 judges that are each from a different country, are elected by the member states and serve 9-year, nonrenewable terms.

If you want, you're welcome to read through the whole Rome Statute, which can be found here.[6] In short, the Rome Statute sets out the Court's jurisdiction over genocide, crimes against humanity, war crimes and – as of an amendment in 2010 – the crime of aggression.[7]

There's a lot to know about the history of the ICC, but I will just highlight three things that could be relevant to the debate topic here and leave all the details for you to discover yourself.

First, the number of people indicted by the ICC is extremely small, numbering just 67,

[4] Trump's Antiliberal Order: How America First Undercuts America's Advantage
[5] International Criminal Court (ICC) | Definition, History, Purpose, & Facts | Britannica
[6] Rome Statute of the International Criminal Court
[7] Rome Statute of the International Criminal Court

which you can see at this Wikipedia page here.[8] Of those 67, only 32 cases have gone before the court. What explains why this number is so low? Well, the court does not have its own policing body, so it relies on countries who are party to the Rome Statute to make arrests and then extradite those who are arrested to the ICC detention center in The Hague.

This leads us to the second important fact, which is that even though there are 125 countries currently party to the Rome Statute—now that Ukraine has joined[9]—there are some glaring omissions from that list, including China, India, Israel, Russia, and the United States. It's hard to see how the ICC could be particularly effective if it lacks buy-in from many of the largest and most powerful countries in the world.

Third, the US' relationship with the ICC has been fraught to say the least. If you want a more detailed look at the history, I would go here,[10] as they have an excellent interactive timeline. But suffice to say, given that the US has a law that is often called the Hague Invasion Act,[11] it should give you a good idea of the less than stellar relationship that the US has with the ICC.

If there's anything else you want to know about the ICC, I would recommend reading the Council on Foreign Relations' backgrounder on the ICC here.[12]

While I think it might be useful to spend a little more time thinking about the history of the ICC, I don't think it's strictly necessary to effectively debate this topic, so let's go ahead and jump into the arguments!

1.3 Topic Thoughts

I have two major thoughts about the topic. First, the relevance of the Israel Gaza war makes the topic area quite sensitive.

While I could see the politically sensitive nature of the subject area being a problem for some more traditional or lay circuits, I do think it has the net positive effect of opening the topic up to more arguments. We'll discuss the issue of Israel Gaza more soon.

[8] List of people indicted in the International Criminal Court - Wikipedia
[9] ICC welcomes Ukraine as a new State Party | International Criminal Court
[10] The US-ICC Relationship | International Criminal Court Project
[11] US use of 'Hague Invasion Act' to threaten ICC sparks backlash – Middle East Monitor
[12] The Role of the ICC | Council on Foreign Relations

Second, I think many debaters are going to try to get to big impact scenarios, like constraining Russia in Ukraine or restraining Israel's actions in Gaza, without thinking more about the broader theoretical frames in which these arguments are situated.

In many ways, this topic is asking a broader question about the role of international law, and one's perspective on this will largely depend on how you approach international relations generally.

The Pro will generally draw from sources that take an approach more situated within a cosmopolitan or liberal internationalist perspective, while the Con will generally find sources that tend to align with a more realist perspective. For a fairly comprehensive introduction on these different schools of thought, I'd recommend *One World, Many Theories* as a great way to become acquainted with these approaches to IR.[13]

It's unnecessary to fully unpack each of these theories here, but it is important to understand some of the assumptions behind each. While cosmopolitan and liberal internationalist perspectives believe in the possibility of cooperation, realists tend to be more skeptical of whether genuine cooperation can exist in a largely anarchic international environment.

Unsurprisingly, defenders of the liberal international order,[14] or LIO, will extol the virtues of international law as an instrument for bringing about cooperation and peace, while realists will often suggest that abiding by principles of international law unnecessarily constrain the exercise of state power.

I think one thing that debaters can do to bolster the quality of their arguments is to ground their approach is a more principled way of viewing international relations. This can have cascading implications for many parts of the debate. For example, if debaters on the Con win that realism best explains state behavior, then that not only has implications for whether or not the US should bind itself to the authority of an external actor, but it also has implications for, say, whether or not Russia will continue to act aggressively, implicating other parts of the debate.

1.4 Pro Arguments

It's not difficult to see how the Pro might win in lay debates. The idea that genocide is bad is hardly a controversial one, and the US potentially has a moral obligation to pre-

[13] International Relations: One World, Many Theories
[14] Liberal international order - Wikipedia

vent genocide and other such crimes against humanity. Participation by the US would potentially increase the legitimacy of the ICC, cover a significant jurisdiction gap in the statue quo, and increase the amount of resources brought to bear in the fight against genocide.

Additionally, ratification would have the obvious benefit of improving US legitimacy as well. Currently, the US maintains a somewhat incoherent and hypocritical stance regarding war crimes, genocide, and other abuses of power. Opening up the US to being held accountable by an outside body that enjoys fairly widespread public legitimacy would bring about some improvements to the US' image. For example, the ICC backed off of investigating American actions in Afghanistan, even though America almost certainly committed war crimes there.[15]

I suspect that many debaters will want to run to fairly big-stick impacts. I will divide these up into more *structural impacts*, e.g., those appealing to more general impacts like supporting a rules-based order or soft power, and more *specific impacts*, e.g., those predicated on a specific scenario.

The structural impacts are fairly decent, and there are more than a few articles that argue that ratifying the Rome Statute helps shore up the US-led international order[16] or promote American soft power.[17] It's not hard to see why an America that proclaims to care about the rules-based order but fails to support the very institutions that enable it is an America that sabotages itself. As one article argues:

> If the US is truly committed to the rules-based international order, it should ratify the Rome Statute and join the International Criminal Court.
>
> 'Ukraine is fighting an existential war for all democracies'. Such were the words of Canadian Foreign Affairs Minister Mélanie Joly in May 2022 as she visited Ukraine to show her government's unwavering support for the country's self-defence against unprovoked aggression. But her words also implied that, should Ukraine fall, it could become the first of many democracies that will have to fight for their own right to exist.
>
> The institutional framework that has enabled communities to coexist in relative peace for the past seven decades is the so-called 'rules-based interna-

[15] The ICC's Flawed Afghan Investigation | Foreign Affairs
[16] It's Time for the United States to Join the ICC
[17] "Slay This Monster": the United States and Opposition to the Rome Statute on the International Criminal Court | Human Rights Review

> tional order', a concept that has been used as a battle cry for over a year by both Ukrainians and Western allies alike.
>
> The protection of the rules-based order (including its provisions on self-defence) is, thus, Ukraine's and the West's casus belli – their reason or motivation to fight. But is it a casual casus belli? If used only as a slogan devoid of any true commitment to the standards and principles making up such an order, it certainly sounds casual. Policymakers and the public must understand that they cannot have it both ways – invoking the rules-based order while remaining cynical about it. Rather, earnest commitment needs to be shown to the institutions that keep the system well-oiled and running, such as the UN and the International Criminal Court (ICC).[18]

In particular, that hypocrisy imperils the functioning of an other fairly effective and strong international institution in the ICC. As Scheffer writes:

> While I was negotiating the Rome Statute, other negotiators often would press me in sidebar discussions about perceived American hypocrisy and the peculiar American failure to commit. They would remind me that they re-opened the Convention on the Law of the Sea at President Ronald Reagan's insistence to revise the deep sea mining provisions. But once they met U.S. demands and ratified the treaty amendments, the United States never followed through with ratification of that critical treaty. And yet today our government relies heavily on the rights protected by that treaty, albeit claiming they are customary international law, to ensure U.S. commercial and military access on the seas. Our foreign friends are not pacified and are quite cynical. There is deep resentment that the United States intensively negotiates international treaties, signs many of them, and then often fails to follow through with ratification.
>
> The United States would begin to overcome the double-standards perception, which cripples our influence on so many fronts, including international criminal justice, if the U.S. Senate were to follow through on major treaties that the United States took the lead in negotiating and then often signed. These include the Convention on the Law of the Sea, Additional Protocols I and II of the 1949 Geneva Conventions, the Convention on the Rights of Persons with Disabilities, and, yes, the Rome Statute of the International Crim-

[18] Defending the Rules-Based Order: The US at a Crossroads | Royal United Services Institute

> inal Court. All but one of these treaties have been languishing for decades.
>
> For example, it has been 23 years since the United States signed the Rome Statute. Despite some flaws in its performance, the ICC has demonstrated its credibility, competence, fairness in protecting due process rights, reasoned jurisprudence, and a mixture of convictions and acquittals. It also is demonstrating every day its relevance in a highly dynamic and violent world. All of Europe and Latin America, most of Africa, the Caribbean and Central America, and a good number of Asian and Pacific nations are committed to a credible ICC.[19]

For more specific impacts, the obvious ones will concern Russia and Israel.

For Russia, there are many articles out there suggesting that joining the ICC would help hold Putin to account, even if he is never formally brought to court. As one article concludes:

> Putin may not have his day in court. For a trial to occur, Putin would need to be arrested and transferred to The Hague. Nonetheless, the charges against him hold important symbolic value. Even if Putin is never apprehended, he will live as a fugitive of the law and be a pariah on the world stage. By answering Putin's illegal conduct with a legal process, the international community is attempting to reaffirm its commitment to the rule of law and to distinguish itself from Putin, who so clearly despises it. To do that successfully, however, the United States must first recognize that the rules it applies to the world apply to itself, too.[20]

For example, one article (not necessarily in support of the ICC, but making the larger point) argues:

> It is unlikely that Putin, who is clearly the man most responsible for the war, will ever be placed in the dock, even if such a court is established. But the creation of a court is not simply about holding one person—or a few—personally accountable. Russia has challenged the fundamental principles for which the Allies fought in World War II and the very core of the modern international legal order they established in its aftermath. If those principles are to survive Russia's assault, the global community, working through the

[19] The United States Should Ratify the Rome Statute - Council on Foreign Relations
[20] It's Time for America to Join the International Criminal Court | Foreign Affairs

> institution created after the war to keep the peace, must act—together with Ukraine—to reinforce and reaffirm those principles. If it does so, there is a chance that the international legal order will emerge from this crisis stronger than ever.[21]

Stringing together a few of these articles should enable the Pro to make a fairly reasonable case about how joining the ICC might help end the war in Ukraine sooner rather than later.

For the Israel side of the topic, it is far more politically fraught, so I would suggest approaching it with caution. For context, in November 2024, the ICC issued arrest warrants for two senior members of Israel's government.[22] This prompted strong backlash from the US government.

Now, I think it's totally fine for the Pro to argue that arresting Netanyahu would have some effect of slowing down or ending the conflict in Gaza. The evidence for this is a little sparse, but it's certainly out there.[23]

Ultimately, I think that the Pro has a reasonable set of arguments at its disposal and can spend some time developing any of these positions into a winning one.

The Pro should also spend some time winning that the ICC has been and can continue to be effective,[24] and that many of the typical objections (e.g., that it targets American military personnel[25]) are false.

1.5 Con Arguments

There are some generic criticisms of the ICC that the Con can start with, which are detailed in the CFR backgrounder post here:

> Criticisms generally come from two directions. Some believe the court has too little authority, making it inefficient and ineffective at putting away war criminals. Others think it has too much prosecutorial power, threatening state sovereignty, and that it lacks sufficient due process and other checks

[21] A Crime in Search of a Court: How to Hold Russia Accountable
[22] International Criminal Court arrest warrants for Israeli leaders - Wikipedia
[23] Israel and the ICC: A legal scholar's response to The Washington Post | Opinions | Al Jazeera
[24] 20 years on, the International Criminal Court is doing more good than its critics claim
[25] Does the International Criminal Court Target the American Military? | American Political Science Review | Cambridge Core

> against political bias. There has also been debate about the qualifications of judges. Meanwhile, some worry that the prospect of international justice prolongs conflicts by dissuading war criminals from surrendering, though the research on that question is inconclusive. Even advocates of the court have admitted it has shortcomings. Additionally, some cases have raised thorny legal and moral questions, such as the culpability of former child soldiers who were pressed into service and themselves victimized.[26]

The Con can then apply some of these issues more specifically to the US, suggesting that it harms the US in some way.[27] John Bolton made this point forcefully in a 2018 speech:

> First, the International Criminal Court unacceptably threatens American sovereignty and U.S. national security interests. The prosecutor in – The prosecutor in The Hague1 claims essentially unfettered discretion to investigate, charge, and prosecute individuals, regardless of whether their countries have acceded to the Rome Statute.
>
> The court in no way derives these powers from any grant of consent by non-parties to the [Rome] Statute. Instead, the ICC is an unprecedented effort to vest power in a su[pra]national body without the consent of either nation-states or the individuals over which it purports to exert jurisdiction. It certainly has no consent what[soever] from the United States. As Americans, we fully understand that consent of the governed is a prerequisite to true legitimacy, and we reject such a flagrant violation of our national sovereignty.
>
> To make matters worse, the court's structure is contrary to fundamental American principles, including checks and balances on authority through the separation of powers. Our Founders believed that a division of authority among three separate branches of government would provide the maximum level of protection for individual liberty.[28]

The Con can then take this further and argue that this would harm American military interests. As what I'm sure will be an oft-cited article from The Heritage Foundation argues:

> Complications to Military Cooperation Between the U.S. and Its Allies. The

[26] The Role of the ICC | Council on Foreign Relations
[27] The Biden Administration Must Defend Americans Targeted by the International Criminal Court | The Heritage Foundation
[28] John Bolton Speech to the Federalist Society (text-video)

> treaty creates an obligation to hand over U.S. nationals to the court, regardless of U.S. objections, absent a competing obligation such as that created through an Article 98 agreement. The United States has a unique role and responsibility in preserving international peace and security. At any given time, U.S. forces are located in approximately 100 nations around the world, standing ready to defend the interests of the U.S. and its allies, engaging in peacekeeping and humanitarian operations, conducting military exercises, or protecting U.S. interests through military intervention. The worldwide extension of U.S. armed forces is internationally unique. The U.S. must ensure that its soldiers and government officials are not exposed to politically motivated investigations and prosecutions.[29]

The Con can also make backlash arguments, for example, suggesting that alienating Israel would be harmful,[30] or that it is harmful for the ICC to issue arrest warrants for heads of state:

> On Sept. 3, Russian President Vladimir Putin visited Mongolia—despite the country's obligation, as per its International Criminal Court (ICC) membership, to detain the leader given his outstanding arrest warrant. Although a chorus of Western voices called for Mongolian officials to detain Putin, the trip raises the recurring question of the efficacy and wisdom of issuing arrest warrants for heads of state or government. Such warrants risk colliding with the legitimate interests of states and their capacity to conduct foreign policy, at the same time eroding the principles that support accountability for national leaders.[31]

But ultimately, I think that the Con benefits greatly from a very strong set of defensive arguments to cut against many Pro arguments. Many Pro arguments sound good rhetorically, but they all lack warrants that demonstrate that ratifying the Rome Statute would be *sufficient* to solve any common impact. While most Pro evidence is good at establishing that acceding to the Rome Statute would improve the US' image or slightly improve the legitimacy of the ICC, none of it goes so far as to say that it would be enough to restore a fairly damaged liberal international order, to end the war in Ukraine, or even restore America's generally tarnished international reputation. And there is almost no way that the ICC will grow so much stronger even with the US on board since most

[29] The U.S. Should Not Join the International Criminal Court | The Heritage Foundation
[30] The U.S. Should Oppose ICC Attempts To Target Israeli Officials | The Heritage Foundation
[31] ICC Arrest Warrants for Heads of State Are Not Risk Free | Lawfare

of the perpetrators of horrible crimes against humanity are not themselves party to the ICC.

That being said, the Con certainly does find themselves in a slightly worse position because the quality and quantity of literature still favors the Pro, and the offensive arguments that the Con has access to are just a little worse than the ones that the Pro has. Debate 101 suggests that whichever side has the higher risk of offense is likely to win, and that still probably slightly favors the Pro on this topic.

1.6 Conclusion

While it's a little frustrating that much of the Con evidence on this topic is a bit outdated, I still think this is a fairly good topic that brings broader discussions about international law into conversation with ongoing events of geopolitical relevance. Good luck on this topic!

2 Topic Analysis by Spencer Burris-Brown

Spencer Burris-Brown is currently a student at the University of Minnesota. He competed in Public Forum for four years in high school, is in his third year coaching PF Bergen Debate Club, and has instructed at three VBI sessions. As a competitor, he placed in the top 20 at NSDA Nationals, got multiple bids to the Tournament of Champions, and made it as far as semifinals at the Minnesota State Tournament. Spencer has expertise in both technical and traditional/narrative-style debate. He is also a VBI alumni, having attended twice as a student.

2.1 Introduction

Hey y'all! I'm looking forward to hearing debates on this year's February topic, which reads

Resolved: The United States should accede to the Rome Statute of the International Criminal Court.

International law topics are always fascinating to me because they spark a fundamental question of what a country's responsibilities are to their own people versus to the rest of the world. A U.S. policy may benefit the world in general but have adverse effects domestically. In such a case, we're asked to delve into not just the implications of a policy but the question of *which* implications inherently matter the most. Answering this question isn't exclusively a matter of weighing one impact versus another; United States' responsibilities to American citizens and to the broader world order may conflict at times, as is potentially the case in this topic, and it's not always clear how these responsibilities should be prioritized. While I can't resolve that conflict for you, I can hopefully give you some context behind the resolution so that you can come to your own conclusions.

2.2 Background

The idea of the International Criminal Court (ICC) was first founded in the United Nations (UN) General Assembly in 1948 following the Nuremberg trials in which the victors of World War II prosecuted German officials for their transgressions.[1] UN member countries wanted a streamlined process for international prosecution of severe crimes such as those committed by the Nazis leading up to and amidst the war. While the Cold War forced the process of creating such an institution to grind to a halt, efforts were revived after the beginning of the Soviet Union's collapse in 1989; over the course of five years, the International Law Commission worked to draft provisions for the establishment of the ICC, which the General Assembly subsequently worked to revise in order to accommodate as many members countries' concerns and ideas as possible.[2] In 1998, member countries convened at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (a mouthful of a name that you definitely don't need to know), and after five weeks, finalized the Rome Statute which laid the foundation for the ICC's existence. The ICC was officially established in 2002 after the necessary threshold of sixty ratifying countries was surpassed.[3]

Initially, the ICC's jurisdiction only extended to three crimes: war crimes, which refer to crimes against militants in the context of a conflict such as torture or the use of child soldiers; crimes against humanity, which refer to crimes against civilian populations such as indiscriminant air strikes; and genocide, which generally refers to the targeting and violent persecution of a particular group of people by state actors.[4] The Rome Statute also included provisions for the addition of aggression as a fourth prosecutable offense, under the condition that signatory countries could agree on its specific definition — a stipulation met at last in 2010 — as well as provisions for the possibility of adding drug and terrorist crimes in the future, which has yet to occur.[5]

The ICC's track record was fairly underwhelming for the first decade or so after its establishment. It wasn't until 2012 that the ICC achieved its first conviction, finding Thomas Lubanga Dyilo of the Union of Congolese Patriots guilty of enlisting child soldiers and

[1] Sadat, Leila Nadya, April 16 2014. "The International Criminal Court: Past, Present and Future," Washington University in St. Louis Journal of Law & Policy, https://law.washu.edu/wp-content/uploads/2018/10/ICC-PastPresentFuture4-16-14.pdf

[2] Ibid.

[3] Joshi, Animesh, January 9 2021. "Roundtable #6 | The Promises and Problems of the International Criminal Court," Columbia Undergraduate Law Review, https://www.culawreview.org/roundtable-1/roundtable-discussion-the-promises-and-problems-of-the-international-criminal-court

[4] Sadat, 2014.

[5] Ibid.

later convicting several other Congolese leaders as well.[6] More recently, the ICC convicted both Putin and Netenyahu for their actions in Ukraine and Gaza, respectively, putting out arrest warrants for both. In the interim, the ICC also played a crucial role in the decline of the Lord's Resistance Movement in Uganda which helped put an end to a prolonged, deadly civil conflict.[7]

At this point you might be asking yourself, "where does the United States come into play in all of this?" The U.S. has long been at the forefront of international criminal justice efforts, from its leading role in the Nuremberg trials beginning in 1945 to the international tribunals in Yugoslavia and Rwanda established in the 1990s.[8] International and criminal law professor Claus Kreß corroborates:

> *In 1993, the United States, under the leadership of its Permanent Representative to the UN Madeleine Albright, decisively helped convince the world that, in view of the crimes under international law committed in the Balkans, the enforcement of international criminal law could not be left to the exclusive jurisdiction of the States directly involved, but required the establishment of an international criminal tribunal.*[9]

Similarly, the U.S. played a leading role in the negotiations that led to the creation of the ICC throughout the 1990s, and only backed out of ratification at the last second due to reservations surrounding the ability of the ICC to exercise jurisdiction over non-member parties — relatively unprecedented in international law — as well as the perception of disproportionate power allocated to the ICC prosecutor to unilaterally initiate cases.[10] Ultimately, Clinton signed the Rome Status to express the United States' support for the concept of the ICC but deferred ratification by the Senate until its concerns were resolved; seeing that changes weren't being made, Bush formally backed out of the ICC in 2002 and implemented policies such as the American Servicemembers' Protection Act in addition to bilateral "Article 98" agreements with a multitude of ICC member

[6] Joshi, 2021.

[7] Drake, Michael, 2019. "They Hate U.S. for Our War Crimes: An Argument for U.S. Ratification of the Rome Statute in Light of the Post-Human Rights Era," UIC Law Review, https://repository.law.uic.edu/cgi/viewcontent.cgi?article=2806&context=lawreview

[8] Kreß, Claus, May 7 2021. "A PLEA FOR TRUE U.S. LEADERSHIP IN INTERNATIONAL CRIMINAL JUSTICE," West Point Lieber Institute, https://lieber.westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/

[9] Kreß, 2021.

[10] Groves, Steven, and Schaefer, Brett, August 18 2009. "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court

states to protect U.S. nationals from the ICC's jurisdiction.[11] Since then, U.S. administrations have taken somewhat mixed approaches toward the ICC: Obama tried to enhance cooperation with the ICC but opposed the application of its jurisdiction to alleged war crimes committed by U.S. interrogators against enemy soldiers in Afghanistan; despite the non-member status of the U.S., the fact that the alleged crimes were committed in the territory of a member state theoretically authorized the ICC to pursue prosecution, which Obama contended was a gross jurisdictional overreach.[12] Following Obama, Trump took a much more antagonistic approach against the ICC, actively sanctioning ICC officials in order to prevent them from entering U.S. territory and investigating U.S. nationals, a move that Biden subsequently repealed after entering office.[13]

Despite differences in the specifics of various administrations' policies toward the ICC, the overall trend is that no president has embraced the application of ICC jurisdiction toward U.S. nationals' actions, asserting that this would undermine U.S. sovereignty and its role in maintaining peace across the globe. In contrast, critics of these policies contend that such a stance epitomizes American exceptionalism and that the U.S. has a moral and practical obligation to abide by the international human rights norms that it holds other countries to.

2.3 Defining the Resolution

To "accede to the Rome Statute of the International Criminal Court" would entail ratifying the Rome Statute and officially becoming a member of the International Criminal Court. The resolution would give the ICC jurisdiction to prosecute U.S. nationals for actions committed across the globe (not just in the territories of member countries). However, unless the U.S. explicitly authorizes investigations on the contrary, the ICC would only be able to pursue justice for actions taken following ratification, so it's unlikely that the resolution would have significant implications concerning past transgressions by U.S. nationals.[14] On one hand, extended ICC jurisdiction could constrain the actions

[11] McKenney, Sydney, May 17 2013. "The United States' Need to Ratify the Rome Statute," E-International Relations, https://www.e-ir.info/2013/05/17/the-united-states-need-to-ratify-the-rome-statute/#google_vignette

[12] Ibid.

[13] Scheffer, David, Winter 2023. "The United States Should Ratify the Rome Statute," Citizens for Global Solutions, https://globalsolutions.org/updates/mondial-journal/the-united-states-should-ratify-the-rome-statute/

[14] International Criminal Court, n.d. "Understanding the ICC," https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf

of U.S. service members carrying out military duties in non-member countries; on the other hand, it could provide the U.S. with additional flexibility to refer alleged crimes in foreign territories to the ICC rather than having then tried in local criminal justice systems which have the potential to be less objective and provide fewer due process protections.[15]

The ICC would also gain the ability to prosecute nationals of non-member parties for crimes committed in U.S. territory. Importantly, the ICC does not aim to override existing national justice systems but rather supplement them under the concept of complementarity, which posits that the ICC may only pursue individuals if the relevant governmental justice system is either unwilling or unable to investigate the crimes themselves. Law professor Michael Scharf adds,

> *At the insistence of the United States, the delegates at Rome added teeth to the concept of complementarity by providing in article 18 of the Court's Statute that the Prosecutor has to notify States with a prosecutive interest in a case of his/her intention to commence an investigation. If, within one month of notification, such a State informs the Court that it is investigating the matter, the Prosecutor must defer to the State's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham.*[16]

In addition, these crimes must be egregious and involve prior planning; the ICC cannot intervene in random acts of violence that do not explicitly violate the Charter of the UN.[17] The plethora of constraints on the ICC raise the fairly ambiguous question of to what extent ratification would tangibly apply to and affect the actions of the United States. The difficulty of enforcing ICC decisions contributes to this ambiguity, as enforcement relies on the voluntary cooperation of member countries and foreign governments may be hesitant to take action against the United States out of fear of upsetting the great power.[18] Given how plausible it is that affirming the resolution would have more symbolic than practical effects, I anticipate that moral or more abstract arguments will be more prevalent on this topic than they have been in other recent topics. Without

[15] Paust, Jordan J., 2013. "The U.S. and The ICC: No More Excuses," Washington University Global Studies Law Review, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1453&context=law_globalstudie

[16] Scharf, Michael, 2002. "The Case For Supporting the International Criminal Court," Washington University in St. Louis Journal of Law & Policy, https://law.washu.edu/wp-content/uploads/2018/10/The-Case-For-Supporting-the-International-Criminal-Court.pdf

[17] Paust, 2013.

[18] Collerton, Simon, January 9 2021. "Roundtable #6 | The Promises and Problems of the International Criminal Court," Columbia Undergraduate Law Review, https://www.culawreview.org/roundtable-1/roundtable-discussion-the-promises-and-problems-of-the-international-criminal-court

further ado, let's get into some of those arguments.

2.4 Affirmative Ground

2.4.1 Curbing U.S. Human Rights Violations

The first affirmative argument I'll be covering in this topic analysis concerns human rights violations committed by the U.S. It's no secret that the U.S. military has engaged in numerous actions in foreign countries of questionable legality. For example, the U.S. Senate Intelligence Committee found that the CIA covered up instances of illegal torture in Afghanistan.[19] While 11 soldiers have been sentenced for illegal actions in Afghanistan, only a few were sentenced for violence against civilians and none were the high-ranking officials that authorized such violence; similarly, no soldiers have been convicted for war crimes such as the violent torture of Afghani militants.[20]

There are two factors that have contributed to a lack of accountability for crimes committed by the U.S. military and overseeing officials, both of which potentially addressed by the resolution. First, U.S. federal law doesn't have provisions for prosecuting instances of genocide or crime against humanity, and only few provisions for prosecuting war crimes.[21] Thankfully, ratification of the Rome Statute incentivizes the U.S. to update its laws in order to afford it the ability to exercise jurisdiction over its own nationals and take advantage of complementarity rather than deferring to ICC jurisdiction.[22] Second, the U.S. does not want to admit to such crimes, fearing impacts to its reputation. Unfortunately for the U.S. — but fortunate for the international human rights regime — it may not have a choice but to own up to its actions once bound by its obligations under the Rome Statute. The ICC would gain greater jurisdiction to investigate and prosecute crimes committed by the U.S. military in the affirmative world, which may produce accountability for past transgressions as well as deter future ones.[23] One potential context this may apply to (although teams will have to do additional research into what constitutes a crime under the ICC's highly specific definitions) is the United States' cur-

[19] Human Rights Watch, September 2 2020. "Q&A: The International Criminal Court and the United States," https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states

[20] Drake, 2019.

[21] Paust, 2013.

[22] Scheffer, David, 2008. "Constitutionality of the Rome Statute of the International Criminal Court," Journal of Criminal Law and Criminology, https://www.ojp.gov/ncjrs/virtual-library/abstracts/constitutionality-rome-statute-international-criminal-court

[23] Scheffer, 2023.

rent military and financial support to regimes which themselves commit human rights violations.

2.4.2 U.S. Credibility

Another affirmative argument concerns U.S. credibility. The United States undoubtedly creates a double standard when it plays a leading role in creating international treaties that it expects the rest of the world to adhere to but doesn't themselves ratify them (the Rome Statute is not the only instance, concerningly).[24] The resulting impact to the United States' moral authority has tangible effects, for instance the U.S. lost its seat in the UN Human Rights Council in the early 2000s, with multiple countries voting against it citing its opposition to the ICC as a key justification.[25]

By eliminating this double standard — at least in one instance — affirming helps improve the United States' authority in the context of international institutions and efforts to promote human rights across the world.[26] In doing so, the U.S. can also set itself apart from Russia and China, countries that are also not members of the ICC with whom the U.S. competes for global influence.[27] The precise implications of enhanced U.S. credibility and authority will be up to teams to brainstorm, but I can assure you international law covers quite a few different bases so there will be no shortage of potential scenarios. Beyond the tangible benefits, however, the U.S. as the global hegemon at the very least has an ethical obligation to involve itself more directly in the fight for human rights to uphold the same norms it seeks to impose upon other countries — anything else would be blatant hypocrisy.[28]

2.4.3 ICC Legitimacy

The final affirmative argument I'll be covering in this topic analysis (I'm going to give my usual disclaimer that these are only a few of the handful of arguments I'd consider core to the affirmative position on this topic and it's up to you to discover the others) concerns the legitimacy of the ICC itself. One of the main critiques of the ICC is that it

[24] Scheffer, 2023.
[25] Scharf, 2002.
[26] Vindman, Yevgeny, April 11 2023. "It's Time for the United States to Join the ICC," Foreign Policy, https://foreignpolicy.com/2023/04/11/russia-putin-ukraine-war-icc-united-states-crimes-arrest-warrant/
[27] Kreß, 2021.
[28] McKenney, 2013.

allows countries who are not members to nonetheless exercise significant power over its proceedings. For example, one of the three pathways through which cases are referred to the ICC is by UN Security Council (UNSC) recommendation; as a permanent member of the UNSC, the U.S. has the power to veto a case referral and postpone ICC investigations, despite not being itself accountable to the ICC as a non-member.[29]

By acceding to the Rome Statute, the U.S. could undercut critiques of the ICC and improve the court's legitimacy, potentially preventing countries from leaving the ICC.[30] In addition, ratification could have spillover effects that put pressure on other countries to join, removing a primary excuse for non-membership (the United States' own refusal to participate).[31] Bolstering the legitimacy of the ICC could improve willingness to cooperate with ICC investigations, help further extend its jurisdiction, and incentivize increased financial support to the court.

If an affirmative team, through these various warrants, can prove that affirming the resolution would expand the ICC's operational capacity, there are a number of directions from there that teams can go to contextualize the impacts of a stronger ICC. From ending conflicts, to stopping human rights abuses, to deterring aggression in the first place, the ICC in theory has the ability to substantially contribute to global peace.

2.5 Negative Ground

2.5.1 U.S. Hegemony

Now for the negative arguments. To be entirely honest I was initially having some difficulty generating ideas for negative arguments because much of the literature opposing U.S. ratification of the Rome Statute relies on more abstract concepts such as "U.S. sovereignty" that can be difficult to contextualize. This should not read as "neg is bad on this topic," but rather that negative teams may need to get a bit creative in finding specific applications of the often-vague oppositions to the ICC.

One article, published by John Smith, an Adjunct Faculty in Intelligence Studies and Government and Public Service at the University of Arizona South, took a particularly

[29] Collerton, 2021.
[30] Barbarette, Emma, January 9 2021. "Roundtable #6 | The Promises and Problems of the International Criminal Court," Columbia Undergraduate Law Review, https://www.culawreview.org/roundtable-1/roundtable-discussion-the-promises-and-problems-of-the-international-criminal-court
[31] Drake, 2019.

interesting stance in arguing that joining the ICC would pose a threat to U.S. hegemony.[32] Underlying this threat are two key facts: first, that virtually any country can bring any case to the attention of the ICC prosecutor, and second, that many countries have issues with the United States given the nature of the role it has taken on as a global policing force. Based on who the prosecutor at the time is as well (taking into account potential biases) as well as how they interpret the definitions of crimes under the jurisdiction of the ICC, enemies of the United States and other countries with grievances against it could exploit this ability to target the U.S. with a flurry of accusations hoping one of them sticks. Such accusations could chill the willingness of U.S. officials to project power abroad, and if any of them stick, could seriously undermine U.S. credibility.[33]

Whether ICC prosecution of U.S. officials alone has the power to actually tilt the global balance of power will be more difficult for teams to prove, but at its core the reasoning behind the argument is fairly intuitive. Teams then have the ability to tie U.S. hegemony into a number of different impacts, ranging from authoritarianism and human rights, to conflict prevention and global power war, creating a lot of strategic flexibility.

2.5.2 Peacekeeping

Very similar to the hegemony argument, a slightly more focused version of the argument that the ICC could constrain the United States' operations abroad concerns peacekeeping. As Heritage Foundation research fellows Steven Groves and Brett Schaefer postulate,

> *U.S. forces are located in approximately 100 nations around the world, standing ready to defend the interests of the U.S. and its allies, engaging in peacekeeping and humanitarian operations, conducting military exercises, or protecting U.S. interests through military intervention. The worldwide extension of U.S. armed forces is internationally unique. The U.S. must ensure that its soldiers and government officials are not exposed to politically motivated investigations and prosecutions.*[34]

Both by prosecuting the U.S. for actions taken in other countries as well as deterring it from taking action in other countries in the first place, the ICC —after gaining additional jurisdiction over the U.S. following ratification — has the ability to seriously jeopardize

[32] Smith, John S., September 21 2023. "Sovereignty vs. Justice: U.S. Realism and the ICC Dilemma," International Journal of Political and Social Sciences, http://topjournals.org/index.php/IJPSS/article/view/717

[33] Smith, 2023.

[34] Groves & Schaefer, 2009.

these global peace efforts.[35] This argument relies on the notion that the ICC's alleged objectivity surrounding what constitutes a criminal act can be undermined by perverse political motives, as it will be very difficult for negative teams to justify the argument that the U.S. should get free rein to commit *actual* human rights violations. If this notion can be convincingly supported, however, this argument becomes very potent as peace-keeping forces have played an essential role in the mitigation of violence amidst, and even resolution of numerous conflicts.

2.5.3 Informal Imperialism

Last but not least is the negative argument concerning informal imperialism, which is underlied by the concept of selective prosecution where the ICC prosecutes certain countries — but not others — for the same crimes. Philosophy professor Thomas Christiano explains that there are two main reasons why the ICC exhibits a favoritism of sorts toward major, Western powers, turning a blind eye to their crimes while prosecuting Global South countries (often African ones) for similar actions:

> *It is dependent on financial support, intelligence gathering, and gathering of information in conflict zones by powerful states. It simply cannot investigate or prosecute crimes without this support. But states, members and non-members, offer support in accordance often with their own interests or the interests of allies. Hence, one cause of selective prosecution is that the prosecutor may have little or no hope of collecting the necessary evidence without the support of one of the major powers. And so it may choose not to investigate a case for that reason alone. A second reason is that one secures the good will of the major powers by not investigating their nationals or those of their allies and by only pursuing cases that the major supporters favor. This establishes a kind of inherent bias in the process of investigation that systematically explains the lack of proportionate equality in prosecution.*[36]

Such systematic inequality in prosecution is a form of informal imperialism, in which major powers — in place of formal military or political occupation — impose their wills on countries they perceive as lesser and in need of fixing. Not only is this practice by the ICC against the spirit of criminal justice and equality, but it causes tangible harm to countries in the Global South as the insertion of ICC authority into delicate conflicts

[35] Ibid.

[36] Christiano, Thomas, March 14 2015. "The Problem of Selective Prosecution and the Legitimacy of the ICC," https://www.law.berkeley.edu/files/TChristiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf

with little consideration for the nuances of the situation can disrupt negotiations and prolong conflicts.[37] In addition, selective prosecution undermines the credibility and authority of the ICC while emboldening the West to continue or ramp up human rights abuses.[38]

From a moral perspective, negative teams can argue that the U.S. signing onto the ICC would lend legitimacy to an inherently imperialist institution which is inherently wrong; from a more practical perspective, the participation of the U.S. in the ICC could increase the court's power while also enhancing its incentives to exhibit nepotistic biases toward major powers, exacerbating these issues. I'm particularly fond of this argument given the fact that it's grounded in important historical context surrounding colonialism / imperialism and has also been substantiated time and time again by the actions of the ICC, in contrast with other negative arguments which are by and large much more hypothetical.

[37] Ibid.
[38] Drake, 2019.

3 More Background by Nick Smith

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3.1 Introduction

Resolved: The United States should accede to the Rome Statute of the International Criminal Court.[1]

I was surprised to see OPTION 1 for the February PF topic given that LD January/February topic is "Resolved: The United States ought to become party to the United Nations Convention on the Law of the Sea and/or the Rome Statute of the International Criminal Court." I'm guessing that this was not intentional and is instead a product of one hand not talking to the other at the NSDA, which makes sense because the topic committees for the two events seem to be two separate entities. Regardless, this is a pretty classic debate topic with enough breadth to keep debates fresh, but not so much that it becomes unwieldy for a one-month topic. I will be covering background information including: the history of the Rome Statue, the operations of the International Criminal Court (ICC), and the US' stance.

[1] https://www.speechanddebate.org/topics/

3.2 Background

3.2.1 The Rome Statute

In the wake of World War II, the major Allied powers set up the first international war crime tribunals to prosecute and punish high level officials and military leaders of the European Axis for war crimes and other atrocities.[2] After that, the United Nations (UN) had set up ad hoc tribunals for Yugoslavia and Rwanda and in 1989 Trinidad and Tobago petitioned the UN create a permanent court to hold the perpetrators of the most serious crimes accountable.[3] The hope was to deter those who might otherwise commit heinous acts, promote international rule of law, and create legal avenues to get justice for victims of egregious acts.

The founding treaty was adopted in 1998 and, after more than sixty countries ratified it, the Rome Statue went into effect in 2002. Ukraine will soon become the 125th nation to accede to the Rome Statue. A number of major powers have not acceded to the Rome Statute, notably China, India, Israel, Russia and the US. Two former member states, Burundi and the Philippines, left following the ICC reviewing relevant potential crimes in the respective countries.

There are four crimes that the ICC is concerned with:

Genocide

> "First, the crime of **genocide** is characterised by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group."[4]

[2] https://history.state.gov/milestones/1945-1952/nuremberg
[3] https://www.cfr.org/backgrounder/role-icc
[4] https://www.icc-cpi.int/about/how-the-court-works

Crimes against humanity

"Second, the ICC can prosecute **crimes against humanity**, which are serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid and deportation."[5]

War crimes

"Third, **war crimes** which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes." [6]

Crimes of aggression

"Finally, the fourth crime falling within the ICC's jurisdiction is the **crime of aggression**. It is the use of armed force by a State against the sovereignty, integrity or independence of another State. The definition of this crime was adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010.

On 15 December 2017, the Assembly of States Parties adopted by consensus a resolution on the activation of the jurisdiction of the Court over the crime of aggression as of 17 July 2018."[7]

Nations fall into one of three categories: those that are party to the Rome Statute, states that have signed but not ratified it, and non-signatories. Nations that are a party to the Rome Statute fully accept the jurisdiction of the ICC. Nations that have signed but not ratified the Rome Statute are not bound by it, but customary international requires those who have signed to refrain from acts that would defeat the purpose of the treaty.

[5] Ibid.
[6] Ibid.
[7] Ibid.

Non-signatories are not bound by the treaty and are not subject to jurisdiction of the ICC unless specific conditions are met.

The ICC recently made the news for issuing arrest warrants for Israeli Prime Minister Netanyahu, former Israeli Defense Minister Gallant and Hamas commander Deif.[8] The ICC issued the warrants based on allegations of war crimes and crimes against humanity during the war between Israel and Hamas.[9] The ICC does not have a police force of its own but instead relies on member nations to enforce arrest warrants and summons it has issued. Israel is not a member of the ICC, but if the aforementioned individuals visit one of the member countries, they would be obligated to arrest them.

Similarly, a little over a year ago the ICC issued arrest warrants for Russian President Vladimir Putin and Russia's commissioner for children's rights Maria Lvova-Belova.[10] The warrants concern allegations of unlawful deportation of Ukrainian children to Russia. The arrest warrant cause Putin to have to video conference into the BRICS summit in South Africa[11] and he had to skip a G20 summit in Brazil.[12] Russia isn't a member of the ICC, but member countries are required to arrest Putin and Lvvova-Belova if they visit the member country.

3.2.2 Operations

The ICC is based in The Hague and is meant to compliment national courts for holding people accountable. The ICC is only supposed to act when the nation is unable or unwilling to try the case. Investigative work is done through the Office of the Prosecutor. There are eighteen judges. Each judge is from a different member country. They are elected by member states. There's also a requirement that there is representation of each five regions. Judges are elected for nine-year nonrenewable terms. There is a President and two Vice Presidents that are elected by the judges to handle administration of the court. [13]

The ICC only applies if the alleged crime(s) occur in a territory of a member nation, a non-party nation that has accepted the ICC's jurisdiction, or if the United Nations makes a referral. The court can open an investigation when: a member makes a referral,

[8] https://news.un.org/en/story/2024/11/1157406
[9] https://www.bbc.com/news/articles/cly2exvx944o
[10] https://www.bbc.com/news/world-europe-64992727
[11] https://www.cnn.com/2023/07/19/world/putin-brics-summit-south-africa-intl/index.html
[12] https://www.aljazeera.com/news/2023/8/29/putin-confirms-g20-absence-to-modi-congratulates-india-on-moon-landing
[13] https://www.cfr.org/backgrounder/role-icc

the UN Security Council makes a referral, or the Prosecutor can open an investigation *proprio motu*[14]. The Prosecutor must conclude that there is sufficient gravity to the allegations. Once that has been determined the ICC will send staff and investigators the gather evidence. If there is sufficient evidence an arrest warrant or summons must be approved by the judges. After the warrant or summons a pretrial judge will determine if the case should be brought to trial. If a case is being brought to trial the court will pay for outside council, if desired. Conviction and sentencing require two of three judges on the trial bench to approve. Those found guilty can appeal and there is a five-judge appellate bench.

3.2.3 US-ICC History

The Clinton administration initially supported the Rome Statue, but then opposed the final draft over concerns that the prosecutor would have unchecked power, which could subject Americans to politicized prosecutions. Later, Clinton authorized the signing of it, but did not send it to the Senate until US concerns were addressed. Bush formally withdrew the US' signature in 2002.[15] Additionally, Bush signed into law the American Service-Members' Protection Act, nicknamed The Hague Invasion Act, which, "Authorizes the President to use all means necessary (including the provision of legal assistance) to bring about the release of covered U.S. persons and covered allied persons held captive by, on behalf, or at the request of the Court."[16]

The Trump administration's stance was that the US will not cooperate and has threatened retaliation should the ICCC investigate the US or allies. The court considered investigation of US citizens for alleged crimes in Afghanistan, prompting the 2019 visa bans on ICC officials involved in said investigation. This led to an executive order in 2020, which authorized asset freezes and family entry bans of the ICC officials.[17] The Biden administration was initially more cooperative, lifting the Trump sanctions and visa restrictions, until the arrest warrants were issued for Israeli officials. The expectation is that the second Trump term will reimpose sanctions over the Israeli warrants, with incoming National Security Advisor Mike Waltz promising a "strong response"[18].

[14] https://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor
[15] https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states
[16] https://www.congress.gov/bill/107th-congress/senate-bill/1610
[17] https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states
[18] https://www.pbs.org/newshour/show/war-crimes-court-issues-warrants-for-netanyahu-and-former-israeli-defense-minister

The topic concerns if the US should accede to the ICC, which entails formally joining the ICC by becoming party to the Rome Statue. This would represent the US agreeing to the jurisdiction of the ICC and to assist in court's efforts to prosecute individuals accused of the most serious crimes.

4 Pro Evidence

4.0.1 ICC Legitimacy

The US's absence from the ICC upholds an "immunity interpretation" that harms ICC legitimacy.

Scheffer, 23 – former U.S. Ambassador at Large for War Crimes Issues; Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University

[David Scheffer, "The United States Should Ratify The Rome Statute," Lieber Institute West Point, 7-17-2023, https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/, accessed 1-12-2025; AD]

There is longstanding American policy that while the United States remains a non-party State to the Rome Statute, the ICC has no jurisdiction over U.S. nationals for actions undertaken even on the territory of a State Party of the Rome Statute. The same standard would apply to any other non-party State (like Russia) and its nationals acting on State Party territory (or territory of a non-party State—like Ukraine—that has fallen under the jurisdiction of the ICC voluntarily or because of a UN Security Council mandate). I term this the "immunity interpretation," which makes it difficult for the United States to fully embrace the ICC's investigations of Russian suspects for atrocity crimes (war crimes, crimes against humanity, genocide) committed in Ukraine.

The immunity interpretation reached its peak under the Trump Administration, with the threat and, in two cases, imposition of sanctions against key personnel of the ICC and foreigners. President Joe Biden repealed the executive order authorizing such sanctions on April 2, 2021, though Secretary of State Antony J. Blinken stated, "We maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel."

The immunity interpretation, however, is archaic, counter-productive, and largely rejected worldwide. I should know, as I presented the immunity interpretation before

the 1999 annual meeting of the American Society of International Law. While the position articulated some logical premises, it also defied the core principle of criminal law, which is territorial jurisdiction. It ignored the decision-making authority of a sovereign government when entering a treaty regime, including to confer criminal jurisdiction to an international court.

In December 2019, during a hearing on the Afghanistan situation before the ICC Appeals Chamber, I spoke as an amicus and publicly rejected the immunity interpretation, whatever its original merit, as an argument that has been overtaken by customary international law. I elaborated on the point in a May 2021 article.

After three decades of rapid development in international criminal law and in tribunal-building and jurisprudence to enforce the law, it is implausible that a non-party State can invade a State Party, commit atrocity crimes that fall within the jurisdiction of the Rome Statute, and essentially enjoy immunity for doing so. To do so rewards the non-party State with impunity while rendering meaningless the State Party's membership in the ICC. Professor Leila Sadat has persuasively countered the immunity interpretation by focusing on the conferral authority of governments in her forthcoming article in the Notre Dame Law Review.

In Washington, D.C., I have attended meetings recently where retired senior officials of the U.S. Government, particularly having held legal positions, have reversed their own positions and believe the United States should abandon the archaic immunity interpretation. Granted, the Russian invasion of Ukraine has proven to be an inflection point on the issue. At some stage the hypocrisy of the matter must be acknowledged. It simply is implausible to keep arguing the immunity interpretation with a straight face when the criminal assault against Ukraine and its people is so blatant, so widespread, so deadly, so destructive, and so persistent and while the U.S. Congress and the Biden Administration have evolved to support efforts, such as the ICC investigations, to hold Russian officials accountable under international criminal law.

The ICC's track record over the past 25 years merits US respect.

Scheffer, 23 – former U.S. Ambassador at Large for War Crimes Issues; Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University

[David Scheffer, "The United States Should Ratify The Rome Statute," Lieber Institute West Point, 7-17-2023, https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/, accessed 1-12-2025; AD]

I firmly believe that whatever the merits of the immunity interpretation 25 years ago, it has been overtaken by the march of customary international law combining both state practice and opinio juris, by judicial decisions, by persuasive scholarly work, by a renewed recognition of fundamental principles of criminal law and of sovereign decision-making, and frankly by common sense. Related to the immunity interpretation is the debate playing out in Washington over the implementation of ICC cooperation legislation that President Biden signed into law on December 29, 2022. Administration officials have delivered tortured testimony before Senate committees in recent months when confronted by Senators over the failure of the Administration to follow through on cooperation efforts with the ICC that are mandated by U.S. law regarding the Court's investigation of Russian atrocity crimes in Ukraine.

In a recent Senate Appropriations defense subcommittee hearing, Senators Lindsay Graham (R-SC) and Dick Durbin (D-IL) pressed Secretary of Defense Lloyd Austin on the Pentagon's resistance to the legal mandate. Austin said that he was concerned about the issue of reciprocity. Such views are old think and reflect the concern that someday the tables will be turned and the ICC will be investigating and prosecuting U.S. actions and that we would not want other governments to cooperate with the ICC in its investigative work. The cooperation train left the station decades ago. All of America's allies, with the exception of Israel and Turkey, are States Parties to the Rome Statute and are obligated to cooperate with ICC investigations.

But there is no comparison in modern times with what is transpiring in Ukraine. Ambassador-at-Large for Global Criminal Justice Beth Van Schaack answered Austin quite effectively when asked on the PBS NewsHour recently. She said, "I think there is virtually no equivalency or comparison to what Russia has done here to anything that might involve U.S. personnel or service members. We have a full-scale war of aggression being committed through the systematic and widespread commission of war crimes, crimes against humanity. There's no comparison here. And so I do not see a concern that this would set any sort of a precedent that might redound badly to the

United States."

Austin's statement also reflects a presumption that should be challenged. During the Clinton Administration, my instructions as the U.S. chief negotiator of the Rome Statute were based on the intent of building an international criminal court which the United States one day would join. The instructions were not to negotiate for six years to build a court that the United States would never join. When I signed the Rome Statute, the intent was to signal that the United States would remain on deck with the treaty and work towards one day joining the Court, not to stand in permanent opposition to it.

President Bill Clinton conceded in his signing statement that the treaty would not (during Clinton's remaining three weeks in office) and should not be submitted by his successor to the Senate until "fundamental concerns are satisfied," a primary one being to "observe and assess the functioning of the court." That opportunity to "observe and assess" began on July 1, 2002, when the ICC became operational following ratification of the Rome Statute by 60 nations. We have had 21 years to "observe and assess" and while there are some imperfections in the workings of the ICC, as there are with every legal system, the ICC's professionalism and track record merit Washington's respect.

In any event, U.S. policy towards the ICC today should not be premised on, structured, or implemented as if the United States intends to be a permanent non-party State. Such isolation was never the Clinton Administration's position and never reflected my negotiating instructions.

The immunity interpretation was not advanced by the United States in order to permanently keep the United States out of the ICC, but rather to explain its status and non-exposure to ICC jurisdiction until Washington ratified the treaty. Otherwise, why did we negotiate and sign the treaty?

Rationalizations for permanent non-party status may attract the support of those seeking that outcome, but such thinking defies all that was negotiated into the Rome Statute and its supplemental documents to protect U.S. interests, including due process protections, complementarity, Security Council backstop under Article 16, precise definitions of the crimes, judicial oversight of the Prosecutor's investigations, tough admissibility standards, high approval requirements for amendments, precise rules of procedure and evidence, comprehensive elements of crimes, and much more.

4.0.2 US Influence

Membership in the ICC expands US influence – it allows us to advance critical American values.

Scheffer, 23 – former U.S. Ambassador at Large for War Crimes Issues; Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University

[David Scheffer, "The United States Should Ratify The Rome Statute," Lieber Institute West Point, 7-17-2023, https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/, accessed 1-12-2025; AD]

If the United States were to become a State Party of the Rome Statute, the immunity interpretation would become irrelevant—a non-issue—for the United States even if Washington wished to argue its merits for Israel, Turkey, Pakistan, North Korea, China, Iran, Myanmar, Libya, Egypt, Russia, Belarus, India, Saudi Arabia, Indonesia, Cuba, and other non-party States.

Those who express concerns about "reciprocity" unfortunately convey an intimidated attitude about the ICC. Rather than be on the defensive about the ICC, the U.S. Government and particularly the Pentagon should take the offensive and recognize how the ICC in fact advances critical U.S. values, particularly against an aggressor State like Russia. The United States can weigh in and influence gravity requirements at the ICC and how the Prosecutor can best utilize his discretion, not to mention placing an American judge on the bench and perhaps one day greeting an American chief prosecutor. Washington can use its diplomatic clout to advance ICC investigative and prosecutorial objectives globally and in ways that are compatible with U.S. foreign policy and global security needs. The ICC should become part of this nation's lawfare strategy. In other words, Washington should weaponize the ICC for worthy objectives—such as justice in Ukraine and Darfur—that reflect critical American values rather than taking an anemic defensive posture towards the Court.

The Pentagon should embrace the duty of the law and when necessary justify the conduct of warfare to Congress, to the public, and even to the courts during the adjudication of relevant cases. A skeptical fear of being accused of atrocity crimes is a long way from the reality of credibly being investigated or prosecuted for such international crimes. The world has changed, and any presumption of the right to commit atrocity crimes, or to be shielded from accountability, is quite antiquated. If the U.S. military dared to plan and implement genocide, crimes against humanity, or serious war crimes anywhere in

the world, then such action would demand investigation and prosecution at home with enforcement of federal and military law.

Article 18 of the Rome Statute, which as a negotiator I proposed and largely drafted, is intended to give a country like the United States the opportunity to seize the reins of justice and hold onto them without interference by the ICC. We should take that option seriously if the need arises, but which actually should not arise because U.S. armed forces and indeed our civilian leadership should never be engaged in the planning and commission of atrocity crimes and certainly not of the magnitude that could trigger ICC jurisdiction. One has to think counter-intuitively to enter the world of ICC paranoia, namely that the United States must never become a State Party because it should be at liberty to act with permanent impunity as a non-party State or that the United States should be free to plan and commit atrocity crimes without consequence even if it were to become a State Party, so the Rome Statute should somehow permit that outcome.

What do we have to fear from the ICC? I would argue that scenarios of illegal American conduct overseas or at home should never come to pass, but if they did, then the response must be first and foremost the enforcement of U.S. law, be it federal criminal law or the Uniform Code of Military Justice, or both, and adherence to Congressional oversight. The United States could become a pillar of complementarity and leadership in the ICC if some in Washington were not so intimidated by fear of ICC scrutiny.

Lawmakers still have work to do on complementarity. For many years, Senator Durbin has advanced legislation to fill the gaps in federal criminal law for genocide, war crimes, and crimes against humanity. If the gaps can be filled, then the United States can demonstrate its capacity to investigate and prosecute the atrocity crimes found in the Rome Statute and thus, if addressed properly, avoid ICC scrutiny. This is the same goal shared by our allies, which are almost all States Parties to the Rome Statute, and many have amended their criminal codes accordingly.

Supporting the ICC can help bolster the US-led international order.

Vindman, 23 – former colonel in the U.S. Army JAG Corps who served as deputy legal advisor on the White House National Security Council from 2018 to 2020

[Yevgeny Vindman, "It's Time for the United States to Join the ICC," Foreign Policy, 4-11-2023, https://foreignpolicy.com/2023/04/11/russia-putin-ukraine-war-icc-united-states-crimes-arrest-warrant/, accessed 12-10-2024; AD]

Since World War II, the United States has helped build, reinforce, and lead an international order in which countries play by predictable rules. Conflicts, at least between major powers, are resolved through negotiation and consensus instead of force. This system of postwar institutions provides a bedrock of stability that has allowed for a climate of relative peace among global powers and economic prosperity for the American public.

Russia's aggression in Ukraine is the most serious attack on this system since at least the collapse of the Soviet Union and the greatest threat to peace on the European continent since World War II. As one of the guardrails put in place to maintain the rules-based international order, if the ICC's warrant is ignored, then the other remaining guardrails to prevent illegal warfare may erode, too. Inversely, abiding by international legal norms, including those enforced by the ICC, has the potential to walk back the damage Russia has already done to the rule of law. If the global community can put up a united front to hold Russia accountable for its crimes, other would-be aggressors—especially Russia's backers in Beijing—would take note.

Supporting institutions of justice and accountability—even those that could potentially hold the United States accountable—would be a much-needed investment in the long-term viability of the U.S.-led international system for generations to come.

As is the case of any international treaty, support for the ICC undoubtedly involves a certain sacrifice of sovereignty in pursuit of stability, deterrence, and peace. But even sharp criticisms and great concerns about joining the ICC should not dissuade the United States from entering into a treaty that will support the international rule of law.

The US loses leverage by staying out of the ICC.

Geoghegan, 22 – staff writer and contributing writer to The New Republic

[Thomas Geoghegan, "There's No Good Reason for the United States to Stay out of the International Criminal Court," New Republic, 5-9-2022, https://newrepublic.com/article/166300/international-criminal-court-ukraine-russia, accessed 1-12-2025; AD]

Now that the Biden administration has pledged to help the International Criminal Court, or ICC, in The Hague—"and other efforts"—to prosecute Putin and others for war crimes committed during the invasion of Ukraine, it makes even less sense for the United States not to join the court after decades spent ducking the responsibility. Let's face facts: After Ukraine, the ICC will be the only game in town. And like it or not, the U.S. has already been forced to build the court up, the perennial objections from the Pentagon that the ICC should not be permitted to have jurisdiction over U.S. military personnel notwithstanding.

It is a fantasy to believe that the ad hoc tribunals created by the U.N. Security Council—where Russia has a veto—are going to derail the ICC from its steadily growing preeminence in the judging of war crimes of the future. And while the claim that the ICC has no "jurisdiction" over nonsignatory countries may technically be a limit in the ICC's charter, that limitation was rendered impractical well before the Russian invasion. Russia is not a member either; while Ukraine may have technically accepted jurisdiction, the reality is that the ICC has, in its legal DNA, the ability and the responsibility to act globally—especially against monsters who do not accept its jurisdiction. There is no future for the U.S. in trying to stand apart from the ICC. And we will be far better able to protect our legitimate national security interests by being inside, and not outside, the court.

Let's start with what we get out of participating in the ICC. Just as we did at Nuremberg in 1945, we will have a hand in defining what is or is not a war crime, what is or is not genocide, and what is or is not a crime against humanity. We will participate in the judging, and inside the ICC, we will be primus inter pares—first among equals—at least in the bloc of ICC members who are our NATO allies and who are beholden to us for their own security. Why would we stay out, give up that leadership role, and let other countries take the lead in defining the legal standards that will apply to us? Aside from setting the standards, it is additionally important for the U.S. to have some say about who should be prosecuted under these standards. We can continue to cheer from the sidelines if we wish. But there is no internal institutional reason why Ukraine, our

NATO allies, or less friendly countries should take any heed from us as to whether it makes sense to prosecute Putin.

And it is not just that the U.S. loses this power by staying out. It has erected a law that is designed to alienate or poison our relationship to anyone who is a lawyer, civil servant, or part of whatever permanent bureaucracy, formal or informal, constitutes the European Union. That's because of the spectacularly ill-advised American Servicemember Protection Act, or ASPA, one of the more stupid and self-defeating laws ever enacted by Congress. Under the ASPA, should the ICC detain or take custody of any American service member or "U.S. person"—which is defined to cover just about anyone helping us—the president has authority to use any means necessary, other than bribery, to obtain that "U.S. person's" release. In other words, the president can conduct a special military operation, the term Putin used for the initial invasion of Ukraine.

The notion is utterly ridiculous. Consider that Article 5 of the 1949 NATO Treaty—invoked only once, after the 9/11 attacks—would have to be invoked again if the U.S. carried out a military assault upon The Hague, located within the territory of a NATO country. Not only would our NATO allies be required to attack the U.S., the U.S. would be required … to attack itself. Nonsense it may be, but it is hardly lost on those connected with the ICC that each and everyone is potentially under a shoot to kill order, enacted without a sunset clause, by the same U.S. that is providing assistance to build up the ICC into a preeminent global institution.

Joining the ICC is important to overcome suspicions of the US and exert global leadership to counter Russia.

Geoghegan, 22 – staff writer and contributing writer to The New Republic

[Thomas Geoghegan, "There's No Good Reason for the United States to Stay out of the International Criminal Court," New Republic, 5-9-2022, https://newrepublic.com/article/166300/international-criminal-court-ukraine-russia, accessed 1-12-2025; AD]

For the heretofore reluctant Pentagon, membership in the ICC may offer a boon: It should increase the capacity of military leadership to command and control the lower ranks. It will increase the importance of the military courts in which Senator Lindsey Graham used to practice. The worst thing for both the military and the delicate military missions it is likely to conduct in the future is to bear any resemblance to the anarchic insubordination of the Russian army in Ukraine. We need to incorporate military justice into military missions in an age when global standards are here to stay. Remaining outside the ICC weakens our ability, as well as NATO's, to overcome suspicion of the U.S. on those occasions when winning the cooperation of civilians is crucial. Staying out of the ICC will always be a stain on our military—a mark of Cain on them in any country where American soldiers may find themselves serving.

But regardless of whether joining the ICC will have an effect on military discipline or on amplifying the standards of the U.S. military to a level beyond Russia's or China's reputation, we have a vital interest in being part of a court whose territory is the NATO heartland. We are the West—and it is in our long-run interest to be the West. The ICC exists as the bearer of values that historically came out of Europe's civil wars. What is the interest of leaving our NATO allies and other countries to develop the legal standards that will inevitably be applied to us?

There is a moral issue that has become sharper since the invasion of Ukraine. So far, the U.S. has had a very good war. Without risking a single life, or losing a single soldier, the U.S. has achieved a remarkable strategic objective: the degrading of the capability of the Russian military. We have had to sit back and write checks—checks that are not even that dear, compared to what's at stake in this war. For all the human sacrifice the Ukrainian people have made for us, for all that they have served our own interest, the U.S. owes an enormous debt: a debt that money can never repay. Should the outcome of this war permit it, we owe them a new world order. A Nuremberg for our century, wrought through joining the only institution through which it can happen. It would be a lasting stain upon our country not to join the ICC.

4.0.3 US Accountability

Lack of ICC punishment enables the US to commit war crimes and undermine international law.

Nouri, 22 – B.A. in Economics and Political Science from Columbia University

[Selma Nouri, "Double Standards in International Law: Did the U.S. Get Away with War Crimes in Afghanistan?," Columbia Undergraduate Law Review, 6-16-2022, https://www.culawreview.org/journal/double-standards-in-international-law-did-the-us-get-away-with-war-crimes-in-afghanistan, accessed 1-12-2025; AD]

Following the withdrawal of U.S. troops from Afghanistan, a substantial portion of media coverage and political debate focused on the glaring economic costs of the war. After nearly 20 years of military involvement, the United States is estimated to have spent over two trillion dollars in the region. [1] However, this economic cost pales in comparison to the human cost of war. Reports estimate that, as of April 2021, more than 71,000 innocent Afghan and Pakistani civilians had been killed as a direct result of the Afghanistan War. [2] In fact, despite the U.S. government's claim that it was only targeting terrorists and enemy combatants, many of the victims of U.S.-led airstrikes were innocent civilians. Reports show that, in 2017, the U.S. relaxed its regulations on airstrikes, resulting in a nearly 330% increase in the number of civilian casualties. [3] The large number of innocent civilians killed during the U.S. involvement in Afghanistan raises critical questions regarding the authority of international law in relation to acts of war.

The Hague and Geneva Conventions of the late nineteenth and early twentieth centuries provided a shared international understanding of what constitutes an improper act of war. The Hague Conventions of 1899 and 1907 were the first "multilateral" or multistate treaties created to address the proper conduct of warfare, prohibiting two warring parties from engaging in inhumane means and methods during war. Articles 23 and 25 state that any military or government cannot "employ arms, projectiles, or material calculated to cause unnecessary suffering." [4] The laws also forbid states from "attacking, destroying, or bombarding" any "towns, villages, dwellings, or buildings" that are undefended. [5] The 1949 Geneva Conventions were created to supplement these laws by legally protecting the dignity and lives of innocent civilians who are not directly taking part in the violence. [6] The fourth 1949 convention, in particular, focuses on how not only the life but "the dignity" of all human beings must be respected, even in the midst of war. [7] Therefore, under these conventions, any unjustified killing of innocent civil-

ians or unnecessary destruction of property is considered a violation of international law, even though not all violations are considered "war crimes."

While not all states have ratified both the Hague and Geneva conventions, the United Nations (UN) argues that the rules outlined in them have inherently become a part of "customary international law." [8] Therefore, all states are bound by them, regardless of whether or not they have "ratified the treaties themselves." [9] This is critical to assessing the legality of U.S. actions in Afghanistan. Despite having ratified both conventions, the United States repeatedly violated them during the War in Afghanistan. For example, in 2021, the United States admitted to a drone strike that mistakenly killed 10 Afghan civilians, including an aid worker and seven children living in a "dense residential block." [10] When the attack was first reported, however, the United States had denied any claims of wrongdoing, claiming it to be a "righteous strike" targeting a "suspicious" vehicle that they believed was carrying an "ISIS bomb." [11] The military also alleged that the strike had only killed around three civilians. [12] It was not until the New York Times published declassified footage of the strike that the truth was revealed: the driver of the "suspicious" vehicle was Zemari Ahmadi, an Afghan aid worker who had spent his entire day "transporting colleagues to and from work." [13] Further investigation of the video also revealed that at least one child had been near the site of the strike only two minutes prior. [14] Despite being in clear violation of both Articles 23 and 25 of the Hague Conventions, which state that it is forbidden to cause "unnecessary suffering" or attack villages and dwellings that are undefended, none of the U.S. military officials involved with the strike were punished for their deadly actions under the stipulations of these Conventions. [15] Only the innocent victims and their families had to pay the price for the U.S. military's "mistake."

This, unfortunately, is not an isolated case. Many deadly strikes, in undefended homes and densely populated neighborhoods, occurred throughout the War in Afghanistan. For example, in 2008, an airstrike "against a target of opportunity" killed 47 civilians who were traveling to attend a wedding in the Nangarhar province of Afghanistan. [16] Among those killed were 39 women and children, including the bride. As in the case of Mr. Ahmadi in 2021, the United States had initially denied any wrongdoing, stating that no civilians had been killed. It was not until further investigation of the incident occured that the truth was revealed. Once again, the United States government had acted with impunity and a reckless disregard for the value of innocent lives. [17] Similar to the case with Zemari Ahmadi, U.S. officials were never punished for violating international law.

A formal mode of punishing perpetrators of international war crimes is through the

International Criminal Court (ICC). Following the ratification of the Rome Statute, the Court was officially established in 2002 to investigate, try, and charge individuals responsible for war crimes, genocide, crimes against humanity, or the crime of aggression. [18] Those initially in support of creating the ICC hoped that it would "deter-would be war criminals, bolster the rule of law, and offer justice to victims of atrocities." [19] However, this has clearly not been the case. Since its ratification, the Court has received criticism for its failure to adjudicate claims made against major powers like the United States, China, and Russia [20]. Moreover, the Court is accused of having unfairly "singled" out Africa, prosecuting a number of African leaders while failing to take into account the atrocities committed by major world powers. [21]

These criticisms are especially relevant when comparing the atrocities committed by the United States in Afghanistan to those committed by states that are currently under investigation by the ICC as violations of international law. For example, in 2011, the ICC opened an investigation against the Libyan government for alleged "war crimes" and "crimes against humanity" committed by the "highest level" of Libyan authority. [22] The United Nations Security Council referred the situation to the ICC, condemning the Libyan government for using "violence and force" against innocent civilians and violating human rights. [23] The same accusations could be leveraged against the United States for the crimes they have committed against innocent civilians in Afghanistan. However, the ICC continues to turn a blind eye to crimes committed by the American government - deliberately excluding the United States from any investigations into alleged war crimes.

Similarly, in 2005, the ICC opened an investigation in Darfur, Sudan regarding alleged war crimes, crimes against humanity, and genocide. [24] Like the United States, Sudan is not a state party to the Rome Statute, yet it is still being investigated for crimes such as "outrage upon personal dignity" and "torture." [25] The same accusations, however, can be leveraged against the United States for the alleged killing and torture that took place at Bagram, a former U.S. detention site in Afghanistan. In 2005, a New York Times report revealed the atrocities that occurred against unarmed Afghan civilian prisoners by U.S. armed forces at the detention center. [26] The report claimed that the prisoners were "chained to the ceiling" and "beaten to death." [27] Despite these atrocities, however, unlike the Sudanese government, the U.S. was never prosecuted or formally condemned by the ICC.

In 2021, the ICC decided to "deprioritize" an investigation of the crimes committed by the United States in Afghanistan, choosing to focus instead on the crimes committed

by the Taliban and Afghan leaders. [28] This decision by the ICC highlights a double standard in its enforcement of the rule of law. By "deprioritizing" crimes committed by the United States, the ICC is encouraging major powers to continue disrespecting international law without any fear of the consequences. Even if the ICC is unable to convict powerful leaders from countries like the United States, Russia, or China, it should at least investigate and condemn their actions. By failing to even acknowledge the crimes committed by the United States, the ICC is communicating to the world that the dignity and lives of innocent civilians do not matter if major world powers are responsible. As long as international legal organizations such as the ICC continue to allow the U.S. and other major powers to undermine international law, innocent civilians will continue to be the ones who suffer as a consequence of crimes that go unpunished.

We can't achieve justice for victims of war crimes as long as a double standard continues to shield the US from prosecution.

Nouri, 22 – B.A. in Economics and Political Science from Columbia University

[Selma Nouri, "Double Standards in International Law: Did the U.S. Get Away with War Crimes in Afghanistan?," Columbia Undergraduate Law Review, 6-16-2022, https://www.culawreview.org/journal/double-standards-in-international-law-did-the-us-get-away-with-war-crimes-in-afghanistan, accessed 1-12-2025; AD]

Upholding equal enforcement of international law is especially pertinent given the unfolding tension in Ukraine. Many in the United States and Europe have accused Russia of committing war crimes due to the Russian military's alleged use of "cluster munitions," deadly weapons that can "scatter hundreds of submunitions over large" urban areas, killing many at a time. [29] Cluster munitions have been banned by most countries and strongly condemned by international organizations such as the UN. [30] However, during the War in Afghanistan, the United States repeatedly used cluster munitions, dropping nearly 1,228 cluster bombs between 2001-2002. [31] Despite this fact, the United States has never been held legally accountable for doing so.

By allowing powerful countries such as the United States to undermine international law, guardians of human rights such as the United Nations and the International Criminal Court not only condone the suffering of innocent people, but erode the very power and authority of their claims. This is, once again, exemplified by Russia's recent invasion of Ukraine. Failing to hold all states equally accountable for violations of international law enables powerful leaders such as Russian President Vladimir Putin to ignore the policies and laws established by the international community. Until all powers, including the United States, are uniformly held accountable for their crimes, international law will remain ineffective. Why should powerful leaders abide by the laws when others are excused? Justice can never be achieved when a double standard exists. While powerful leaders roam free, innocent civilians will continue to pay the price.

Unaccountability for war crimes harms US legitimacy.

Corn and VanLandingham, 20 – Gary A. Kuiper Distinguished Professor of National Security at South Texas College of Law; Professor of Law at Southwestern Law School

[Geoffrey S. Corn and Rachel E. VanLandingham, "Strengthening American War Crimes Accountability," American University Law Review, 2020, https://aulawreview.org/blog/strengthening-american-war-crimes-accountability/, accessed 1-12-2025; AD]

The United States faces periodic and appropriate criticism for failing to hold its service members accountable for their battlefield criminality.1 An example of impunity that prompted such condemnation occurred in 2019, when President Donald J. Trump granted pardons to military personnel either convicted of or facing charges for offenses that qualify as war crimes.2 These pardons exacerbated a prevalent impression that America is indifferent to its own battlefield misconduct. This perception of impunity degrades U.S. legitimacy. Additionally, the underlying truth it reveals—that the U.S. military has not been fulfilling its responsibility to appropriately punish war crimes—frustrates the governing legal regime's humanitarian goals, challenges the military's attainment of operational and strategic objectives, and harms individual service members.

This negative impression of America's treatment of war crimes contrasts starkly with our modern military's self-perception as a professional force, one that justly punishes those who fail to follow the laws of war.3 It also contrasts with most Americans' belief that our military predominantly complies with the laws of war and that they should so comply—and that the widespread atrocities by U.S. forces in Vietnam have been left behind.4 On the other hand, criticism of how the United States handles war crimes that its own service members commit seems rather consonant—disconcertingly so—with American society's view regarding punishment of its service members for war crimes. Today, many Americans—with President Trump egging them on—seem to support impunity for war crimes that U.S. service members commit.5

These seemingly opposing views reflect that the American public fails to appreciate that accountability for war crimes is essential for the compliance it desires. We therefore strongly set out this link in detail in the first part of this Article.6

Away from the din of public opinion and President Trump's tweets, the reality of U.S. military accountability for serious violations of the laws of war—typically referred to as war crimes—is nuanced. The current, perhaps endemic, political pressure to avoid

domestic prosecutions of service members for war crimes, combined with certain systemic flaws, create a sinister war crimes accountability deficit. This deficit is sinister not only because it quietly corrodes the military's internal discipline and moral compass, but also because it degrades the United States' compliance with its state responsibility obligations to ensure such accountability7 and provides ammunition for those generally critical of military tribunals.8 Plus, this accountability deficiency dilutes the important signaling effects regarding U.S. commitment to accountability for war crimes that military adjudicatory processes can and should have.9

Current structural defects outlined in this Article exacerbate the inherent challenges of ensuring accountability for battlefield crimes, contributing to this deficit.10 While these existing challenges are often practical, such as limited availability of evidence, political pressure (of a type not unique to America) often accompanies such prosecutions.11 For example, many Americans felt that Lieutenant William L. Calley's horrendous actions were either justified, or that he was simply a scapegoat for the 1960s My Lai tragedy (during which a U.S. Army platoon massacred hundreds of Vietnamese civilians) and that he should not have been prosecuted for murder.12

More recently, the U.S. President and Commander-in-Chief demonstrated similar politicized misunderstanding of the need for war crimes accountability. During his Administration, President Trump publicly condemned the prosecution of American military "heroes" for their alleged war crimes.13 Worse, he pardoned war criminals both after their military convictions14 as well as during the court-martial process.15 These actions were predicated not on mercy, but on the perversion of the entire war crimes accountability regime, seemingly in order to score political points. Clarifying the need for accountability, as well as strengthening the mechanism for achieving it, will help counter the harm that such actions have inflicted on our armed forces.

This Article provides necessary awareness and outlines a path forward. It first identifies several structural legal defects, starting with military law's failure to criminalize war crimes as war crimes. While the statutory enumeration of military criminal offenses found in the Uniform Code of Military Justice16 (UCMJ) provides general authority to prosecutors to charge serious violations of the laws and customs of war, it does not delineate any specific war crimes17—and hence none are ever charged.18 Without specified war crime offenses, the U.S. military turns to what are often referred to as "common law crimes"—ordinary, non-war-related crimes such as murder, assault, battery, arson, theft offenses, and rape—to prosecute service members for what are more logically understood and characterized as war crimes.19 In the U.S. military system, the

same generic murder offense used to convict a service member of murdering his or her spouse in downtown Los Angeles is used to prosecute a service member for killing a prisoner of war in U.S. custody in Iraq.

This approach fails to capture the full harm of the war crime, thereby degrading the law's retributive, deterrent, and international signaling effects.20 This approach also feeds the perception that war crimes go unpunished within the U.S. military, given that service members are never convicted for war crimes as such. This failure to prosecute U.S. soldiers' war crimes as war crimes undermines the legitimacy of U.S. military operations by contributing to the impression that U.S. military personnel benefit from war crimes impunity.21

We propose an easy fix: the United States should utilize the same enumerated war crimes already used to prosecute its enemies at Guantanamo Bay, Cuba through the Military Commissions Act of 200622 (MCA) to prosecute U.S. service members for identical criminal conduct on the battlefield.23 However, delineating offenses alone is insufficient for just and thorough fulfillment of this nation's obligations to its service members. This Article also assesses issues stemming from the lack of incorporation of specifics of the laws and customs of war—modernly often referred to as the law of war, the law of armed conflict (LOAC) or international humanitarian law—and its battlefield setting into the UCMJ. We accordingly propose adding tailored defenses to accompany the enumerated war crimes transplanted from the MCA.24

A handful of scholars have previously expressed alarm at the lack of UCMJ war crimes; we both echo their concern and go further to comprehensively contextualize this defect within the norms of the LOAC, emphasizing the law's requirement of responsible command.25 Part I outlines the criticality of compliance, focusing on why accountability for war crimes is a necessary predicate of compliance; this Section also emphasizes the duties that flow from responsible command while highlighting internal benefits of the doctrine.26 Part II highlights the asymmetry between the UCMJ's lack of war crimes in its punitive articles and the MCA's enumerated list applicable to captured alien "unprivileged belligerents" subject to military commission jurisdiction.27 Here we recommend both incorporating the latter into the former, and extending command responsibility liability to U.S. commanders. Part III identifies additional deficiencies in current U.S. military criminal law regarding war crimes; this Part demonstrates why court-martial jurisdiction should be exercised over not only U.S. service members, but all captured enemy belligerents, both privileged and unprivileged.28

Our conclusion notes that enactment of UCMJ-enumerated war crimes and defenses,

coupled with delineation of appropriate court-martial jurisdiction over those whom the LOAC was designed to apply—both U.S. service members and enemy belligerents, lawful and unlawful—will together offset any necessity to invoke military commission jurisdiction for captured personnel, helping to end the ill-conceived military commission system at Guantanamo Bay and close the American war crimes accountability deficit.

4.0.4 Human Rights

It also reduces human rights violations.

Ford, 20 – Professor at UIC Law

[Stuart Ford, "Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention," Loyola of Los Angeles International and Comparative Law Review, Vol. 43, No. 2, Winter 2020, https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1801&context=ilr, accessed 12-10-2024; AD]

In a 2018 article, Professor Appel explored whether states that ratify the Rome Statute engage in more or less human rights violations than non-ratifiers.149 His model controlled for a number of variables that are known to be associated with respect for human rights, including population size, per capita gross domestic product, democracy, regime type, an independent judiciary, and any recent history of conflict.150 Moreover, the statistical technique he used was specifically chosen to minimize the possibility that the ICC would appear to be associated with lower rates of human rights violations because only states with good human rights records join the ICC.151

The results showed that ratifiers of the Rome Statute did have fewer human rights violations than non-ratifiers and that this result was statistically significant.152 Since the human rights variable in the model is based on the frequency of acts of torture, summary execution, physical disappearances, and political imprisonment,153 this means a reduction in human rights violations means a reduction in violence. The effect size of the reduction (i.e., its impact on human rights violations) was similar to the impact of having an independent judiciary, which was also found to reduce human rights violations.154

While ratifiers did, on average, have better human rights records than non-ratifiers, the human rights records of ratifiers continued to improve after ratification and improved more than the human rights records of non-ratifiers.155 These results led him to conclude that states' human rights practices improve after joining the ICC.156 Or to put it another way, his study represents "systematic evidence that the Court can deter leaders from committing atrocities."157

Ratification of the ICC has a positive effect on domestic laws and decreases human rights violations.

Philips, 16 – J.D. from Stanford Law School

[Christen Romero Philips, " The International Criminal Court & Deterrence: A Report to the Office of Global Criminal Justice, U.S. Department of State," Stanford Law School: Law & Policy Lab, June 2016, https://law.stanford.edu/wp-content/uploads/2016/07/Philips-The-International-Criminal-Court-and-Deterrence-A-Report-to-the-U.S.-Department-of-State.pdf, accessed 12-10-2024; AD]

There is some evidence that ratification of the ICC Statute alone produces a deterrent effect. Studies have found "suggestive evidence that a government's ratification of the ICC tends to be correlated with a pause in civil war hostilities or reduction in human rights violations."16 Part of this effect may be attributable to the ICC's complementarity provision, which provides Member States with an incentive to develop or strengthen domestic justice systems in order to preclude ICC jurisdiction. "There is strong evidence of a reduction in intentional civilian killing by government actors when states implement ICC-consistent statutes in domestic criminal law, which we can reasonably attribute, at least indirectly to the ICC's influence."17 It may be impossible to tease apart the deterrent effect of the new domestic laws from that of the ICC itself, but regardless, joining and engaging with the ICC seems to have some deterrent effect, either directly or indirectly.

Simmons and Danner found through an empirical analysis that the "the least accountable governments – the least democratic, with the weakest reputations for respecting the rule of law, the least politically constrained – with a recent past of civil violence," were among the earliest to ratify the Rome Statute. 18 They attribute this finding to something they call "credible commitment theory," which explains why governments with such low accountability voluntarily chose to subject themselves to ICC jurisdiction.19 This theory posits that ratification of the ICC can be used as a form of self-binding by states that are most vulnerable to ICC prosecution and least able to commit credibly to domestic alternatives, by essentially tying their hands as they work toward conflict resolution.20

Furthermore, even in countries that are able to commit credibly to domestic alternatives, there is evidence that avoiding ICC jurisdiction by conducting domestic prosecutions has positive effects on human rights practices. For example, research by Sikkink and Walling in 2007 found that "in 14 of the 17 cases of Latin American countries that

have chosen trials, human rights seem to have improved."21 In response to critics of trials who argue that judicial processes exacerbate conflict (discussed more fully below), Sikkink and Walling conclude that "there is not a single transitional trial case in Latin America where it can be reasonably argued that the decision to undertake trials extended or exacerbated conflict."22 Although the ICC did not intervene in any of these cases, the act of conducting domestic prosecutions, consistent with the ICC's complementarity provision, had a positive effect on human rights practices throughout the region.

The ICC makes prosecutions for human rights violations a primary mechanism for justice – that improves the protection of human rights.

Philips, 16 – J.D. from Stanford Law School

[Christen Romero Philips, " The International Criminal Court & Deterrence: A Report to the Office of Global Criminal Justice, U.S. Department of State," Stanford Law School: Law & Policy Lab, June 2016, https://law.stanford.edu/wp-content/uploads/2016/07/Philips-The-International-Criminal-Court-and-Deterrence-A-Report-to-the-U.S.-Department-of-State.pdf, accessed 12-10-2024; AD]

Research by Kim and Sikkink "provides evidence that prosecutions work both through their punishment effects and because they communicate norms."23 The ICC has the ability to communicate such norms at a very high level that could have widespread effects, given the Court's visibility and potential for nearly worldwide jurisdiction. By investigating and prosecuting human rights abuses, the ICC exerts a normative influence, communicating the importance and value of prosecutions as a mechanism for justice. Prosecutions are some of the most visible forms of justice in post-conflict societies with the potential to advance peace by highlighting the measures taken to hold specific individuals accountable. Furthermore, prosecutions can help to advance peace by dispelling notions of collective guilt and highlighting individual responsibilities for atrocities.24

While there has been some debate about the appropriateness of prosecutions as a tool for justice, research in Latin America by Kim and Sikkink highlights the value of human rights trials. For example, they found that "transitional countries with human rights prosecutions are less repressive than countries without prosecution," that "countries with more cumulative prosecutions are less repressive that countries with fewer prosecutions," and that even "countries with more neighbors with prosecutions are less repressive."25 They argue that "both normative pressures and material punishment are at work in deterrence, and the combination of the two…is more effective than either pure punishment or pure normative pressure." 26

The ICC may also be able to assert a normative effect on victim involvement in prosecutions, although this impact has yet to be empirically studied. Victims are theoretically given a more prominent role in the ICC than in other international criminal tribunals.27 If the ICC is looked to as a model of how to prosecute human rights abuses, it may have an impact on the decisions domestic or other international bodies to increase victims' roles within a prosecution.

Although there are many advocates of the emergence of prosecutions as a new norm

for seeking justice, there are also skeptics and opponents. For example, Nouwen and Werner argue that adversarial prosecutions threaten to monopolize global justice efforts, minimizing or eliminating other reparative conceptions of justice. They suggest that the ICC has a significant impact on this effect both because it legitimizes prosecution as the only acceptable form of justice, and because its complementarity provision could operate to force states to choose prosecutions in order to avoid jurisdiction.28

The US should join the ICC to hold leaders accountable for human rights abuses.

Omar, 22 – the U.S. representative for Minnesota's 5th congressional district since 2019

[Ilhan Omar, "Opinion: For Putin to face justice, we must join the International Criminal Court," Washington Post, 4-13-2022, https://www.washingtonpost.com/opinions/2022/04/13/icc-war-crimes-putin-russia-us-should-join/, accessed 12-10-2024; AD]

There's a simple solution to this: The United States must join the International Criminal Court.

Equality under the law is one of the core tenets of our legal system and the international legal system. If we truly believe in prioritizing human rights and enforcing international law, how can we not be part of the court that upholds that law?

Our absence also allows regimes to commit human rights abuses with impunity. If the most powerful country won't hold itself accountable to the rule of law, other countries feel emboldened to violate it. And indeed, we have turned a blind eye to wanton human rights violations by regimes in countries such as Saudi Arabia, Egypt, El Salvador and even India, in the name of political convenience. Even when war criminals are successfully convicted— as Malian terrorist Ahmad al-Faqi al-Mahdi was in 2016 — our absence only undermines the legitimacy of those verdicts.

It's also important to remember that the ICC is a court of last resort. It doesn't have jurisdiction over crimes unless the country in question — like Russia — is unable or unwilling to prosecute the perpetrators domestically. Because we aren't members of the ICC, we can't engage directly in the efforts to prosecute criminals. Imagine how much we could accomplish if we helped legitimize the ICC.

Many will argue that there are parts of the criminal court that need to be reformed. I agree. Let's work as a member state to improve it and make sure it lives up to the highest standards of impartiality.

The United States once led the world on international justice. In response to the horrors of the Holocaust, we spearheaded the Nuremberg trials to hold Nazi war criminals accountable and, for the first time, establish international criminal law. We intentionally created an impartial judicial process modeled on our own judiciary, rather than simply executing Nazi war criminals without trial. The last living Nuremberg prosecutor, Benjamin Ferencz, boiled this philosophy down to a simple axiom: "Law not war."

In this moment of horrifying violence, it's time to reclaim the mantle of leadership we seized after World War II. It's time to hold the perpetrators of crimes against humanity

accountable for their actions and send a message to the whole world that true justice is blind, that no targeting of civilians, no use of chemical weapons and no wars of aggression will ever be tolerated again. It's time for the United States to join the International Criminal Court.

Joining the ICC would demonstrate that the US is dedicated to advancing human rights law.

Norton, 16 – Africa Policy Analyst and Advisor at an economic consultancy firm

[Hugo Norton, "It's Time for America to Join the ICC," Fair Observer, 7-19-2016, https://www.fairobserver.com/region/north_america/its-time-america-join-icc-00164/#, accessed 1-12-2025; AD]

Nevertheless, there are means to address these issues in a meaningful way. In order to dispel fears of an "African bias," the ICC chief prosecutor, Gambian lawyer Fatou Bensouda, has sought to broaden the court's scope by exploring alleged crimes in Palestine, opening an initial inquiry in Ukraine and requesting the ICC to commence a formal investigation into the 2008 Russia-Georgia war, while investigations relating to Afghanistan, Colombia and Iraq are ongoing.

Truly reforming the ICC, however, will only be achieved once the US joins its ranks. From the outset, Washington's refusal to ratify the Rome Statute sabotaged the ICC's legitimacy and reach, condemning the court to run on one engine. While President Bill Clinton signed the statute in 2000, in 2002 the Bush administration "unsigned" it out of fear that US nationals, particularly military personnel, could be put on trial before the ICC. At a time when the war in Afghanistan was raging and the Pentagon was drawing up plans to oust Saddam Hussein from Iraq, the administration's fears were fully warranted.

Next, the administration went one step further and signed into law the American Service-Members' Protection Act (ASPA), which explicitly protects US military personnel and government officials of any rank "against criminal prosecution by an international criminal court to which the United States is not party." Numerous technicalities have also been invoked for the US' defiance, such as Article 1, Section 8 and Article 3, Section 1 of the Constitution regarding the establishment of courts. Both sections can be interpreted as an explicit ban on international legal jurisdictions.

Naturally, the US could resort to other legal instruments to arrest individuals such as Bashir. Washington could call for a UNSC resolution obligating all member states of the United Nation (UN) to arrest Bashir and submit him to the ICC's jurisdiction; or invoke the 1948 UN Genocide Convention, which obligates member states to prosecute perpetrators of genocide, as well as the Nuremberg Charter which established that heads of states indicted by international courts no longer enjoy immunity.

America's role as self-proclaimed primary supporter of human rights makes it essentially unavoidable for the US to join the ICC. If the US insists on leading, then joining the ICC would show that it is serious in doing so. This move would represent the strengthening of the institution as well as of human rights in general. Thus, the US should at least embark on a course of legal convergence with the Rome Statute's provisions by removing obstacles in domestic law and paving the way for full ratification.

By opposing the ICC, the US prevents the court from defending the victims of war crimes.

Jones, 21 – J.D. Candidate at the University of Wisconsin Law School

[Nicole Jones, "SANCTIONING THE ICC: IS THIS THE RIGHT MOVE FOR THE UNITED STATES?," Wisconsin International Law Journal, 2021, https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2021/12/39.1_175-204_Jones.pdf, accessed 1-12-2025; AD]

IV. CONCLUSION

The ICC was created to end war crimes and ultimately prevent them. It does this through investigations that can lead to arrest warrants and hopefully with enough support, obtain convictions of war criminals who commit atrocities. It has been quite successful so far, but it needs support from outside countries every step of the way to bring these criminals to justice. The recent actions of the United States will most certainly hinder this process and it could mean the end to a proper investigation into the war crimes committed in Afghanistan.

Even though the sanctions program aligns with the US view of the ICC, it doesn't seem to be meeting the goals of either entity. The United States has continually held itself out to be a defender of justice in the face of war criminals, but by directly opposing the ICC, it ultimately opposes the goal of the ICC which is to defend the victims of war crimes. This opposition may have been here from the very beginning, but it is not too late to change the foreign policies of the United States and once again be the defender of those who cannot defend themselves. Changing how the United States views the ICC will be a great step in the right direction to really establishing a zero-tolerance policy on war crimes and crimes against humanity.

Additionally, the sanctions program is an obstruction to US citizens' First and Fifth Amendment rights. By listing individuals in the sanction program, it prevents US citizens from supporting the ICC in almost any fashion. This sanctions program is not an appropriate use of executive power and should not be how the United States reacts to an investigation into the atrocities committed in the armed conflict of Afghanistan.

Strengthening the ICC enhances the rule of law by holding criminals responsible for their actions.

Fahmy, 21 – researcher at Pharos University

[Walid Fahmy, "The measures against the International Criminal Court (USA v. ICC): the perspective of International Law," RUDN Journal of Law, 2021, https://cyberleninka.ru/article/n/the-measures-against-the-international-criminal-court-usa-v-icc-the-perspective-of-international-law/viewer, accessed 1-12-2025; AD]

Enhancing Justice and the Rule of Law

What, then, would international rule of law mean? 'The distinction between three different definitions is helpful here. Firstly, the "international rule of law" can be interpreted as applying the rules of the rule of law to relations between States and other international law subjects. Secondly, the "rule of inter-national law" may favor international law over national law, for example by establishing the primacy of covenants on human rights over domestic legal arrangements. Thirdly, a "global rule of law" would signify the existence of a normative system that directly touches individuals through existing national institutions without formal mediation (Chesterman, 2008:355–356).

Across transitional context criminal trials play a significant role. We convey public condemnation of criminal activity, offer a clear form of accountability for offenders and provide a measure of justice for victims by either reparations or joy in seeing the offenders held responsible. In particular, the criminal trial process is an important way of enhancing the Rule of law. Trials potentially generate an officially background record, individualize criminal liability rather than ascribe collective guilt, officially acknowledge the pain of the victims and theoretically remove terrorist groups. Holding criminals responsible and punishing them for their illegal activity has a possible deterrent effect and helps replace a system of entitlement with one of responsibility (Jallow, 2009:78).

Conformity to international norms is important for preventing the worst crimes.

Fahmy, 21 – researcher at Pharos University

[Walid Fahmy, "The measures against the International Criminal Court (USA v. ICC): the perspective of International Law," RUDN Journal of Law, 2021, https://cyberleninka.ru/article/n/the-measures-against-the-international-criminal-court-usa-v-icc-the-perspective-of-international-law/viewer, accessed 1-12-2025; AD]

Proponents view the ICC as an essential step towards establishing a genuinely universal rule of law in which no individual criminal can escape responsibility for crimes and no victim can be denied justice merely because of the legal illusion of sovereignty. Some critics contend that the decline of sovereignty demanded by the ICC is actually corrosive of the international order if it were ultimately to limit the autonomy of certain "civilized" great powers thus depriving the United States the opportunity to manage processes in a so-called orderly fashion. The ICC is clearly imbued with a world order in which different rule of law models clash (Franceschet, 2004:32).

The ICC aims to combat corruption and develop the rule of law by ensuring that the most egregious crimes do not go unpunished and by fostering respect for international law. The ICC 's central mission is to serve as a court of last resort with the power to prosecute people for genocide, crimes against humanity and war crimes when national jurisdictions are unable or reluctant to do so for whatever cause14.

Impunity reigns, without rule of law. The ICC and the broader Rome Statute scheme play a significant role in upholding the rule of law by punishing breaches of international legal norms and encouraging conformity to those norms, thus eliminating impunity. This role is critical given the nature of the specific norms that concern the Rome Statute — norms designed to prevent crimes that "threaten the world's peace, security and well-being. The crimes and omissions that come under its authority are so horrific, so damaging, that it is worth any effort to avoid them. Accountability is not only necessary for the sake of the past but also for the future. It provides the potential for the recurrence of conflicts and the repetition of violence where impunity is left unaddressed. In order to fulfill its mandate, the ICC needs the support and cooperation of States. The international community has on many occasions declared its determination to end impunity for the most serious crimes. Cooperation with the ICC is a concrete means of achieving this objective"15.

In conclusion, the system of the Rome Statute changed the perception of serious crimes under international law. The establishment of a permanent international court to try

such crimes encouraged and empowered national courts to prevent impunity.

As an outside body, the ICC faces particular challenges that many locals can view with skepticism. Nonetheless, if the public actually finds the tribunal to be a good illustration of equal and impartial justice, then it needs to be done effectively. Therefore, one must be realistic about the difficulties faced by the tribunals in credibly demonstrating to the local community that immunity is punctured for heinous crimes and that justice can be fair. But precisely because of these obstacles, if tribunals aim to create public confidence in justice and the rule of law, they must address public concerns regarding their work (Stromseth, 2011:435).

4.0.5 Conflict

Studies prove the ICC is effective at preventing conflict.

Ford, 20 – Professor at UIC Law

[Stuart Ford, "Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention," Loyola of Los Angeles International and Comparative Law Review, Vol. 43, No. 2, Winter 2020, https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1801&context=ilr, accessed 12-10-2024; AD]

In recent years, Professor Dancy has written a series of articles exploring the effect of international criminal trials, both on his own and with other collaborators. In a 2017 article, he explored the deterrent effect of the ICC.129 He made a number of findings. First, states that ratified the Rome Statute during the course of a conflict were more likely to end that conflict through negotiations than other states.130 Second, conflicts in which the ICC intervened were shorter than conflicts in which the ICC did not intervene (2.05 years versus 3.41 years).131 The latter finding, although intriguing, was not statistically significant.132 He concluded that this was "suggestive evidence" that joining the ICC encouraged parties to reach negotiated settlements of conflicts.133 At the same time, Professor Dancy acknowledged that the presence of the ICC was just one factor that could result in conflict termination, so it was not possible to draw firm conclusions from his results.134

He also looked at one-sided violence against civilians in countries that were the subject of ICC investigations.135 He found that violence decreased after ICC intervention in four of those situations (the Democratic Republic of the Congo, Sudan, Uganda, and Libya), while violence increased in only two of them (the Central African Republic and Nigeria).136 In three cases (Kenya, Côte d'Ivoire, and Mali), there was no trend in the violence after the ICC intervened.137 He viewed these finding as warranting "cautious optimism" that the ICC could deter violence because violence decreased after ICC intervention more often than it increased.138

Finally, he looked at the rate at which new conflicts began in ICC members states versus non-members.139 The results showed that ICC members states were significantly less likely to become involved in new conflicts than non-members.140 Ultimately, he concluded that there was no evidence that the ICC obstructed peace or prolonged conflicts and that there was some evidence that it shortened conflicts and reduced violence.141

The ICC has a direct deterrence effect on conflict.

Philips, 16 – J.D. from Stanford Law School

[Christen Romero Philips, " The International Criminal Court & Deterrence: A Report to the Office of Global Criminal Justice, U.S. Department of State," Stanford Law School: Law & Policy Lab, June 2016, https://law.stanford.edu/wp-content/uploads/2016/07/Philips-The-International-Criminal-Court-and-Deterrence-A-Report-to-the-U.S.-Department-of-State.pdf, accessed 12-10-2024; AD]

Given that it "can try cases arising out of any events taking place after 1 July 2002, the possibility of prosecution and punishment by the ICC might realistically enter into the calculations of potential perpetrators worldwide."1 Many of the early literature on the impact of the ICC based justifications on a general deterrence theory, positing that the threat of an ICC prosecution would deter both leaders and subordinates from committing atrocities across the board. For example, Payam Akhavan has argued, in the context of the ICTY, that the long culture of impunity created a world in which international law coud not deter future violations of human rights, but that the creation of the ICTY could, at least to some extent.2 He argued that "targeting political and military leaders and subjecting them to a threat of punishment, or even mere international opprobrium, can generate a form of immediate deterrence.3

In recent years, emergent empirical evidence has shifted the discussion to a conditional deterrence model, suggesting that the ICC's capacity to deter will depend on the type of actor, the context, and the level of ICC involvement in a situation country. 4 In perhaps the largest and most in-depth empirical study of the ICC's deterrence effect, published in 2015, Jo and Simmons present evidence supporting the conditional deterrence theory. Jo and Simmons found "[g]overnments that depend on aid relationships are easier to deter than the more self-reliant."5 They also found that rebels are harder to deter than governments, but that "even rebels appear to have significantly reduced intentional civilian killing when the ICC has signaled its determination to prosecute."6 Furthermore, there is variation among types of rebel leaders; secessionist rebels who want to rule and gain international legitimacy are more likely to be deterred by the threat of the ICC than non-secessionist rebels, due to the impact ICC action could have on their standing in the international community.7 Importantly, Jo and Simmons' findings suggest that individuals, especially rebel groups, may only be deterred once the ICC has taken affirmative steps toward investigation.8

In the primary findings of a case study of Kenya that is still underway, Dutton and Alle-

blas describe three factors that together impact the deterrent effect of the ICC: 1. The domestic political context, 2. The type of actor, and 3. The level of ICC intervention. Their findings suggest that ratification of the ICC Statute alone did not necessarily produce any deterrent effect in Kenya, but that the investigation and indictments of Kenyatta and Ruto seems to have produced some deterrent effect, contributing to the relatively peaceful elections in 2013. However, sustaining this increased level of involvement may have also contributed to the unintended consequence of forcing "the country's leaders into a corner, and they responded by taking actions to ensure that they would not be held accountable for any human rights abuses."9 These findings in Kenya lend support to Jo and Simmons' conclusion that individuals may only be deterred once the ICC has taken affirmative steps to investigate.

Furthermore, a recent in-depth analysis of the situation in the DRC by Broache found that "the publication of the arrest warrant for Ntaganda had no significant effect on violence against civilians, mostly because Ntaganda and other CNDP leaders perceived a low probability of arrest."10 While the conviction of Lubanga was associated with an immediate increase in violence against civilians, "Ntaganda's voluntary surrender to the ICC was associated with lower levels of violence against civilians, mostly because it significantly weakened the M23."11 Broache argues for reframing the deterrence debate to look at various stages of the legal process, and his research in the DRC gives further weight to a conditional deterrence theory, as opposed to all-or-nothing approaches.

Along with earlier literature discussing a more theoretical basis for the deterrence argument, these emergent findings support the ICC's capacity to deter in specific situations. For example, CroninFurman's earlier research found that commanders who permit or fail to punish subordinates for atrocities will be easier to deter than those who explicitly order the commission of such atrocities.12 This lends additional support to the distinction both Jo and Simmons and Dutton and Alleblas make between different types of actors.

In a recent online symposium created to discuss the emerging research by Jo and Simmons, a number of experts in this field weighed in on the study. These criticisms will be further elaborated on in the second section. However, there are a number of criticisms of the study itself that merit discussion here. First, the data set used by Jo and Simmons ends in 2011, as discussed by Drumbl, and thus was generated before the ICC had actually convicted anyone.13 Therefore, although the study is comprehensive and very well done, it does not actually address the way the most recent and significant prosecutorial developments affect the deterrence argument. Second, it is impossible to completely

eliminate all selection effects that arise from "the fact that states choose to accept the court's jurisdiction through ratification of the Rome Statute."14 Therefore, it is difficult to entirely eliminate the possibility that any change in the behavior of various actors is due to the same factors that lead the state to ratify the ICC Statute in the first place, such as a democratic transition or a commitment to peace and justice.15

Empirics prove – the ICC reduces civilian deaths and brings perpetrators to justice.

Jo and Simmons, 16 – specialist in international institutions, international law, and political economy; Professor of Law and Political Science at the University of Pennsylvania

[Hyeran Jo and Beth Simmons, "Can the International Criminal Court Deter Atrocity?," Cambridge University Press, 2016, https://doi.org/10.1017/S0020818316000114, accessed 1-12-2025; AD]

Model 2 looks at the effect of ICC actions, the three-year moving average of previous preliminary examinations, investigations, and warrants by the OTP. According to the incidence-rate ratio based on Model 2, one additional investigation each year over the three-year term is estimated to reduce[s] intentional civilian killing by a factor of 0.570. (See Table 1 for an estimate of lives spared, which is substantial.) Note that the significant effect of ICC actions is robust even after including post-ICC regime, a variable that captures the court's existence, but not its actions. It is therefore quite unlikely that the effect of ICC actions is merely an artifact of some general violence-reducing temporal trend or the result of a passive court. Rather, [The] ICC actions represent[s] new information, available to all actors, demonstrating that the ICC is operational, authoritative, and that the prosecutor means to bring[s] perpetrators to justice.

The ICC creates incentives for national courts to act – that encourages aggressors to moderate their behavior.

Jo and Simmons, 16 – specialist in international institutions, international law, and political economy; Professor of Law and Political Science at the University of Pennsylvania

[Hyeran Jo and Beth Simmons, "Can the International Criminal Court Deter Atrocity?," Cambridge University Press, 2016, https://doi.org/10.1017/S0020818316000114, accessed 1-12-2025; AD]

The Rome Statute's complementarity regime creates a channel for the ICC to support prosecutorial deterrence at the national level as well. The ICC is designed to complement and not to preempt or substitute for national prosecution. National courts have the option of investigating a case domestically before the ICC can adjudicate it.37 The ICC may nonetheless find a case admissible despite domestic action if the court determines that "the state is unwilling or unable genuinely to carry out the investigation or prosecution."38 Sudan's desultory investigations and prosecutions of crimes committed in Darfur provide an example of the kind of behavior the admissibility provisions were designed to override.39

This complementarity principle bolsters the ICC's prosecutorial deterrence to the extent that it creates incentives for states to strengthen their own legal capacities.40 The ICC report to the United Nations notes several reforms that came after the launch of preliminary examinations, including reforms in Guinea, Colombia, and Georgia.41 Nouwen documents how ICC investigations catalyzed legal reforms in the DRC and Sudan.42 Uganda's ICC-implementing legislation was passed only recently in 2010 but it empowers the Ugandan High Court to prosecute international crimes.43 Thus, an indirect channel through which the ICC may exert prosecutorial deterrence is through stimulating national courts to act,44 theoretically creating favorable conditions for internal monitoring and law enforcement, bolstering prosecutorial deterrence. Arguably, national courts have contributed to a broader system-wide expectation that impunity is no longer quietly tolerated.45

In sum, prosecutorial deterrence is expected to be enhanced by any condition that makes prosecution more likely in a given jurisdiction, such as ratification of the Rome Statutes, passage of ICC-implementing legislation, national trials, or court reforms that make trials more probable and credible.46 Qualitative research reveals that such changes become part of leaders' updated calculations. For example, former Colombian President Andrés Pastrana expressed concerns that he might get prosecuted by the ICC, and the

paramilitary leader, Vincente Castano, of the Autodefensas Unidas de Colombia (AUC), was "sharply aware and fearful of the possibility of ICC prosecution, a fear that reportedly directly contributed to his demobilization."47 Even some rebel groups have begun to assess risks in the ICC's shadow. For example, the two main rebel groups in Colombia—the Fuerzas Armadas Revolucionarias de Colombia (FARC-EP) and the Union Camilista-Ejército de Liberaciön Nacional (UC-ELN)—have published internal documents assessing the likelihood of prosecution by the ICC or domestic courts.48 ICC investigations, indictments, and convictions or those triggered by complementarity are likely to encourage actual or potential perpetrators to reassess the risks of punishment—-relative to the status quo, which is often impunity—and to moderate their behavior.

4.0.6 China

Joining the ICC would enable the US to investigate China for the Uyghur genocide.

Stradner and Drexel, 20 – research fellow with FDD's Barish Center for Media Integrity; fellow for the Technology and National Security Program at CNAS

[Ivana Stradner and Bill Drexel, "The ICC's Failure to Investigate China on Genocide Is a Vast Moral Failure," American Enterprise Institute, 12-28-2020, https://www.aei.org/op-eds/the-iccs-failure-to-investigate-china-on-genocide-is-a-vast-moral-failure/, accessed 1-12-2025; AD]

The ICC can step in only where national legal systems fail to undertake prosecutions. Though the U.S. government already investigated the situation in Afghanistan and prosecuted several individuals, Bensouda found these efforts insufficient — but seems to have nothing to say of Chinese courts' active corroboration in Uighur oppression. And while the U.S. case allegedly relates to about 80 victims for war crimes more than 15 years ago, China stands accused of atrocities against more than a million victims in an ongoing campaign of systematic torture, rape, forced labor and involuntary sterilization. There can be no doubt that the court's dodging jurisdiction of the Uighur issue represents a vast moral and institutional failure.

There is mounting evidence that China's campaign of repression against Uighurs and other Turkic minorities fits the United Nations' legal definition of genocide — the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group," including killing, bodily harm, "group conditions of life calculated to bring about its physical destruction" and more.

Though the Uighurs have long been targeted by the Chinese state, in the past four years the Uighur homeland has transformed into the world's most advanced high-tech surveillance state, as officials seek to fulfill Chinese Communist Party leader Xi Jinping's command to use the "organs of dictatorship" and show "absolutely no mercy" in cracking down on perceived threats from Turkic minorities. Hundreds of "reeducation" camps across the region detained more than a million Uighurs for a harrowing regiment of forced cultural cleansing.

Then there is the horrifying attempt to sterilize the Uighurs en masse: According to Chinese government documents, Xinjiang authorities planned to subject at least 80 percent of women of childbearing age in four southern minority prefectures to birth prevention procedures. Despite the region making up only 1.8 percent of China's population, 80

percent of China's new IUD placements were performed in Xinjiang in 2018. Unsurprisingly, Uighur birthrates have plummeted. If these blood-curdling accounts coming out of Xinjiang aren't evidence enough, footage of shaved, bound and blindfolded Uighurs being loaded onto trains, and the seizure of 13 tons of human hair believed to be shorn from Uighur scalps — evoking echoes of the Holocaust — should be.

Indeed, an increasing number of observers are formally recognizing the grim reality of genocide. But not the ICC.

Theoretically, the ICC has left the door open for accusers to return with further evidence. But the greater need is for the court to show a backbone and sense of proportionality. Its track record leaves little room for optimism — more than $2 billion spent and just eight convictions, all in Africa.

Facing accusations of corruption and politicization, the court is at a turning point as elections for the next chief prosecutor loom. The successful candidate will direct the agenda of the court for years to come. President-elect Joe Biden will have to weigh how to approach America's fraught relationship with the ICC at this pivotal time. Reports suggest he will lift President Trump's sanctions shortly after taking office. That would be a mistake.

The Trump sanctions offer an opportunity to both the Biden administration and the ICC. Biden must make clear to the ICC and our allies that the first step toward any improvement in U.S. relations with the court must be the institution's thorough investigation of the world's largest ongoing atrocity.

Biden has a chance to help restore the ICC's credibility and deliver some small hope for justice to China's Uighurs. He would be foolish not to take the opportunity.

The ICC has influence over China – China cares about the rulings.

Zhu, 20 – scholar at the Fudan University School of Law

[Dan Zhu, "China, The International Criminal Court, And Global Governance," Australian Institute of International Affairs, 1-10-2020, https://www.internationalaffairs.org.au/australianoutlook/china-the-international-criminal-court-and-global-governance/, accessed 1-12-2025; AD]

Being a permanent member of the Security Council, China has been especially concerned about the ICC's jurisdiction over the crime of aggression, which is intrinsically linked to role of the Security Council in finding whether an act of aggression has been committed by a state. After the adoption of the Kampala amendment on the crime of aggression in 2010, China cautioned that the ICC's jurisdiction could compromise the central role of the United Nations and, in particular, the Security Council, in safeguarding world peace and security.

The other kind of Chinese concerns regarding the ICC centred on how to define these core crimes under the Court's jurisdiction. Apart from genocide, China has reservations over the definitions of all the other core crimes, namely, crimes against humanity, war crimes and crime of aggression. Throughout the negotiation process, one of the major guiding principles in defining the crimes under consideration was that these definitions should be reflective of customary international law. China opposed the ICC's jurisdiction over crimes against humanity committed during peacetime, because, it argued that customary international law required a nexus to armed conflict, and without such nexus, the major attributes of the crimes would be changed. China's objection towards the ICC's jurisdiction over war crimes committed in non-international armed conflict was similarly raised in the context of customary international law. Moreover, China resisted the inclusion of the crime of aggression under the ICC's jurisdiction due to the lack of a precise definition on state act of aggression underlying the crime.

Chinese dichotomy on human rights

Despite the Chinese tradition of regarding treatment of citizens as internal state affairs, it would not be accurate to infer that China's emphasis on sovereignty and objection to outside intervention represents a total rejection of the validity of international human rights norms.

In fact, China has signed and ratified most of the core international human rights treaties, including conventions on racial discrimination, discrimination against women,

apartheid, refugees, genocide, and torture, with the major exception being the International Covenant on Civil and Political Rights (ICCPR). These moves, though indicated an implicit acceptance of international human rights standards, were regarded by its critics as no more than empty gestures. Indeed, efforts to encourage China to enforce its obligations tended to be frustrated.

However, despite China's continuous adherence to sovereignty as part of its foreign policy on global governance on human rights, it does not rule out, or even actively support certain international interventions to prevent and punish the most serious violations of human rights that amount to international crimes, although it still jealously guards its prerogatives as to the extent to which it is willing to relinquish sovereignty. In fact, there has been a growing willingness by China to endorse multilateral humanitarian interventions subject to certain conditions being met.

While the ICC was not created as a human rights court to secure the suspect's fair trial at domestic level, the ICC judges have nevertheless expanded the Court's mandate to cover a state's compliance with international human rights instruments. Thiss kind of practice has raised the issue of overly creative judicial interpretation or judicial activism, which represents a deviation in implementation of the announced public policy decisions of the legislators. In light of the emerging practice of the ICC on complementarity, the risk to sovereignty the ICC poses may be higher than originally anticipated by the Chinese authorities. If the Court continues to examine a state's compliance with international human rights standards during its determination of admissibility, it would inevitably trigger China's sensitivities and anxieties about exposing itself to international adjudication on ordinary human rights violations.

4.0.7 Russia

Russia is weaponizing the US's double standards to diminish the credibility of international law.

Zvobgo, 23 – Assistant Professor of Government at William & Mary and Founder and Director of the International Justice Lab

[Kelebogile Zvobgo, "It's Time for America to Join the International Criminal Court," Foreign Affairs, 10-29-2023, https://www.foreignaffairs.com/ukraine/time-america-join-international-criminal-court-vladimir-putin?, accessed 12-10-2024; AD]

Facing international pressure, in April 2021, Biden reversed Trump's sanctions. But U.S. Secretary of State Antony Blinken reiterated that the ICC does not have jurisdiction over U.S. or Israeli forces acting anywhere. Perhaps trying to gain the favor—and aid—of the United States for the ICC's work, the court's chief prosecutor, Karim Khan, announced in September 2021 that he would deprioritize the investigations into U.S. personnel in Afghanistan.

Now, however, by supporting the ICC's investigations against Russia for its acts in Ukraine, the White House and Congress have said the quiet part out loud: the United States believes the ICC does, indeed, have jurisdiction over acts committed by nonmember-state forces—just not over U.S. forces and the forces of its select allies such as Israel. If the United States held Russia to the standard to which it holds itself, it would have to reject the ICC's claim of jurisdiction over Russians in Ukraine, and the Russian military would enjoy impunity for its serious crimes. But the United States has made an exception for its rival. This is a huge problem because it makes the United States' double standard explicit.

Such double standards corrode the very principle of an international rule of law. And it particularly undermines the ICC, which has been beleaguered since its inception by accusations of bias. The ICC's first set of charges—but likely not its last—against Putin concern the unlawful transfer of hundreds of Ukrainian children from Ukraine to Russia. Putin, who is accused alongside another Russian official involved in the transfer, Maria Lvova-Belova, is the fourth sitting head of state that the ICC has formally accused of serious crimes.

Putin is clearly worried: his government has put a number of ICC officials, including Chief Prosecutor Khan, on a wanted list. And this past August, he had to strike an agreement with South African President Cyril Ramaphosa not to attend a meeting of

the BRICS states (Brazil, Russia, India, China, and South Africa) hosted in South Africa; South Africa is an ICC member, and if Putin traveled there, Ramaphosa would have been obligated to hand him over to the court.

Russian propagandists, however, are already degrading the court's efficacy by weaponizing the United States' double standard. They argue that behind the West's principled rhetoric lies a purely selfish wish to protect its interests and hurt the interests of its adversaries. The West, that argument goes, is no better than Russia and must be resisted at all costs.

The US can best hold Putin accountable by joining the ICC.

Zvobgo, 23 – Assistant Professor of Government at William & Mary and Founder and Director of the International Justice Lab

[Kelebogile Zvobgo, "It's Time for America to Join the International Criminal Court," Foreign Affairs, 10-29-2023, https://www.foreignaffairs.com/ukraine/time-america-join-international-criminal-court-vladimir-putin?, accessed 12-10-2024; AD]

In the coming weeks and months, the ICC may pursue further charges against Putin, Russian soldiers, and Russian intelligence operatives. Intelligence sharing between Washington and The Hague will improve the chances of successful trials. U.S. intelligence agencies have already reportedly collected evidence of Russian plans to target civilian infrastructure, in addition to evidence concerning the deportation and transfer of children.

None of this is to say that the United States cannot help the ICC without formally joining the court. It can. But the long-standing fear that joining the ICC would expose U.S. citizens to unfair prosecution is likely a boogeyman: according to the court's "complementarity" rule, if a country undertakes genuine investigations into its own personnel and, where appropriate, prosecutes offenders, the ICC, which is a court of last resort, will not have jurisdiction over their citizens. The ICC has upheld its side of this principle in the past, withdrawing from Colombia in 2021 and proving its promise to defer to national governments that conduct their own proceedings.

Well beyond Ukraine, the United States can better promote democratic values such as accountability and human rights as an ICC member than as a nonmember. The United States simply does not like to defer to supranational bodies unless it is in the driver's seat. But in the case of the ICC, this notion has now come to its limit. The "law for thee but not for me" that the United States wishes to apply to Russia is simply not tenable—legally, politically, or morally.

Putin may not have his day in court. For a trial to occur, Putin would need to be arrested and transferred to The Hague. Nonetheless, the charges against him hold important symbolic value. Even if Putin is never apprehended, he will live as a fugitive of the law and be a pariah on the world stage. By answering Putin's illegal conduct with a legal process, the international community is attempting to reaffirm its commitment to the rule of law and to distinguish itself from Putin, who so clearly despises it. To do that successfully, however, the United States must first recognize that the rules it applies to the world apply to itself, too.

The US's absence from the ICC prevents the court from holding Putin accountable for the Ukraine invasion.

Scheffer, 23 – former U.S. Ambassador at Large for War Crimes Issues; Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University

[David Scheffer, "The United States Should Ratify The Rome Statute," Lieber Institute West Point, 7-17-2023, https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/, accessed 1-12-2025; AD]

The ICC cannot exercise jurisdiction over Ukraine for the crime of aggression because of the constraint built into Article 15bis(5) of the Rome Statute. This creature of the Kampala Amendments process in 2010, at the time strongly supported by the United States and some other major powers, reads, "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory." Consider for a moment how surreal that sounds, particularly if one recites it to the mother of a young girl who died from the impact of a Russian missile fired from across the border in Russia and hitting a civilian neighborhood in Ukraine.

There is a solution to the particular problem of the crime of aggression. Official U.S. statements condemning the Russian aggression against Ukraine ring rather hollow when the Biden Administration fails to support the creation, through a procedure involving a UN General Assembly resolution and a treaty between the United Nations and Ukraine, of an international Special Tribunal for Ukraine on the Crime of Aggression that can deny head of state immunity. Instead, the United States has opted for "an internationalized national court" in the Ukrainian legal system some day for the crime of aggression—a weak option that invites head of state immunity and hardly deters massive and continuous acts of aggression by Russia against Ukraine.

Recently, I attended a closed-door meeting in Washington with a senior government lawyer and, when asked, that official simply could not answer the question of why the Biden Administration would continue to uphold the longstanding and awkwardly hypocritical immunity interpretation, particularly in light of both the Russian actions against Ukraine and the Administration's support for new laws that enable U.S. cooperation with the ICC to investigate Russian conduct. It also proves difficult to explain the ICC's investigation, without any noticeable U.S. objection, of Myanmar officials, whose country is a non-party State, for atrocity crimes against the Rohingya who were persecuted and forcibly deported onto the territory of neighboring Bangladesh, a State Party,

beginning in 2017.

4.0.8 Israel/Palestine

The Israeli system shouldn't be entrusted with prosecution – ICC intervention is key.

Sayed, 24 – researcher in international law at Kent Law School

[Abdelghany Sayed, "Israel and the ICC: A legal scholar's response to The Washington Post," Aljazeera, 12-2-2024, https://www.aljazeera.com/opinions/2024/12/2/israel-and-the-icc-a-legal-scholars-response-to-the-washington-post, accessed 12-10-2024; AD]

Should the Israeli system be entrusted with prosecution?

The Post uncritically reproduces a regular Israeli and US talking point: that Israel as "a democratic country that is committed to human rights" is capable of investigating its own security forces. The ICC should not put "elected leaders of a democratic country with its own independent judiciary in the same category as dictators and authoritarians who kill with impunity", it argues.

This argument misrepresents the law of the ICC and conceals substantive facts.

Even if Israel and its institutions could be deemed "democratic" and "independent", international law requires a lot more than that. The principle of complementarity means that the ICC complements, rather than replaces, national jurisdictions. Thus, the ICC prosecutor may intervene only when the state that has jurisdiction is "inactive" in investigating the crimes.

Complementarity in no way means that the elected officials and independent judiciary of a democratic state shall enjoy immunity from ICC prosecution. Instead, it means that Israel needs to show it has active investigations. The fact of Israel's inactivity in relation to war crimes and crimes against humanity by Prime Minister Benjamin Netanyahu and former Defence Minister Yoav Gallant in and of itself already means that the complementarity assessment has been exhausted and the court may proceed.

And even if it were active, Israel would need to demonstrate the willingness and ability to genuinely prosecute the perpetrator and conduct. The law of the ICC allows it to intervene if the "investigative activities undertaken by the domestic authorities are not tangible, concrete and progressive", as laid out in a decision in the case of Ivory Coast first lady Simone Gbagbo, accused of crimes against humanity.

Proceedings designated to shield the perpetrators or crimes in question warrant an ICC intervention. This, for instance, requires Israel to investigate the same person for substantially the same conduct.

The Post conceals that for decades, Israel has failed to hold to account its officials and members of its armed forces for crimes. These failures have been repeatedly documented by the UN and human rights organisations.

The 2014 UN Commission of Inquiry, for example, addressed the "procedural, structural and substantive shortcomings, which continue to compromise Israel's ability to adequately fulfil its duty to investigate". Palestinian and Israeli NGOs have repeatedly scrutinised Israel's tendency to whitewash its own crimes, and Amnesty International considered "an ICC investigation [to be] the only way" to uphold international law.

These reports are in no way unknown or recent. Human Rights Watch, for example, has documented Israel's failure to prosecute war crimes as far back as the 2014 war on Gaza, the second Intifada, the first Intifada and even the Israeli invasion of Lebanon in 1982, after which the Israeli government created the Kahan Commission to cover up then-Defence Minister Ariel Sharon's responsibility for the Sabra and Shatila massacre.

The Post's omission of these facts does not seem to be mere negligence.

The ICC's actions against Israel can help redress its legitimacy problems.

Sayed, 24 – researcher in international law at Kent Law School

[Abdelghany Sayed, "Israel and the ICC: A legal scholar's response to The Washington Post," Aljazeera, 12-2-2024, https://www.aljazeera.com/opinions/2024/12/2/israel-and-the-icc-a-legal-scholars-response-to-the-washington-post, accessed 12-10-2024; AD]

Do the arrest warrants give credence to accusations against the ICC?

The editorial also claims that the arrest warrants "undermine the ICC's credibility and give credence to accusations of hypocrisy and selective prosecution". This maliciously misrepresents the facts to intentionally deceive the readers.

There are indeed longstanding, well substantiated and almost undisputed accusations but not of a bias against countries like Israel. During the first 20 years of its operation, the court sought to prosecute people solely from the African continent. As a result, it was criticised for having an "Africa problem" and channelling the "assertion of neocolonial domination".

The ICC's negligence regarding Western armies' atrocities was consistently brought up, especially in relation to Palestine, Iraq and Afghanistan. As Valentina Azarova and Triestino Mariniello and I have previously argued in two articles, the court's action on crimes committed against Palestinians could help it redress its problems with effectiveness and legitimacy.

As a legal scholar, I have not come across any rigorously justified accusation against the court that it is biased against "elected leaders" of "democratic states", as the Post suggests. US attacks on the ICC – starting with the 2002 Hague Invasion Act, which threatens US invasion of any state complying with an ICC arrest warrant for US citizens – have been crude expressions of US hegemony and unpolished thuggery.

Israel itself has engaged in similar activities, as an investigation by +972 Magazine, the Local Call and The Guardian revealed in May. According to these publications, Israel ran a nine-year, state-orchestrated espionage and intimidation campaign against the ICC to shield its nationals from prosecution.

In the end, even in its decision to proceed with prosecution in the Palestine file, the ICC is doing the bare minimum of what it should be. And it is not its "bias" – as The Washington Post argues – that compels it to act, but rather the Israeli conduct – its magnitude, degree of cruelty and unprecedented availability of conclusive evidence.

4.0.9 AT: Prosecution of the US

The ICC wouldn't expose US leaders to prosecution unless it fails to use its own criminal justice apparatus.

Vindman, 23 – former colonel in the U.S. Army JAG Corps who served as deputy legal advisor on the White House National Security Council from 2018 to 2020

[Yevgeny Vindman, "It's Time for the United States to Join the ICC," Foreign Policy, 4-11-2023, https://foreignpolicy.com/2023/04/11/russia-putin-ukraine-war-icc-united-states-crimes-arrest-warrant/, accessed 12-10-2024; AD]

The greatest concern about cooperating with the ICC is that doing so would expose U.S. service members and leaders to politically motivated prosecution by foreign bureaucrats. But the court operates on the principle of complementarity, meaning that the ICC will not exercise jurisdiction when a state exercises its own prerogatives to investigate and prosecute potential war crimes. The ICC steps in only when a state fails to use its own national criminal justice apparatus to handle war crimes, as is currently the case in Russia. In the United States, however, the robust military justice systems ensure that crimes are investigated and prosecuted as a matter of maintaining order and discipline within the armed forces, making ICC jurisdiction against U.S. military personnel unlikely, so long as the United States continues to police its own behavior.

Because the United States is already compliant with core principles of international criminal law, supporting and even joining the ICC would have very little practical effect on U.S. operations. Support for the ICC would, however, eliminate the argument that the United States is hypocritical and send a clear message that the United States plays by the same rules that it expects of all other international actors.

For example, even though the U.S. military has a robust legal regime that effectively polices compliance with the law of war, there have been recent lapses at the political level, specifically the Trump-era grants of clemency for war criminals such as former Navy SEAL special operations chief Eddie Gallagher, who was accused of committing various war crimes while deployed in Iraq in 2017, and four security guards from the private military firm Blackwater—Paul Slough, Evan Liberty, Dustin Heard, and Nicholas Slatten—who were serving jail sentences for a 2007 civilian massacre in Baghdad. These actions were not popular with career military prosecutors—including myself—because the lack of justice and accountability erodes not only U.S. moral authority but ultimately good order and discipline within the military.

4.0.10 AT: No Trial By Jury

Procedural compromises are inevitable.

Kress, 21 – Professor of International Law and Criminal Law, Chair for German and International Criminal Law, Director of the Institute of International Peace and Security Law at the University of Cologne

[Claus Kress, "A Plea for True U.S. Leadership in the International Criminal Court," Lieber Institute West Point, 5-7-2021, https://lieber.westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/, accessed 12-10-2024; AD]

Apart from the already mentioned U.S. legal objection to the ICC's jurisdictional regime, U.S. Congressional findings contain another explicit reason for not joining the ICC Statute: the ICC's procedural law does not foresee a trial by jury. This, however, is not a convincing consideration. In view of many differences in national procedural laws, it is not a consistent position to support international criminal justice on the one hand, and on the other to make one's participation in such a justice system dependent on that procedure's complete congruity with one's own national law. Procedural compromises are inevitable. And at the Rome conference in 1998, the very able U.S. delegates from the Justice Department certainly left their mark on the law governing the proceedings before the ICC.

4.0.11 AT: Definition of Crimes

Definitions of crimes in the ICC Statute don't exceed customary international law and are in a universal consensus.

Kress, 21 – Professor of International Law and Criminal Law, Chair for German and International Criminal Law, Director of the Institute of International Peace and Security Law at the University of Cologne

[Claus Kress, "A Plea for True U.S. Leadership in the International Criminal Court," Lieber Institute West Point, 5-7-2021, https://lieber.westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/, accessed 12-10-2024; AD]

Importantly, the United States does not appear to have insurmountable objections to any of the definitions of the crimes under international law contained in the ICC Statute. This is unsurprising in view of the fact that U.S. delegates from the Department of Defense played a crucial role throughout the negotiations in ensuring that the formulations contained in the relevant texts—especially those regarding war crimes—did not exceed customary international law and were thus ultimately embedded in a universal consensus. Accordingly, the U.S. delegation joined the consensus on the Elements of Crimes.

4.0.12 AT: Liberty Not to Investigate Nationals

For the US to support international criminal law, it needs to be willing to investigate its own nationals.

Kress, 21 – Professor of International Law and Criminal Law, Chair for German and International Criminal Law, Director of the Institute of International Peace and Security Law at the University of Cologne

[Claus Kress, "A Plea for True U.S. Leadership in the International Criminal Court," Lieber Institute West Point, 5-7-2021, https://lieber.westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/, accessed 12-10-2024; AD]

This brings us to the objection of the Secretary of State to the decision of the ICC to include U.S. nationals into the investigation in the "Situation of Afghanistan." As is well known, the ICC Statute, in line with the U.S. position during the negotiations before and in Rome, takes account of any potential national interest in conducting proceedings against its own nationals at home rather than having those nationals appear before the ICC. Accordingly, pursuant to the principle of complementarity, the ICC included U.S. nationals in the investigation into the "Situation in Afghanistan" only because, as they stated, there was no indication of genuine investigations in the United States.

The U.S. opposition to the ICC's exercise of jurisdiction in the "Situation of Afghanistan" thus appears to be coupled with the decision not to conduct a genuine criminal investigation at all. This suggests an implicit reason for the continued U.S. reluctance to move beyond selective support for the ICC. Perhaps the United States wants to retain the liberty not to investigate U.S. personnel in certain cases even when there are grounds to believe that crimes under international law have been committed.

Legal questions aside, such a policy stance would constitute a departure from Jackson's grand design of principled U.S. support of international criminal law and international criminal justice. For this support to be principled, it must include proceedings against one's own nationals if warranted. In his statement, Secretary of State Blinken recalls the fact that "history permanently recorded fair judgments issued by international tribunals against justly convicted defendants." The reference to the concept of fairness is of crucial importance here. But demanding fairness extends beyond ensuring fair proceedings against nationals of other States. It must include a willingness to accept investigations with respect to the conduct of one's own nationals where warranted. Such acceptance is not an easy matter for any State. But the current example of Australia's investigation

into war crimes allegedly committed by Australian special forces in Afghanistan shows that a State can enhance, rather than damage, its reputation by not shielding itself from critical scrutiny.

4.0.13 AT: Lack of US Control

The US could make its voice heard in the ICC to prevent losing control.

Kress, 21 – Professor of International Law and Criminal Law, Chair for German and International Criminal Law, Director of the Institute of International Peace and Security Law at the University of Cologne

[Claus Kress, "A Plea for True U.S. Leadership in the International Criminal Court," Lieber Institute West Point, 5-7-2021, https://lieber.westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/, accessed 12-10-2024; AD]

First, the risk described above will remain low as long as there is a genuine intent to conduct U.S. policy within the confines of international law. By joining the ICC Statute, the United States could do a number of things to work effectively toward further reducing that residual risk. For example, it could present an experienced U.S. judge, not prone to the temptation of judicial activism, for election as a judge at the ICC.

In addition, the U.S. government could make its voice heard within the Court's Assembly of States Parties in support of a prosecution policy that respects the ICC's mission to deal exclusively with situations of crimes under international law of indisputable gravity. In short, the United States could do from within, what Secretary of State Blinken proposes to do from the outside. Whenever the United States has genuinely engaged in the negotiations regarding the ICC, U.S. pleas for moderation and realism have not gone unheard. The addition of two "understandings" of the definition of the crime of aggression—emphasizing its high threshold—constitutes the most recent evidence for the effectiveness of U.S. initiative. There is thus ample reason to believe that the other States Parties and the Prosecutor—while not necessarily accommodating U.S. concerns completely—would listen with great attention if the United States, as a State Party, called for moderation and realism in the exercise of the jurisdiction of the Court.

The benefits of joining the ICC outweigh the risks of accepting an unappealing judgement.

Kress, 21 – Professor of International Law and Criminal Law, Chair for German and International Criminal Law, Director of the Institute of International Peace and Security Law at the University of Cologne

[Claus Kress, "A Plea for True U.S. Leadership in the International Criminal Court," Lieber Institute West Point, 5-7-2021, https://lieber.westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/, accessed 12-10-2024; AD]

Second, the risk of having to accept a divergent judgment by the ICC in an exceptional situation is significantly outweighed by the benefits of a U.S. accession to the ICC Statute. Those benefits are neither short term nor immediately tangible. The core benefit would consist of an enhanced respect for the relevant fundamental international legal rules of conduct that would result from the assumption of true, principled, U.S. leadership in international criminal justice. At the same time, by joining the ICC Statute at a moment in time where neither China nor Russia have done so, the United States would make an important step to establish itself as a global leader not "merely by the example of its power, but by the power of its example" (to use President Biden's phrase).

The Rome Statute and congressional limitations would protect the US from ICC overreach.

Geoghegan, 22 – staff writer and contributing writer to The New Republic

[Thomas Geoghegan, "There's No Good Reason for the United States to Stay out of the International Criminal Court," New Republic, 5-9-2022, https://newrepublic.com/article/166300/international-criminal-court-ukraine-russia, accessed 1-12-2025; AD]

While we lose leverage by staying out, we lose nothing by going in. After the Ukraine invasion, our claim that the ICC has no jurisdiction over the U.S. will be even more illusory: If it is to be brushed aside in the case of Russia, the logic that the U.S. is similarly exempt will no longer be tenable. It is also true that there is a big distinction: In effect, American service members and American citizens, if not the looser category of "U.S. persons," would not be subject to prosecution in the ICC if the U.S. legal system can render justice on its own. This is the principle of "complementarity," a key part of the original Rome Statute of the International Criminal Court, the founding treaty adopted now by 123 member states and which went into effect in 2002. It is the ICC that is supposed to be "complementary," used only in case no nation or applicable nonstate is willing to exercise jurisdiction.

Aside from that jurisdictional limit in the Rome Statute itself, Congress can put in that same limit into a federal law as an additional limit on ICC jurisdiction. With any treaty the U.S. signs, Congress can always pass a law to limit—or modify or clarify the limit of—the U.S. commitment. Such a law will generally have precedence under the Constitution over any treaty obligation. In effect, we can join the ICC and still determine its jurisdiction, or lawfully exclude it over American personnel. Congress can do so by mandating the jurisdiction of the federal or military courts over the same crimes covered by the ICC. In the last resort, the president also can even abrogate a treaty—lawfully under the Constitution—should he choose to do so, and such an abrogation by the president is effectively unreviewable, not only by our own courts but by the ICC as well.

Once in the ICC, and with such a law in place, the U.S. could refuse to extradite or turn over any American service personnel. Under the Rome Statute—but also under a law—we have a legal entitlement to their release. Or we do so long as we have a functioning judicial system capable of adjudicating possible war crimes. God help the U.S. if it does not have such a system. For the sake of our domestic liberty, we might want such a check. And to have such legal entitlement taken from the statute, even if it is one that

we unilaterally enforce under our own domestic law, is at least as much protection as we have now.

4.0.14 AT: Legitimacy

Democratic legitimacy doesn't matter for international criminal courts.

Glasius 12 (Marlies Glasius - Senior Lecturer, Department of Politics, University of Amsterdam and Extraordinary Professor, Department of Politics, Free University Amsterdam.), "Do International Criminal Courts Require Democratic Legitimacy?", OUP Academic, accessed - 12-21-2024, published - 2-1-2012, https://academic.oup.com/ejil/article/23/1/43/525501

4 Conclusion One thing becomes abundantly clear from a survey of the gamut of theories on the basis for and functions of criminal justice: none suggests that the organization of punishment of crimes in a society does or should have democratic foundations in a direct, representative sense. There is no parallel in either classical or critical legal sociology, or legal anthropology, for the notion that direct democratic legitimation, expressed by Branch in consultative and by Drumbl even in franchise terms, is required for the legitimacy of international criminal courts. Even in the most radical critiques of punitive justice systems, no argument has been made, and I would suggest that no logical argument can be made, that a popular vote is the proper way to take decisions on whether a criminal justice institution should have jurisdiction over a particular population, who should be its judges, which suspects ought to be tried, whether they should be found guilty or innocent, or how they should be punished. The view that populations affected by the decisions of international criminal courts are 'disenfranchised' is theoretical as well as historical nonsense. A weaker view could still be put forward, on the basis of Durkheim and the classical anthropologists, that penal law, and court decisions in particular, should express the norms of a collective conscience of a society. This would pose problems for international criminal courts, which stand outside the societies affected by their adjudication. However, the expression of collective conscience theory, never intended to apply beyond 'primitive societies', has had little empirical confirmation in application to modern western societies. The idea of values held in common, of which criminal justice could be an expression, is further compromised in societies where mass violence has recently occurred. And finally, recent anthropological work on legal pluralism in contemporary non-western societies calls into question the very notion of a unified society whose conscience is expressed in a single legal order. So, international criminal courts cannot and should not be asked to be democratically accountable in the strong sense that any aspect of their functioning should be subject to a vote by affected populations. But there are other guiding principles to be found within the different tra-

ditions reviewed here for conceptualizing international criminal justice institutions as having a relationship with, and responsibilities towards, communities affected by their legal functioning. From an eclectic synthesis of the legal sociology, anthropology, and political theory, I derive three substantive aims to be pursued by international criminal courts in order to be legitimate in their dealings with populations affected by their legal interventions, as well as two principles to guide their conduct in this respect. This will be followed by a brief sketch of how these principles could be translated into concrete policies. First, the connection between criminal justice and a collective conscience should be interpreted dynamically. International criminal courts should not be rejected on the basis that they are not fit to express a society's fixed normative system, a fixity that is generally unproven and particularly implausible in situations where crimes against humanity have just taken place. Instead, international criminal courts could and should play a (modest) role in the reshaping of a society's evolving, always contested, and temporarily traumatized sense of its normative order. Secondly, the will to heal societies and emancipate the marginalized should be tempered by a Weberian recognition that formal justice is if not a sufficient, still a necessary condition for substantive justice. International criminal courts are in a position to provide post-conflict societies with an image of unflappable integrity, and create legal security through predictability, which is likely to have been in short supply in the recent past. Thirdly, based on a Marxist interpretation of law in the tradition of E.P. Thompson, international criminal courts might (occasionally) take on the function of destabilizing power relations and legitimate the claims of those most marginalized in their own context. Arguably, we have seen some of this already in international criminal trials dealing with sexual crimes and, more problematically, child soldiers. A radical orientation would counsel courts to cultivate this function, seeking out and bestowing legitimacy on particularly marginalized groups in the form of redress. This would require a great deal of sensitivity on the part of court staff in assessing the balance between potential emancipatory effects and the potential risks that destabilizing the status quo might pose to its would-be beneficiaries. These are daunting demands. Two converging sets of literature help conceptualize how courts can make these contributions. The literature on responsive law and that on deliberative democracy help us conceptualize a court's ideal relation to the demos as not democratic in the classic sense, but communicative and cognitive instead. In other words, international criminal courts should expand on the small strides made in explaining themselves, but also open themselves up to social learning. Below I will offer some tentative ideas about how the communicative and cognitive mandates could be translated into concrete policies of international criminal courts. A communicative re-

lationship would entail (a) accessibility, (b) self-justification, and (c) encouragement of debate. A communicative court should give affected populations access to the officials of the court: through written communication, open telephone lines, interactive radio programmes, or town hall or village tree meetings. Officials should come to consider availability and responsiveness to the public at particular times as a core part of their job description. The outreach programmes of the existing courts and tribunals are already oriented in this direction, but they tend to be considered as a derivative activity carried out by dedicated personnel rather than a core task for judges and prosecutors. A communicative court would justify decisions by the court and its officials. Naturally, judgments are all about reason-giving, but officials of a communicative court should also be prepared to give reasons for not opening a particular investigation or not prosecuting a particular person, and should give reasons in language and through media accessible to the population, not just to their peers. Examples of existing practices are the ICC prosecutor's reasoned decisions not to open investigations in Iraq or Venezuela, or the ICTY prosecutor's defence of plea bargaining. In both these cases, however, the communication appears to have been directed towards global more than specifically affected local audiences. Finally, a communicative court should foster debate, about past crimes as well as about appropriate forms of justice. Research has shown that, while its trial proceedings are painfully slow, the International Criminal Court has in various situations had the unintended effect of opening debates on justice in local civil society which might otherwise have remained closed.99 Without taking controversial positions itself, a communicative court should welcome such debates as part of its societal mandate, for instance by maintaining relations with journalists and civil society groups, including critical ones. A cognitive court should (a) put in place internal learning mechanisms and (b) be open to considering institutional (re-)designs that systematically offer carefully circumscribed citizen deliberation in certain stages of adjudication. Institutional learning mechanisms would ensure that the results of planned and unplanned encounters with concerns of the public are evaluated and fed back into future decision-making by the court's officials. Institutionalization of societal voices could entail the use of a penal board including victims' groups, prisoners' rights movements, different ethnic or religious blocks to set guidelines on sentencing,100 or the use of a jury or sentencing circle to give a binding or advisory opinion on sentencing in a particular case.101 Such schemes should of course be considered with great caution, as with every 'voice' that is given official status, other voices may be excluded. But a cognitive court would not reject out of hand the policy potential of carefully deliberated and culturally sensitive outcomes from such bodies. I have shown that while there is no argument to

be derived from the legacy of legal sociology and anthropology that supports a direct democratic basis for international criminal courts, there are clear points of departure for insisting that they should pursue wider social aims, for identifying these aims, and for identifying principles that can guide the conduct of relationships with affected populations. International criminal courts should contribute to reshaping a society's sense of normative order, to providing redress for individuals and groups marginalized by the crimes in question, and should project integrity as well as predictability to the societies at large. Their relationship with these societies should be communicative and cognitive, entailing accessibility, self-justification, encouragement of debate, internal mechanisms to consolidate social learning, and openness to institutional experimentation with deliberative designs.

5 Con Evidence

5.0.1 Constitutionality

The US would subject American citizens to prosecution in courts not established under the Constitution – that's unconstitutional.

Casey, 1 – partner in the law firm of Baker & Hostetler LLP

[Lee A., "The Case Against Supporting the International Criminal Court," WashU Law, 2001, https://law.washu.edu/wp-content/uploads/2018/10/The-Case-Against-Supporting-the-International-Criminal-Court.pdf, accessed 12-10-2024; AD]

With respect to the Constitutional objections, by joining the ICC Treaty, the United States would subject American citizens to prosecution and trial in a court that was not established under Article III of the Constitution for criminal offenses otherwise subject to the judicial power of the United States. This, it cannot do. As the Supreme Court explained in the landmark Civil War case of Ex parte Milligan (1866), reversing a civilian's conviction by a military tribunal, "[e]very trial involves the exercise of judicial power," and courts not properly established under Article III can exercise "no part of the judicial power of the country."2

This rationale is equally, and emphatically, applicable to the ICC, a court where neither the prosecutors nor the judges would have been appointed by the President, by and with the advice and consent of the Senate, and which would not be bound by the fundamental guarantees of the Bill of Rights. In fact, individuals brought before the ICC would only nominally enjoy the rights we in the United States take for granted.

For example, the ICC Treaty guarantees defendants the right "to be tried without undue delay." In the International Criminal Tribunal for the Former Yugoslavia (an institution widely understood to be a model for the permanent ICC), and which also guarantees this "right," defendants often wait more than a year in prison before their trial begins, and many years before a judgment actually is rendered. The Hague prosecutors actually

have argued that up to five years would not be too long to wait IN PRISON for a trial, citing case law from the European Court of Human Rights supporting their position.3

Such practices, admittedly, have a long pedigree, but they mock the presumption of innocence. Under U.S. law, the federal government must bring a criminal defendant to trial within three months, or let him go.4

By the same token, the right of confrontation, guaranteed by the Sixth Amendment, includes the right to know the identity of hostile witnesses, and to exclude most "hearsay" evidence. In the Yugoslavia Tribunal, both anonymous witnesses and virtually unlimited hearsay evidence have been allowed at criminal trials, large portions of which are conducted in secret. Again, this is the model for the ICC.

Similarly, under the Constitution's guarantee against double jeopardy a judgment of acquittal cannot be appealed. Under the ICC statute, acquittals are freely appealable by the prosecution, as in the Yugoslav Tribunal, where the Prosecutor has appealed every judgment of acquittal.

In addition, the ICC would not preserve the right to a jury trial. The importance of this right cannot be overstated. Alone among the Constitution's guarantees, the right to a jury trial was stated twice, in Article III (sec. 2), and in the Sixth Amendment. It is not merely a means of determining facts in a judicial proceeding. It is a fundamental check on the abuse of power. As Justice Joseph Story explained: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people."5 It is "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." That said, the exclusion of jury trials from the ICC is not surprising, for that Court invites the exercise of arbitrary power by its very design.

The ICC will act as policeman, prosecutor, judge, jury, and jailor – all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. If the ICC abuses its power, there will be no recourse. From first to last, the ICC will be the judge in its own case. It will be more absolute than any dictator. As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States.

ICC supporters suggest that U.S. participation in this Court would not violate the Constitution because it would not be "a court of the United States," to which Article III

and the Bill of Rights apply. They often point to cases in which the Supreme Court has allowed the extradition of citizens to face charges overseas. There are, however, fundamental differences between United States participation in the ICC Treaty Regime and extradition cases, where American are sought for crimes committed abroad. If the U.S. joined the ICC Treaty, the Court could try Americans who never have left the United States, for actions taken entirely within our borders.

Bill of Rights guarantees wouldn't be available in the ICC.

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A hypothetical, stripped of the emotional overlay inherent in "war crimes" issues, can best illustrate the constitutional point here: The Bill of Rights undoubtedly impedes efficient enforcement of the drug laws – also a subject of international concern. Could the federal government enter a treaty with Mexico and Canada, establishing an offshore "Special Drug Control Court," which would prosecute and try all drug offenses committed anywhere in North America, without the Bill of Rights guarantees? Could the federal government, through the device of a treaty, establish a special overseas court to try sedition cases – thus circumventing the guarantees of the First Amendment.

Fortunately, the Supreme Court has never faced such a case. However, in the 1998 case of United States v. Balsys, the Court suggested that, where a prosecution by a foreign court is, at least in part, undertaken on behalf of the United States, for example, where "the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character . . ." then an argument can be made that the Bill of Rights would apply "simply because that prosecution[would not be] fairly characterized as distinctly 'foreign' The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation. . ."6

This would, of course, be exactly the case with the ICC. If the United States became a "State Party" to the ICC Treaty, any prosecutions undertaken by the Court would be "as much on behalf of the United States as of" any other State party. Since the full and undiluted guarantees of the Bill of Rights would not be available in the ICC, the United States cannot, constitutionally, sign and ratify the ICC treaty.

5.0.2 Accountability

The ICC's power will go unchecked.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

The ICC's Unchecked Power. The U.S. system of government is based on the principle that power must be checked by other power or it will be abused and misused. With this in mind, the Founding Fathers divided the national government into three branches, giving each the means to influence and restrain excesses of the other branches. For instance, Congress confirms and can impeach federal judges and has the sole authority to authorize spending, the President nominates judges and can veto legislation, and the courts can nullify laws passed by Congress and overturn presidential actions if it judges them unconstitutional.

The ICC lacks robust checks on its authority, despite strong efforts by U.S. delegates to insert them during the treaty negotiations. The court is an independent treaty body. In theory, the states that have ratified the Rome Statute and accepted the court's authority control the ICC. In practice, the role of the Assembly of State Parties is limited. The judges themselves settle any dispute over the court's "judicial functions." The prosecutor can initiate an investigation on his own authority, and the ICC judges determine whether the investigation may proceed. The U.N. Security Council can delay an investigation for a year–a delay that can be renewed–but it cannot stop an investigation. As Grossman noted:

Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.[59]

Rouge actors will misuse the ICC for politically motivated purposes.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

Politicization of the Court. Unscrupulous individuals and groups and nations seeking to influence foreign policy and security decisions of other nations have and will continue to seek to misuse the ICC for politically motivated purposes. Without appropriate checks and balances to prevent its misuse, the ICC represents a dangerous temptation for those with political axes to grind. The prosecutor's proprio motu authority to initiate an investigation based solely on his own authority or on information provided by a government, a nongovernmental organization (NGO), or individuals[67] is an open invitation for political manipulation.

One example is the multitude of complaints submitted to the ICC urging the court to indict Bush Administration officials for alleged crimes in Iraq and Afghanistan. The Office of the Prosecutor received more than 240 communications alleging crimes related to the situation in Iraq. Thus far, the prosecutor has demonstrated considerable restraint, declining to pursue these cases for various reasons, including that the ICC does not have "jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq," which is also not a party to the Rome Statute.[68]

All current ICC cases were referred to the ICC by the governments of the territories in which the alleged crimes occurred or by the Security Council. Comparatively speaking, these cases are low-hanging fruit–situations clearly envisioned to be within the authority of the court by all states. Even so, they have not been without controversy, as demonstrated by the AU reaction to the arrest warrant for President Bashir and attempts to have the Security Council defer the case.[69]

However, the ICC's brief track record is no assurance that future cases will be similarly resolved, especially given the increasing appetite for lodging charges with the ICC.[70] A far more significant test will arise if the prosecutor decides to investigate (and the court's pre-trial chamber authorizes) a case involving a non-ICC party without a Security Council referral or against the objections of the government of the involved territory.

The motivations and political agenda of the ICC will determine whom it prosecutes.

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[Lee A., "The Case Against Supporting the International Criminal Court," WashU Law, 2001, https://law.washu.edu/wp-content/uploads/2018/10/The-Case-Against-Supporting-the-International-Criminal-Court.pdf, accessed 12-10-2024; AD]

ICC supporters also have argued that the U.S. should sign and ratify the Rome Treaty because the Court would be directed against people like Saddam Hussein and Slobodan Milosevic, and not against the United States. Here, as pretty much everywhere, the past is the best predictor of the future. We already have seen this particular drama staged at the Yugoslav Tribunal. Even though that Tribunal was established to investigate crimes committed during 1991-1995 Yugoslav conflict, and even though NATO's air war against Serbia was fought on entirely humanitarian grounds, and even though it was conducted with the highest level of technical proficiency in history, the Hague prosecutors nevertheless undertook a politically motivated investigation – motivated by international humanitarian rights activists along with Russia and China – of NATO's actions based upon the civilian deaths that resulted.

At the end of this investigation, the prosecutors gave NATO a pass not because, in their view, there were no violations, but because "[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses."7

Significantly, in their report the prosecutors openly acknowledged the very elastic nature of the legal standards in this area, further highlighting the danger that the United States will be the subject of such politically motivated prosecutions in the future: "[t]he answers to these question [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision-maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases."8

These are, in fact, "will build to suit" crimes. Whether prosecutions are brought against American officials will depend entirely upon the motivations and political agenda of

the ICC.

In response, ICC supporters claim that we can depend upon the professionalism and good will of the Court's personnel. One of the ICC's strongest advocates, former Yugoslav Tribunal Prosecutor Louise Arbour has argued for a powerful Prosecutor and Court, suggesting that "an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes."

The Framers of our Constitution understood the fallacy of this argument probably better than any other group in history. If there is one particular American contribution to the art of statecraft, it is the principle – incorporated into the very fabric of our Constitution – that the security of our rights cannot be trusted to the good intentions of our leaders. By its nature, power is capable of abuse and people are, by nature, flawed. As James Madison wrote "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."9 The ICC would not be obliged to control itself.

The ICC is at risk of manipulation by powerful actors.

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["The ICC at 20: Double standards have no place in international justice," Amnesty International, 7-1-2022, https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/, accessed 12-10-2024; AD]

Court at risk of manipulation by powerful actors

The international community has shown unprecedented support for the ICC since the Russian invasion of Ukraine. Governments who have previously opposed ICC investigations involving their own nationals or political allies have actively encouraged the OTP to investigate crimes committed in Ukraine.

Meanwhile, the ICC has recently begun accepting voluntary funding and seconded personnel clearly 'earmarked' for the Ukraine situation. Without exceptional caution and sufficient transparency, this approach risks allowing states parties to support only those situations which align with their interests. This exacerbates the risk of selective justice and leaves the court vulnerable to manipulation by powerful states.

Amnesty International is also concerned that the court and its principals have largely remained silent on the situation in Palestine and other investigations, in contrast to the publicity they have given to the Ukraine situation. This silence may have weakened the court's deterrent effect, and has left a void which has been filled with political attacks on the court's work, as well as attacks on human rights defenders. It is vital for the court's credibility that its messaging does not appear politicized.

Amnesty International is calling on the ICC to ensure that all funding is allocated in a non-discriminatory way and in accordance with the interests of justice, and to ensure that all victims of international crimes have equal access to the rights to remedy and reparations. In particular, and with its increased funds, the OTP should reprioritize its investigations into crimes committed by all parties in Afghanistan. It should also request judicial authority for its hibernated Nigeria investigation, and increase its activities in other situations where it has justified minimal progress with resource constraints.

ICC states parties must ensure that all of the court's investigations and activities are fully funded – they must not use their resources and cooperation as tools to influence which situations and parties are investigated. Meanwhile, all states who have not yet done so, including Ukraine, must ratify the Rome Statute.

"On this twentieth anniversary, we still believe the ICC can play a unique role in the realization of the universal rights to remedy and reparations," said Agnès Callamard.

"To fulfil this role, the Prosecutor must pursue all investigations without distinction: into all perpetrators of atrocities, without fear or favour, and no matter how great the political or economic power of certain actors."

5.0.3 Security Council

The Rome Statute undermines the UN Security Council's authority.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

The Challenges to the Security Council's Authority. The Rome Statute empowers the ICC to investigate, prosecute, and punish individuals for the as yet undefined crime of "aggression." This directly challenges the authority and prerogatives of the U.N. Security Council, which the U.N. Charter gives "primary responsibility for the maintenance of international peace and security" and which is the only U.N. institution empowered to determine when a nation has committed an act of aggression. Yet, the Rome Statute "empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime" free of any oversight from the Security Council.[60]

5.0.4 National Sovereignty

The US would be surrendering its sovereignty to authoritarian states.

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[Lee A., "The Case Against Supporting the International Criminal Court," WashU Law, 2001, https://law.washu.edu/wp-content/uploads/2018/10/The-Case-Against-Supporting-the-International-Criminal-Court.pdf, accessed 12-10-2024; AD]

Finally, it's important to understand exactly what is at stake here. Today, the officials of the United States are ultimately accountable for their actions to the American electorate. If the United States were to ratify the ICC Treaty this ultimate accountability would be transferred from the American people to the ICC in a very real and immediate way – through the threat of criminal prosecution and punishment. The policies implemented, and actions taken by our national leaders, whether at home or abroad, could be scrutinized by the ICC and punished if, in its opinion, criminal violations had occurred. As Alexis de Tocqueville wrote, "[h]e who punishes the criminal is . . . the real master of society."10 Ratification of the ICC Treaty would, in short, constitute a profound surrender of American sovereignty – our right of self-government – the first human right. Without self-government, the rest are words on paper, held by grace and favor, and not rights at all.

That surrender would be to an institution that does not share our interests or values. There is no universally recognized and accepted legal system on the international level, particular in the area of due process, as the Rome Treaty itself recognizes in requiring that, in the selection of judges, "the principal legal systems of the world," should be represented. Moreover, although a number of Western states have signed this treaty, so have states such as Algeria, Iran, Nigeria, Sudan, Syria and Yemen. According to the U.S. State Department, each of these states have been implicated in the use of torture or extrajudicial killings, or both. Yet, each of them would have as great a voice as the United States in selecting the ICC's Prosecutor and Judges, and in the Assembly of State Parties.

This is especially troubling because, as the ICTY Prosecutor conceded, who is and who is not a war criminal is very much a matter of your point of view. And I'd like to give give you a fairly poignant example that I learned of, actually, while practicing before the ICTY.

In this case there was a young officer, 20 or 21 years old, who commanded a detachment

of regular soldiers, along with a group of irregulars. Irregulars are, of course, always a problem. I think everyone pretty much agrees that, for example, the worst atrocities in Bosnia were committed by irregulars. At any rate, these irregulars were clearly under the officer's command when they all ran into a body of enemy troops.

There was a short, sharp firefight. A number of the enemy were killed or wounded, and the rest through down their arms and surrendered. At that point, the officer entirely lost control of the situation. His irregulars began to kill the wounded and then the rest of the prisoners – with knives and axes actually.

After a good deal of confusion, the officer managed to form up his regulars around the remaining prisoners, but about a dozen were killed. Now, under our system of military justice, the perpetrators would be prosecuted, but the officer would very likely not be. He gave no order for the killings, and took some action to stop it.

However, under the command responsibility and "knowing presence" theories now current at the ICTY, the ICC's model, this officer is guilty of a war crime. The fact that he did make some attempt to prevent the killing would certainly be taken into account, but very likely as a matter of mitigation at sentencing.

At any rate, this is a real case. It didn't, however, happen in Central Bosnia, or Kosovo, or Eastern Slavonia, and the individuals involved were not Serbs, Croats, or Muslims. As a matter of fact, it happened in Western Pennsylvania. The soldiers were English subjects, at the time, and the irregulars were Iroquis Indians; their victims were French. The young officer was, as a matter of fact, from the county in which I live – Fairfax, Virginia. And, for those of you who are students here at the University, his name – Washington – will grace each of your diplomas.11

War is, inherently, a violent affair and the discretion whether to prosecute any particular case in which Americans are involved should be kept firmly in the hands of our institutions, to be made by individuals who are accountable to us for their actions. The ICC is inconsistent with our Constitution and inimical to our national interests. It is an institution of which we should have no part.

Membership in the ICC poses a threat to national sovereignty.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

A Threat to National Sovereignty. A bedrock principle of the international system is that treaties and the judgments and decisions of treaty organizations cannot be imposed on states without their consent. In certain circumstances, the ICC claims the authority to detain and try U.S. military personnel, U.S. officials, and other U.S. nationals even though the U.S. has not ratified the Rome Statute and has declared that it does not consider itself bound by its signature on the treaty. As Grossman noted, "While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a U.N. Security Council mandate."[61]

As such, the Rome Statute violates international law as it has been traditionally understood by empowering the ICC to prosecute and punish the nationals of countries that are not party to it. In fact, Article 34 of the Vienna Convention on the Law of Treaties unequivocally states: "A treaty does not create either obligations or rights for a third State without its consent."[62]

Protestations by ICC proponents that the court would seek such prosecutions only if a country is unwilling or unable to prosecute those accused of crimes within the court's jurisdiction–the principle of complementarity–are insufficient to alleviate sovereignty concerns. As Casey and Rivkin note:

[C]omplementarity applies only if the state in question handles the particular case at issue in a manner consistent with the ICC's understanding of the applicable legal norms. If the court concludes that a state has been unwilling or unable to prosecute one of its citizens or government officials because it does not consider the questioned conduct unlawful, based on its own interpretation of the relevant international legal requirements, the court can proceed with an investigation.[63]

For example, the Obama Administration recently declared that no employee of the Central Intelligence Agency (CIA) who engaged in the use of "enhanced interrogation tech-

niques" on detainees would be criminally prosecuted.[64] That decision was presumably the result of an analysis of U.S. law, legal advice provided to the CIA by Justice Department lawyers, and the particular actions of the interrogators. Yet if the U.S. were a party to the Rome Statute, the Administration's announced decision not to prosecute would fulfill a prerequisite for possible prosecution by the ICC under the principle of complementarity. That is, because the U.S. has no plans to prosecute its operatives for acts that many in the international community consider torture, the ICC prosecutor would be empowered (and possibly compelled) to pursue charges against the interrogators.

5.0.5 National Security

The ICC could have a chilling effect on states' willingness to project power.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

Erosion of Fundamental Elements of the U.N. Charter. The ICC's jurisdiction over war crimes, crimes against humanity, genocide, and aggression directly involves the court in fundamental issues traditionally reserved to sovereign states, such as when a state can lawfully use armed force to defend itself, its citizens, or its interests; how and to what extent armed force may be applied; and the point at which particular actions constitute serious crimes. Blurring the lines of authority and responsibility in these decisions has serious consequences. As Grossman notes, "with the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests."[65] The ability to project power must be protected, not only for America's own national security interests, but also for those individuals threatened by genocide and despotism who can only be protected through the use of force.

It would complicate military cooperation between the US and its allies.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

Complications to Military Cooperation Between the U.S. and Its Allies. The treaty creates an obligation to hand over U.S. nationals to the court, regardless of U.S. objections, absent a competing obligation such as that created through an Article 98 agreement. The United States has a unique role and responsibility in preserving international peace and security. At any given time, U.S. forces are located in approximately 100 nations around the world, standing ready to defend the interests of the U.S. and its allies, engaging in peacekeeping and humanitarian operations, conducting military exercises, or protecting U.S. interests through military intervention. The worldwide extension of U.S. armed forces is internationally unique. The U.S. must ensure that its soldiers and government officials are not exposed to politically motivated investigations and prosecutions.

ICC decisions can upset delicate diplomatic situations.

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[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

Disruption of Diplomatic Efforts. ICC decisions to pursue investigations and indictments can upset delicate diplomatic situations. Although the U.N. Security Council has been largely deadlocked over placing strong sanctions on the government of Sudan for its complicity in the terrible crimes in Darfur, it did pass a resolution in 2005 referring the situation in Darfur to the ICC. In summer 2008, the ICC announced that it would seek an indictment against Sudanese President Omar al-Bashir for his involvement in crimes committed in Darfur. On March 4, 2009, a warrant was issued for his arrest.[78]

Issuing the arrest warrant for Bashir was certainly justified. His government has indisputably supported the janjaweed militias that have perpetrated massive human rights abuses that rise to the level of crimes against humanity. His complicity in the crimes demands that he be held to account. Regrettably, the decision to refer the case to the ICC and the subsequent decision to issue an arrest warrant for the sitting Sudanese head of state have aggravated the situation in Darfur and may put more innocent people at risk.

In response to his indictment, Bashir promptly expelled vital humanitarian NGOs from Sudan.[79] Bashir may ultimately decide he has nothing to lose and increase his support of the janjaweed, encouraging them to escalate their attacks, even against aid workers and U.N. and AU peacekeepers serving in the African Union/UN Hybrid operation in Darfur (UNAMID). It could also undermine the 2005 peace agreement meant to reconcile the 20-year north-south civil war, which left more than 2 million dead.

Moreover, the decision to seek the arrest of Bashir, cheered by ICC supporters, may actually hurt the court in the long run. African countries, which would bear the most immediate consequences of a more chaotic Sudan, have called on the Security Council to defer the Bashir prosecution. Sudan's neighbors may be forced to choose between arresting Bashir, which could spark conflict with Sudan, or ignoring the court's arrest warrant. Indeed, all AU members except for Botswana announced in July 2009 that they would not cooperate with the ICC in this instance. South Africa subsequently announced that it would honor the ICC warrant in August 2009.[80] Whether the AU decision will have

broader ramifications for the court's relationship with African governments remains to be seen. Some African ICC parties have mentioned withdrawing from the Rome Statute.

The desire to see Bashir face justice for his role in the crimes committed in Darfur is understandable and should not be abandoned. However, premature efforts to bring Bashir to justice may be counterproductive. The priority in Sudan is to reduce the violence, stop the atrocities, restore peace and security, reconstitute refugees, and set the region on a path to avoid a return to conflict. This requires strong action by the AU and the international community, including economic and diplomatic sanctions designed to bring maximum pressure to bear on Bashir and his allies. It may require military intervention. Once this is achieved, justice can be pursued by the Sudanese themselves through their courts, through an ad hoc tribunal, or even through the ICC.

In another situation, the Ugandan government referred alleged crimes committed by the Lord's Resistance Army in northern Uganda to the court in 2004 in hopes of "engaging the western powers who had ignored the situation in northern Uganda"[81] and pressuring the LRA to negotiate a peace. Regrettably, the LRA has responded by announcing that it will not agree to peace talks until the ICC arrest warrants are withdrawn. If Uganda could resolve its long festering conflict with the LRA by agreeing not to prosecute its leader, it would have no ability to call off the ICC prosecution. Thus, the ICC's involvement could be a real impediment to peace in Uganda, assuming the LRA would abide by an agreement.[82]

The desire to address tragedies such as those in Darfur and Uganda is as laudable as the international community's unwillingness or inability to act is frustrating. The perpetrators of war crimes, genocide, and crimes against humanity should be held to account, but ICC investigation and arrest warrants cannot substitute for decisive action to stop the perpetrators and resolve such situations. Because the vast majority of the court's discretion lies within the Office of the Prosecutor, there is little opportunity to resolve disputes, conflicts, or sensitive political issues diplomatically after a case is brought to the ICC.

Furthermore, the ICC prosecutor and judges are unlikely ever to be held accountable if their decisions lead to greater carnage in Darfur or prolong the conflict in Uganda. They are free to act without considering the potential consequences. Others are not so lucky.

The long-term implications of supporting the ICC, which has become a wild card in a foreign and security policy, are significant, and they emphasize the need for the ICC to keep its distance from political issues.

Prosecutions will prevent US forces from ending atrocities around the world – like in Syria.

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[John Yoo and Ivana Stradner, "The U.S. Must Reject the International Criminal Court's Attack on Its National Sovereignty," National Review, 3-17-2020, https://www.nationalreview.com/2020/03/united-states-must-reject-international-criminal-court-attack-on-national-sovereignty/, accessed 1-12-2025; AD]

Last week, the International Criminal Court (ICC) authorized an investigation of alleged war crimes and crimes against humanity by U.S., Afghan, and Taliban troops in Afghanistan, as well as by CIA black sites operated in Poland, Lithuania, and Romania. While the prosecution will likely fail, it represents another effort by a global elite — consisting of European governments, international organizations, and their supporting interest groups, academics, and activists — to threaten American sovereignty.

The Rome Statute, which established the ICC in 1998, was supported by 120 states. It had the worthy goal of preventing the world's most horrific crimes. Today the ICC can exercise jurisdiction over war crimes, crimes against humanity, aggression, and genocide. Its founders believed that an international organization in the form of a court could replace the customary role of nation-states to punish those who violate the rules of civilized warfare.

The Clinton administration signed the treaty in 2000, but did not submit it for Senate ratification. American support for the court dissolved after 9/11, as American officials worried that the ICC would become an anti-American kangaroo court used by certain countries to constrain nation-state sovereignty. In 2002, the Bush administration announced that it would not sign the agreement, and empowered then-State Department official John Bolton to lead a U.S. campaign to sign bilateral immunity agreements with more than 100 countries to protect both parties from the ICC's jurisdiction.

Ever since, the ICC has labored ineffectually. To date, the Court has spent more than $2 billion dollars and yielded just eight successful convictions and four acquittals, focusing only on African countries. While there are 123 member states, nations that still might have to wage war, such as the U.S., Israel, India, South Korea, China, and Russia, have refused to join. America's Western European allies, perhaps still hoping for a utopian

future where war has disappeared and meager conventional forces are all that is needed, lend the ICC its greatest support.

Most ICC officials have long hoped to achieve international relevance by attacking the ICC's greatest critic: the United States. Since November 2017, ICC chief prosecutor Fatou Bensouda has sought to use alleged crimes in Afghanistan to bring charges against the U.S. military and intelligence community. America's response has been tough, and after numerous threats by the ICC, U.S. secretary of state Mike Pompeo ordered the revocation of the ICC chief prosecutor's U.S. entry visa (though Bensouda managed to circumvent the ban and attend her UN meetings last April). The ICC Pre-Trial Chamber later ruled against an investigation (and possible prosecution) of the U.S. for alleged crimes in Afghanistan because both would most likely fail. Last week, however, the ICC's appellate court reversed this finding and allowed Bensouda to continue her pursuits of American activities in Afghanistan and elsewhere after 9/11.

To end this charade, the U.S. should continue to challenge the Court's jurisdiction and protect the rights of nations that are bound only by rules to which they consent. The Trump administration should continue to deny ICC officials and any government officials (such as any military or law enforcement officers) that assist them from entering the United States or using its financial system. Most important, the United States should strike at the ICC through its supporters. Japan, the United Kingdom, France, Italy, Canada, Spain, Mexico, and Australia are all major Court funders. The Trump administration should warn countries who are ICC top funders yet depend utterly on the U.S. for their defense (such as Japan) that they cannot expect American troops to protect any nation seeking to prosecute and imprison them. It should weaken defense ties with ICC member countries, and cut foreign aid to any nation that cooperates with the Court.

With these actions, the Trump administration will defend the rights, not just of the United States, but of all sovereign nations. America did not join the Rome Statute. It remains unfettered by its requirements. To protect international law, it should refuse to recognize any ICC probe. International rules should only bind nations that consent to them. Allowing the ICC to claim power over the U.S., which does not consent to its jurisdiction will erode any incentive to obey any international rules at all. The ICC's actions threaten the only true mechanism for deterring human rights abuses.

Subjecting U.S. forces to an after-the-fact and idealistic human-rights barometer will only discourage Washington from intervening to end massive human-rights abuses in difficult world hotspots. If the global elite want the U.S. to lead efforts to end killings in

places such as Syria, Yemen, or Sudan, the last thing it should do is prosecute American troops when they take on the difficult jobs that no other nation can or will do.

5.0.6 Conflict

ICC involvement reduces the likelihood of conflict termination.

Prorok, 17 – Associate Professor in the Political Science department at the University of Illinois at Urbana-Champaign

[Alyssa Prorok, "The (In)Compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination," International Organization 71, no. 2 (2017): 213–43, http://www.jstor.org/stable/44651940, accessed 12-10-2024; AD]

Since the birth of the ICC in 2002, scholars and policy-makers have debated the court's role in the pursuit of justice, and how that pursuit affects prospects for peace in warring states. I argue that active involvement by the ICC in ongoing civil conflicts, under certain conditions, decreases prospects for peace by threatening leaders with international prosecution. This effect is conditional upon the risk of domestic punishment: as the threat of domestic punishment increases, the conflict- exacerbating effects of ICC involvement decrease.

Empirical tests provide strong support for this theoretical argument. ICC involve- ment significantly reduces the likelihood of conflict termination when the risk of domestic punishment is low. Its impact diminishes, becoming insignificant, as the domestic punishment risk increases. These results are consistent across a variety of robustness checks, including alternative specifications of the dependent and key in- dependent variables, tests to address selection bias, and models addressing potential endogeneity issues.

This study advances the literatures on the ICC and civil conflict in several ways. As one of the first empirical studies to examine the impact of ICC involvement rather than ICC ratification, and the first on ICC involvement to study conflict termination, this study contributes important insights to the nascent body of literature on the ICC 's impact, particularly on its ability to facilitate peace while pursuing justice. The con- ditional impact of ICC involvement identified here also adds to growing evidence sug- gesting the court's impact often depends upon factors within a country. Additionally, these findings demonstrate that the court's broader influence is complex and multi- faceted: ICC ratification improves prospects for peace in warring states, while active involvement by the court has the opposite impact. The ICC, therefore, is not universally benign or entirely harmful, and scholars must examine all avenues through which the ICC affects states' behavior to fully understand its overall impact on peace. My find- ings also contribute to the civil conflict literature. They add to an emerging body of research on

leaders' impact on conflict behavior, and identify a novel source of punish- ment - international prosecution - that influences leaders' strategic calculations during civil war.

Finally, while the ICC's primary mandate is the pursuit of justice, the results indi- cate that its broader effects on the process of conflict termination must be taken into account by policy-makers and the court itself. In particular, the fact that ICC involve- ment can prolong conflict has important implications for how the court pursues inves- tigations in ongoing conflict situations in the future. It may be in the best interest of peace, for example, for the ICC to investigate and pursue arrests and trials only after a settlement has been reached. This is particularly true because the court's most detri- mental impact comes when conditions for successful settlement improve (that is, as the domestic punishment risk diminishes), suggesting that the court is doing harm in the very settings where successful settlement may otherwise have been possi- ble. The court appears to recognize, at least to some extent, how influential it can be. It recently issued a statement aimed at reassuring LRA rank-and-file that they would not be killed or tortured by the ICC if they chose to lay down arms.1 13 Further self-reflec- tion by the court is warranted, given the influence it has not only on rank-and-file, but on leaders' strategic calculations and the interplay between peace and justice in inter- national politics.

Various examples demonstrate that the ICC has failed to prevent horrendous crimes and risks prolonging conflicts.

ICG, 12 ["The deterrent effect of the ICC on the commission of international crimes by government leaders," International Crisis Group, 9-26-2012, https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders, accessed 1-12-2025; AD]

The ICC's first decade has seen broad claims made about the Court's ability to deter the commission of international crimes by government leaders.

At one end, enthusiasts have claimed it has the ability to deter future crimes, and to cause abusive leaders to end their ongoing campaigns of violence against their own people. So the ICC has regularly been posited as a tool capable of ending the commission of international crimes in Sudan, Uganda, Libya, Syria, Myanmar, the Democratic Republic of the Congo and elsewhere.

Such claims are not surprising given that the Court's founders themselves highlighted the ICC's deterrent potential, claiming in the preamble of the Rome Statute that ending impunity for perpetrators of atrocity crimes would contribute to the prevention of such crimes.

Sceptics of the Court's deterrent impact, however, have no shortage of examples to back their case that the court has failed to prevent horrendous crimes, even in cases where it is actively investigating or prosecuting. And again, many of the same situations – such as Libya, Sudan, Uganda, the Congo - are cited as examples.

These sceptics argue that the very nature of the crimes prosecuted by the International Criminal Court – war crimes, crimes against humanity and genocide – make them resistant to deterrence through prosecution, and that the record so far suggests that not only do international prosecutions offer little hope of preventing future atrocities, they in fact risk prolonging conflicts.

There is, however, a much-overlooked middle ground.

What we want to explore is the possibility that the risk of ICC prosecution may be one of a range of factors taken into account in the calculations made by government leaders determining how to respond to a challenge to their authority – be it a nascent rebellion, or proposed secession, or simply a vigorous political opposition.

Our proposition is that where a regime still perceives room for manoeuvre then the prospect of such prosecution may be one of a range of domestic and international fac-

tors – such as the possibility of internal opposition, financial consequences, likelihood of military success, international disapproval short of prosecutions, and the possibility of sanctions and other coercive measures – that could impact upon its strategic calculations.

There is some evidence that suggests national leaders are increasingly aware of the possibility of ICC prosecution, and that this can influence their decision-making calculus, for better or worse. And if ICC prosecution factors into a regime or leader's determination to cling to power, it is not unreasonable to conclude that such a fear may also, in certain circumstances, act to curtail abuses and shift the calculus in favour of avoiding war crimes or crimes against humanity.

Though there are plenty of examples in which the threat of criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities, this does not mean that deterrence has not worked or could not work. Those who argue against deterrence often focus on "specific deterrence", that is, the possibility that prosecutions can deter leaders who have already committed war crimes or crimes against humanity from committing them in the future.

But these are, in fact, the very situations where prosecutions are most unlikely to deter. In such situations, prosecution by the International Criminal Court will more likely represent an existential threat to a ruler, or ruling party, and is thus more likely to cause national leaders to seek to entrench themselves, and hence maintain or even escalate an abusive or criminal campaign. We have seen this in Sudan, where President Bashir's indictment by the ICC has done little to halt attacks on civilians in both Darfur and, more recently, South Kordofan.

Instead our focus should be on longer-term legal deterrence and the entrenchment of human rights norms. Over the longer term prosecutions can act to dissuade future generations of leaders from the commission of such crimes.

Specific examples demonstrate that ICC prosecutions have minimal impacts OR cause abusive leaders to entrench themselves.

ICG, 12 ["The deterrent effect of the ICC on the commission of international crimes by government leaders," International Crisis Group, 9-26-2012, https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders, accessed 1-12-2025; AD]

Country Examples

A central difficulty for those seeking to establish a deterrent effect for criminal prosecutions is that while it is easy enough to list cases where deterrence hasn't worked, its very difficult to identify cases in which it has - a difficulty magnified in an international setting. It is of course a difficulty we face in conflict prevention more broadly. Successful conflict prevention, like successful deterrence, means, in effect, that nothing happens. And it is difficult to prove a counterfactual. But there is significant anecdotal evidence to suggest that the risk of prosecution by the ICC – which today is one of the few credible threats faced by leaders of warring parties – may influence their calculations and policy choices.

The evidence of behavioural change due to ICC prosecution is twofold. There is evidence to suggest that in some situations, particularly those where conflict is ongoing and where war crimes or crimes against humanity have already occurred, the possibility of international individual criminal prosecution may cause the abusive leader to entrench himself, thereby prolonging the conflict and facilitating the further commission of atrocities. But there are other situations, notably where a leader is not facing an existential threat, where the possibility of an ICC prosecution could tip the cost-benefit scale away from a large scale criminal course of action.

Uganda

While there was initial criticism of ICC's prosecution in Uganda from civil society actors and others, there is some limited evidence of the prosecutions having a deterrent impact on the leaders of the rebel Lord's Resistance Army. The issue of ICC warrants against LRA commanders in 2005 may have contributed in bringing the LRA to the negotiating table, and helped drive along the peace negotiations. By raising awareness and focussing the attention of the international community, which in turn created a crucial broad base of regional and international support for the fledgling peace process, the ICC's efforts to hold the LRA leadership criminally responsible for its atrocities in

northern Uganda not only helped create that momentum but embedded accountability and victims' interests in the structure and vocabulary of the peace process.

Ultimately however, these prosecutions, or the threat of prosecution, may have been an obstacle to the eventual signing of a peace agreement, though doubts remained throughout the process about the commitment of Joseph Kony to a peaceful settlement.

Democratic Republic of the Congo

In the Democratic Republic of the Congo, home of the ICC's first convict Thomas Lubang Dyilo, there is some evidence that ICC prosecutions are having some impact on the strategic decisions of troop commanders. Media reports suggest a number of ex-combatants have noticed a modification in the behaviour of rebel commanders designed to avoid the possibility of ICC prosecution, particularly in Ituri which has been the focus of the ICC's investigative and prosecutorial activities.

Colombia

Since the Office of the Prosecutor announced its interest in Colombia in 2006, the government has taken a number of measures – most notably promulgating the Peace and Justice Law – arguably designed to avoid the spectacle of high-ranking government officials and army officers appearing at The Hague. The threat of ICC prosecution appears to not only have influenced the calculations of the Colombian government – including former President Pastrana who, according to cables published by Wikileaks, expressed (unwarranted) concern that he may be prosecuted by the ICC for his actions while in power from 1998-2002 – but also by key rebels. And at least one of the leading paramilitary leaders, Vincente Castrano (AUC), was apparently sharply aware and fearful of the possibility of ICC prosecution, a fear that reportedly directly contributed to his demobilisation. Clearly a number of paramilitary commanders in Colombia were aware of the risk of ICC prosecution and took this risk into account when deciding to demobilise.

Kenya

The 2007-2008 violence in Kenya saw an unprecedented number of civilians killed and displaced. A Commission of Inquiry established in the aftermath, commonly known as the Waki commission, recommended the establishment of a Kenyan special tribunal to try the accused organisers of ethnic and political violence in order to break the cycle of impunity that had long characterised Kenyan elections. Failing that, the Commission recommended the transmission of the names of those allegedly responsible for the violence to the ICC.

On 2 July 2009, Kofi Annan transmitted a sealed envelope of names and evidence gathered by the Waki Commission to the ICC prosecutor who, in December 2010 announced the names of six suspects including Uhuru Kenyatta, the deputy Prime Minister, finance minister and son of Kenya's first president, and William Ruto, a former government minister. Political leaders who had initially argued that only the ICC could provide the requisite independence and impartiality to ensure a fair trial, quickly backtracked. Prime Minister Odinga, who had initially appeared supportive of ICC prosecutions, has grown increasingly silent on their progression.

Kenyan politicians have, since the announcement of suspects, repeatedly attempted to block the ICC prosecutions, lobbying to have the case suspended on the basis that it could derail ongoing domestic prosecutions and warning that the ICC process could reignite violence, and arguing that the ICC does not have the proper jurisdiction. These attempts to block accountability processes, though primarily rooted in the need to secure domestic support, particularly among certain ethnic groups, could also hint at a tendency among senior politicians to see prosecution, whether international or domestic, as a threat to their traditional ability to use violence to retain power during elections.

Darfur/Sudan

The case of Sudan represents perhaps the most challenging case to argue for the deterrent impact of the ICC. The government has proven largely immune not only to ICC pressures, but also those of the Security Council whose repeated resolutions calling for a halt to violence in Darfur have been routinely ignored. For some, Sudan represents clear evidence that ICC's prosecutions do not, and cannot, have a deterrent effect.

Following the Court's 2009 landmark indictment of President Bashir for war crimes and crimes against humanity in Darfur, the Office of the Prosecutor was almost immediately pilloried for what some saw as not only judicial overreach, but a step that could endanger the fragile peace processes in both Darfur and South Sudan.

The government reacted to Bashir's indictment by expelling 13 international aid agencies, including Medecins Sans Frontiers (MDF) and Oxfam, and shutting down Sudanese human rights groups. For many these actions acted to bolster the belief that the government of Sudan would not be swayed, let alone deterred, by the threat of ICC prosecution. The government continues to obstruct any ICC attempts at investigation.

Though the leading inner circle of Bashir's ruling National Congress Party (NCP) proved unresponsive to the threat of prosecution by the ICC and to Security Council ultimatums, there are signs that the government was not entirely immune or indiffer-

ent to the international stigmatisation associated with such measures. Following the Prosecutor's July 2008 application for an arrest warrant for Bashir, there was a flurry of announcements of renewed peace initiatives and yet another ceasefire declaration.

With regard to more concrete measures, the ICC indictment appears to have had little impact, though this could arguably be attributed more to the fact that the regime, confident most of the condemnation from the Security Council and wider international community would amount to nothing more than empty threats, calculated that continued warfare held the promise of best results – the reticence of the United States, for fear of upsetting the hard-won North-South peace deal, China's continued oil interests, and the lack of decisive sanctioning action by the Security Council arguably fostered conditions where the regime had more to gain by continuing down a path that involved war crimes and crimes against humanity than it did by dialling back and committing to a genuine peace process.

5.0.7 Frivolous Charges

The US would constantly be defending itself against frivolous and politically motivated charges.

Groves and Schaefer, 9 – Director, Policy Campaigns and Margaret Thatcher Fellow; Jay Kingham Senior Research Fellow in International Regulatory Affairs, Margaret Thatcher Center for Freedom

[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

The Undefined Crime of Aggression. It would be irresponsible for the U.S. to expose its military personnel and civilian officials to a court that has yet to define the very crimes over which it claims jurisdiction. Yet that is the situation the U.S. would face if it ratified the Rome Statute. The Statute includes the crime of aggression as one of its enumerated crimes, but the crime has yet to be defined, despite a special working group that has been debating the issue for more than five years.

For instance, some argue that any military action conducted without Security Council authorization violates international law and is, therefore, an act of aggression that could warrant an ICC indictment. The U.S. has been the aggressor in several recent military actions, including military invasions of the sovereign territories of Afghanistan and Iraq, albeit with the U.N. Security Council's blessing in the case of Afghanistan. U.S. forces bombed Serbia in 1999 and launched dozens of cruise missiles at targets in Afghanistan and the Sudan in 1998 without explicit Security Council authorization. While charges of aggression are unlikely to be brought against U.S. officials ex post facto for military actions in Iraq and elsewhere–certainly not for actions before July 2002 as limited by the Rome Statute–submitting to the jurisdiction of an international court that judges undefined crimes would be highly irresponsible and an open invitation to levy such charges against U.S. officials in future conflicts.

If the U.S. becomes an ICC party, every decision by the U.S. to use force, every civilian death resulting from U.S. military action and every allegedly abused detainee could conceivably give cause to America's enemies to file charges against U.S. soldiers and officials. Indeed, any U.S. "failure" to prosecute a high-ranking U.S. official in such instances would give a cause of action at the ICC. For example, the principle of complementarity will not prevent a politicized prosecutor from bringing charges against a

sitting U.S. President or Secretary of Defense. That is, the U.S. Department of Justice is unlikely to file criminal charges against such officials for their decisions involving the use of military force. This decision not to prosecute would be a prerequisite for the ICC taking up the case.

At best, the U.S. would find itself defending its military and civilian officials against frivolous and politically motivated charges submitted to the ICC prosecutor. At worst, international political pressure could compel the ICC's prosecutor to file charges against current or former U.S. officials. Until the crime of aggression is defined, U.S. membership in the ICC is premature.

5.0.8 White Supremacy

The ICC reproduces structural inequalities – all its indictments have been against Black or Arab-Africans.

Clarke, 20 – professor of anthropology at UCLA

[Kamari Maxine Clarke, "Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality," Just Security, 7-24-2020, https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/, accessed 1-12-2025; AD]

Nowhere are the politics of racial inequality more difficult to instantiate than with a court whose goal is to defend victims of mass atrocity violence. The International Criminal Court (ICC) came into being through the recognition that "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." The champions of the court insisted that the most serious crimes of concern to the international community must not go unpunished, a principle they rallied around to call for an end to impunity for perpetrators at the highest levels. In practice, however, the ICC's fixation on this particular notion of justice has caused it to reproduce deep, global structural inequalities.

To date, the ICC has issued indictments against forty-two individuals, all of whom are Black and/or Arab-Africans. Recognizing the existence of anti-Black, anti-Muslim racism globally, one would expect international criminal justice to further interrogate the place of race and racism. Yet, as Randle DeFalco and Frédéric Mégret argue, agents of the ICC and other international tribunals have strongly rejected any notion that race may shape the conditions and outcomes of their functions. By contrast, proponents of international tribunals tend to position their work as being about mitigating and prosecuting the effects of violence. Race is coded as being external to an international criminal law paradigm in which all lives are supposed to matter; the cultures and systems of white supremacy are rarely acknowledged as shaping the conditions of (in)justice both within and outside this framework.

That's because of several reasons – the structure of non-ICC state dominance, Article 15, and the Prosecutor.

Clarke, 20 – professor of anthropology at UCLA

[Kamari Maxine Clarke, "Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality," Just Security, 7-24-2020, https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/, accessed 1-12-2025; AD]

We could describe numerous other illustrations of this double standard in practice, from Sri Lanka, to Syria, to Palestine. As Cowell remarks, not only does the ICC grant "direct juridical privileges to a narrow group of states – the permanent members who hold the power of veto – but it also underscores the inequality [among] states." This inherent structure of non-ICC state dominance institutionalizes the power of the UNSC, perpetuating its legal hegemony through the Rome Statute and making the ICC a mechanism of empire.

White Supremacy Decides Who Chooses: Prosecutorial Discretion

Additionally, the racially tinged reordering of priorities within international criminal justice is closely tied to the exercise of prosecutorial discretion. This structural inequality in the ICC is grounded in Article 15(1) of the Rome Statute, as well as general prosecutorial powers, which have allowed the court's disproportionate focus on African countries and African defendants. From accusations of lack of impartiality, to the call for greater oversight of the prosecutor's discretionary powers to the inequalities related to case selection, Article 15 has been critiqued less for its content than its application.

The ICC Prosecutor, even within her limited jurisdictional purview, has thousands of potential situations, cases, and suspects from which to choose. Only a very small minority of these are ever investigated, let alone prosecuted at the ICC (or anywhere else, for that matter). The selection of what situations to investigate, and whom to prosecute, is an exercise that identifies and designates the world's "worst" criminals and their victims. This act of naming and ordering, without naming or prioritizing other global acts that are part of the world's context for violence, perpetuates structural inequalities that shape perceptions in particular about blackness and violence.

White Supremacy Decides Who Has Power: Complementarity

The principle of complementarity is another tool worth considering here as it is concerned with the operationalization of international law within state jurisdiction. How-

ever, in order for the ICC to assert its jurisdiction, Article 17 requires an assessment of whether states are "unwilling or unable" to genuinely carry out an investigation. This condition enhances the court's power and diminishes the power of states to manage violence on their terms. By presuming that the lack immediate prosecutorial action is tantamount to lacking capacity, in effect, Article 17 can be seen as creating what Cowell refers to as a "legal regime vesting power[,] and by implication sovereignty[,] within the ICC." As such, complementarity presumes state failure.

Such a mechanism requires the admission of state incapacity and dependence. This "language of state failure" is found in the OTP's official report in which it argued that states that have been devastated by conflict and violence may well be unable to competently investigate and prosecute those culpable for violence. And though that might be the case, it reflects what scholars such as Charles Call have referred to as the "Failed State fallacy," which not only negates the ability of the state to find political solutions to age old violence, but it also erases Western states' complicity for their historic culpability in postcolonial state disfunction.

When such dynamics are applied to states in the Global South, particularly African states, the standard utilized in complementarity assessments feeds into old tropes about African countries being unable to govern themselves, as well as a denial of legal pluralism, at least when it might clash with fundamental colonial interests. The British, like the French, colonizers in African regions were known to defer to local traditional courts on civil matters but claimed jurisdiction of criminal cases. This disregard for traditional justice approaches reflects the same forms of paternalism that we see today in contemporary international justice, which subordinates other forms of conflict resolution and renders Westernized legal processes as the only legitimate means to adjudicate violence.

White Supremacy Decides Who Matters: If All Lives Matter, What Say International Law?

In reflecting on Frédéric Mégret's argument that the brokering of international criminal law is merely a selection of a particular technique, and thus does not dictate preselected outcomes or sets of crimes, then the toleration of racial inequality ought to be foregrounded as among the most serious international crimes. The contemporary production of international criminal law "reflects choices and historical patterns in the development of" juridical and political practices "that have tended to relegate" to the margins the significance of structural inequalities that continue to marginalize African voices and African solutions, as Xavier and Reynolds write. In principle, all lives matter for international criminal justice. In practice, the agency of Black and Brown lives

matters less in the operationalization of international criminal law. As a regime that is driven by law's technocratic logic, the ICC's work is routed through juridical frameworks that are designed to limit its calculus around life in relation to many things, such as scale of violence, nature and manner of violence, and impact of violence. These measures reflect a multilayered set of selectivity measures that are shaped by power, politics and racialized analytics, permeating each layer and shaping the conditions under which certain lives can be preserved – or prosecuted – while others are not.

In contrast with the emergent Black Lives Matter movement, which is a transnational, grassroots social movement aimed to intervening at the root causes and daily manifestations of social inequality, the ICC has a different purpose. It exists through an international treaty that represents a negotiated settlement structured to protect the interests of economically powerful states. This political-juridical mechanism helps to preserve larger sets of international and transnational processes that maintain existing power relations. Even as the ICC focuses exclusively on cases presumed to rescue and protect Black and Brown bodies, its very foundation – shaped by White supremacy – renders the current work of international criminal law difficult to reconcile with the contemporary global call to center Black lives and experiences and eradicate ongoing structural inequality.

Targeting Africa while excluding other parts of the world creates a double standard that fractures credibility.

Goldston, 23 – Columbia College and Harvard Law School

[James Goldston, "Don't let Gaza be another example of International Criminal Court double standards," Politico, 10-26-2023, https://www.politico.eu/article/dont-let-gaza-conflict-be-another-example-international-criminal-court-icc-double-standards-ukraine/, accessed 1-12-2025; AD]

It would be even more so because accusations of double standards have dogged the ICC since its inception.

A decade ago, the ICC was assailed for focusing on Africa's warlords to the apparent exclusion of other parts of the world. Later, in 2021, the prosecutor's announcement that he would "deprioritize" suspected crimes by U.S. forces and Afghan government troops in Afghanistan, and instead focus only on the Taliban — heinous as its crimes were — only deepened suspicions among many outside the West that, to quote George Orwell, some are "more equal than others."

Similar concerns have harmed the ICC's predecessors as well.

The International Criminal Tribunal for the former Yugoslavia declined to prosecute anyone for NATO air strikes in Serbia in spring 1999, even though then prosecutor Carla del Ponte later agreed they might have merited legal action. Four years later, del Ponte — who until then also served as chief prosecutor for the U.N.'s sister court in Rwanda — was removed from her position, after refusing to limit her investigation to enemies of Rwandan President Paul Kagame's government.

And perhaps no institution embodies the notion of "selective justice" more clearly than the Special Tribunal for Lebanon, which was established by the U.N. Security Council in 2007 to try those responsible for a single act of murder — the February 2005 killing of Lebanese Prime Minister Rafik Hariri — in a region which, even at that point, had witnessed thousands of other atrocities.

Now, this month's attacks have once again provoked complaints about bias and partiality — and the consequences are real. Double standards aren't just morally wrong, they're self-defeating. To be globally credible — in Brazil and South Africa as well as in Washington and Berlin — the same principles of human rights and international law need to apply in both Ukraine and Gaza.

5.0.9 Trump Retaliation

Trump's sanctions will make the court toothless.

Human Rights Watch, 20 ["US Sanctions on the International Criminal Court," Human Rights Watch, 12-14-2020, https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court, accessed 1-12-2025; AD]

On September 2, 2020, the United States government imposed sanctions on the International Criminal Court (ICC) prosecutor, Fatou Bensouda, and another senior prosecution official, Phakiso Mochochoko. In addition, US Secretary of State Michael Pompeo announced that the United States had restricted the issuance of visas for certain unnamed individuals "involved in the ICC's efforts to investigate US personnel."

The sanctions on Bensouda and Mochochoko implemented a sweeping executive order issued on June 11, 2020 by President Donald Trump. This order declared a national emergency and authorized asset freezes and family entry bans against ICC officials who were identified as being involved in certain activities. Earlier, the Trump administration had repeatedly threatened action to thwart ICC investigations in Afghanistan and Palestine. In a precursor step, in 2019, the Trump administration revoked the prosecutor's US visa.

The following questions and answers discuss the Trump administration's unprecedented authorization of a sanctions program aimed at undermining the work of the ICC.

What does it mean that the US has imposed sanctions against two ICC officials?

Could others be designated for sanctions?

Who has the authority to designate sanctions targets?

What is the reach of the sanctions and how are sanctions enforced?

How could these sanctions affect the work of the ICC?

Under what authority is the US president able to impose sanctions?

Has the US used its sanctions authority in this way before?

Are these sanctions being challenged before US or other courts? What about challenges to similar sanctions?

The European Union has expressed concern about the extraterritorial reach of some US sanctions programs and has taken countermeasures when it comes to certain other sanctions programs. What countermeasures could the EU take?

How have ICC member countries responded to the US sanctions?

What does it mean that the US has imposed sanctions against two ICC officials?

On September 2, under Executive Order 13928, the "Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court," US officials added Fatou Bensouda, the ICC prosecutor, and Phakiso Mochochoko, the head of a division within the prosecutor's office, to the Specially Designated Nationals and Blocked Persons List (the SDN List). This list is maintained by the US Department of Treasury's Office of Foreign Assets Control (OFAC).

Their designation had two immediate effects. First, any property held by Bensouda and Mochochoko (or the property of any entity of which they own 50 percent or more) in the United States became "blocked." Although any property they might have in the US has not been seized, they would not be able to exercise any rights over it, including use or sale. In addition, US persons or entities located anywhere in the world would not be able to transact with or provide services to either Bensouda or Mochochoko, unless they received a license to do so from the US government. US "persons" are defined under the executive order as "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States."

Second, all property that might belong to Bensouda or Mochochoko that comes within a US jurisdiction would be "blocked." Because the vast majority of international trade is conducted via the US dollar this has potentially broad implications. US dollar-denominated transactions—even if they are between two non-US parties—usually require a bank under US jurisdiction to handle the transactions. Thus, any transaction that passes through them, even momentarily, would also be blocked.

The importance of the US dollar and the fear of losing access to risk-averse US banks means that most major financial institutions around the globe regularly refuse to conduct transactions with or for individuals on the SDN List. This is so even in transactions in which there is no connection to US dollars, US persons, or US jurisdiction. This broadens the reach of the sanctions far beyond blocking assets like bank accounts or property physically located in the US and can affect the ability of designated people to conduct any economic transactions at all on a global basis. In addition, the fear of potentially running afoul of this executive order's vague and undefined prohibition on the provision of material assistance or support to sanctioned people creates additional risk.

In addition, Bensouda and Mochochoko, who were sanctioned as individuals, and their

immediate family members are presumed to be subject to US visa restrictions under the terms of the executive order.

Trump will retaliate to the ICC's prosecution of Israel.

Sampson, 24 – reporter covering international news for The New York Times as a member of the 2024-25 Times Fellowship

[Eve Sampson, "Why Some Countries Won't Join the I.C.C.," The New York Times, 11-21-2024, https://www.nytimes.com/2024/11/21/world/middleeast/us-icc-member-countries.html, accessed 1-12-2025; AD]

The International Criminal Court is the world's highest criminal court, prosecuting warlords and heads of state alike. But several powerful countries, including the United States, do not recognize its authority and refuse to become members.

The court was created over two decades ago to hold people accountable for crimes against humanity, war crimes and genocide under the Rome Statute, a 1998 treaty. On Thursday, it issued warrants for Prime Minister Benjamin Netanyahu of Israel, Israel's former defense minister, Yoav Gallant, and Muhammad Deif, Hamas's military chief.

The United States, which has been involved in major conflicts since the court's creation, has abstained from membership, seeking to prevent the tribunal from being used to prosecute Americans.

More than 120 countries are members of the court, including many European nations, and members are formally committed to carrying out arrest warrants if a wanted person steps on their soil. But powerful nations including China, India, Russia and Israel, like the United States, are not members.

U.S. presidential administrations from both parties have argued in the past that the court should not exercise its authority over citizens from countries that are not a member of the court.

"There remains fear of actually being investigated by the court for the commission of atrocity crimes, given the military projection of both countries regionally or globally, and fear of being prosecuted for political, rather than evidence-based, reasons," said David Scheffer, a former U.S. ambassador and a chief negotiator of the statute that established the court.

Mr. Scheffer added that there were strong rebuttals to those fears, including that "no country's leaders should, as a matter of policy and of law, enjoy impunity for intentionally committing genocide, war crimes or crimes against humanity." This argument, he said in an email, "has been pursued with determination (and American support) in Ukraine, which shortly will become the 125th member of the I.C.C."

The Biden administration swiftly denounced the I.C.C.'s decision on Thursday.

"The United States fundamentally rejects the court's decision to issue arrest warrants for senior Israeli officials," a spokesman for President Biden's National Security Council said in a statement. "We remain deeply concerned by the prosecutor's rush to seek arrest warrants and the troubling process errors that led to this decision."

Several prominent Republicans, too, condemned it, including Representative Michael Waltz, Republican of Florida, whom President-elect Donald J. Trump has tapped to be his national security adviser. Mr. Waltz said in a statement on Thursday that Israel had acted "lawfully" during the war in Gaza and that the United States had rejected the court's charges.

He also warned the court and the United Nations about the Trump administration's position toward the bodies once it takes office. "You can expect a strong response to the antisemitic bias of the ICC & UN come January," he wrote on X.

The former ambassador John R. Bolton, who served as Mr. Trump's national security adviser during his first term, condemned the court's prosecutor, accusing him of "moral equivalence."

"These indictments prove precisely what is wrong with the ICC. A publicity-hungry Prosecutor first goes after the victims of a terrorist attack, before going after the real criminals," he said, adding "I hope this is the death knell of the ICC in the United States."

5.0.10 Ineffectiveness

In practice, the ICC gets weaponized by dictators to go after their political opponents.

Johns & Parente 24 (Professor Leslie Johns and Dr Francesca Parente - Leslie Johns is a Professor of Political Science and Law at UCLA. Her newest book, Politics and International Law: Making, Breaking, and Upholding Global Rules, is available from Cambridge University Press. Twitter: @PoliticsIntlLaw Francesca Parente is an Assistant Professor of Political Science and Director of the Reiff Center for Human Rights and Conflict Resolution at Christopher Newport University. Twitter: @CNUReiffCenter), "Dictators and the ICC: The Enemy's Enemy", Australian Institute of International Affairs, accessed - 12-21-2024, published – 9-24-2024, https://www.internationalaffairs.org.au/australianoutlook/dictators-and-the-icc-the-enemys-enemy/

The International Criminal Court aspires to hold all leaders accountable for serious international crimes. But thus far, the Court has only been successful in helping dictators punish their political opponents, leading many to ask, what is international justice really for? International justice activists have spent months pleading with the Prosecutor of the International Criminal Court (ICC) to get involved in high-profile international disputes in Gaza and Ukraine. In previous decades, similar efforts led the Prosecutor to pursue cases involving Côte d'Ivoire and Kenya, and caused the UN Security Council to order the Prosecutor to take action against leaders in Libya and Sudan. Yet an overlooked fact is that dictators self-refer cases to the ICC, meaning that they welcome the ICC into their state to conduct investigations and prosecute their political opponents. In theory, such self-referrals can result in arrest warrants and trials against anyone within the borders of the state. However, as we argue in a recent publication, dictators have tremendous power to shape investigations and prosecutions. Successful ICC investigations require that investigators identify and locate witnesses. Dictators can limit the information available to the ICC, the free movement of ICC staff, and access to local security, translators, and transportation. ICC investigations and trials also often use digital and documentary evidence to establish that high-ranking individuals, like military commanders, are responsible for acts committed by subordinates. For example, in the recent trial of Uganda rebel leader Dominic Ongwen, this evidence was provided to the ICC by the Ugandan government. And perhaps most importantly, the ICC relies on its member states to enforce arrest warrants. Dictators often have the power to track and

arrest their political opponents, sending them to The Hague for trial. However, rebel groups usually cannot arrest and surrender a sitting dictator to the ICC. These powers are apparent in the ICC's investigations and prosecutions in the Central African Republic, the Democratic Republic of the Congo, Mali, and Uganda. A simple glance at the raw data suggests that dictators are using the ICC to punish their opponents. Between 2002 and 2021, dictator self-referrals resulted in seventeen total ICC arrest warrants. Of these, 94 percent were for opponents of the sitting government. These are the arrest warrants that have resulted in successful trials for the ICC. In contrast, over the same period, only 25 percent of the ICC's other twenty arrest warrants were for government opponents. To date, the ICC has not successfully prosecuted a single sitting head of government. These patterns mean that the only people who are in jail after being found guilty by the ICC of committing a serious international crime are individuals who challenged a dictator. So, a dictator knows that if he commits atrocities against rebel forces, there is little chance that the ICC will hold him accountable. However, that same dictator can use the ICC to punish rebel forces when they commit similar atrocities. This asymmetry in punishment suggests that ICC membership can give a dictator a strategic advantage in a civil conflict. A credible threat of ICC referral makes it extremely costly for a rebel group to commit atrocities, while the dictator faces relatively trivial costs for using the same tactics, knowing that they will be shielded from ICC accountability. However, not all dictators choose to use violence. Higher levels of political competition make it more difficult for a dictator to deploy violence to remain in power. For example, multiple political parties allow opponents to publicise and shame a dictator for atrocities more easily. Similarly, a free press, opposition political parties, active civil society, and/or independent bureaucracies increase transparency about actions and policies. Finally, legislatures and domestic courts can have limited powers to sanction a dictator for violence. We believe that domestic political competition helps to explain why dictators choose to join the ICC. Joining the ICC (and using it through self-referral) has complex direct and indirect effects on how both a government and rebel group will behave during a civil conflict. Overall, when political competition is low, violence is cheap for a dictator, and there is little added benefit from joining and using the ICC. However, as domestic political competition increases, violence becomes more costly. In this scenario, there is more strategic advantage to joining the ICC and then trying to control its processes. This indicates that there are key patterns in how dictators behave. For one, dictators who face more political competition are likely to join the ICC than dictators who do not face credible threats to their power. Statistical results show that dictators who face factional competition—that is, competition based on parochial

or ethnic-based political factions—are nearly twice as likely to join the ICC compared to dictators who can suppress the opposition from participating in politics. Second, the overall level of violence committed in the state is likely to decrease after a dictator joins the ICC because both the dictator and rebel groups will face higher costs from committing atrocities. This is also supported statistical analyses. We estimate that joining the ICC increases the chance of having a year with zero total violence by twelve percentage points (from 71 percent for dictators before joining the ICC to 83 percent after joining). Finally, if there is a benefit to the dictators for joining the ICC. That is, those dictators who join the ICC will be less likely to be removed from office. In other words, joining the ICC should increase their chances of survival. Again, this is supported by our data. The dictators who join the ICC are half as likely to lose office after joining as compared to before joining. International criminal lawyers have lauded the ICC's successes. They rejoice in the development of new case law. They propose new crimes for the Court to pursue like gender apartheid and ecocide. They write thoughtful guidelines about the admissibility of digital evidence. But is it not troubling that the ICC's success has also come at the price of helping dictators prosecute political opponents and remain in power? As students of politics, we have to wonder: is this what international justice is for?

The ICC is ineffective and lacks an enforcement mechanism.

Groves and Schaefer, 9 – Director, Policy Campaigns and Margaret Thatcher Fellow; Jay Kingham Senior Research Fellow in International Regulatory Affairs, Margaret Thatcher Center for Freedom

[Steven Groves and Brett Schaefer, "The U.S. Should Not Join the International Criminal Court," The Heritage Foundation, 8-18-2009, https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court, accessed 12-10-2024; AD]

Other Investigations. In addition to these four cases, the Office of the Prosecutor is "currently conducting preliminary analysis of situations in a number of countries including Chad, Kenya, Afghanistan, Georgia, Colombia and Palestine."[31] Interest in using the ICC to investigate situations has increased rapidly. By February 2006, the prosecutor had received 1,732 communications alleging crimes.[32] As of July 2009, the prosecutor has "received over 8137 communications…from more than 130 countries."[33] Thus, the prosecutor received nearly four times as many communications in the past three and a half years (February 2006 to July 2009) as in its first three and a half years (July 2002 to February 2006).

As an institution, the ICC has performed little, if any, better than the ad hoc tribunals that it was created to replace. Like the Rwandan and Yugoslavian tribunals, the ICC is slow to act. The ICC prosecutor took six months to open an investigation in Uganda, two months with the DRC, over a year with Darfur, and nearly two years with the Central African Republic. It has yet to conclude a full trial cycle more than seven years after being created. Moreover, like the ad hoc tribunals, the ICC can investigate and prosecute crimes only after the fact. The alleged deterrent effect of a standing international criminal court has not ended atrocities in the DRC, Uganda, the Central African Republic, or Darfur, where cases are ongoing. Nor has it deterred atrocities by Burma against its own people, crimes committed during Russia's 2008 invasion of Georgia (an ICC party), ICC party Venezuela's support of leftist guerillas in Colombia, or any of a number of other situations around the world where war crimes or crimes against humanity may be occurring.

Another problem is that the ICC lacks a mechanism to enforce its rulings and is, therefore, entirely dependent on governments to arrest and transfer perpetrators to the court. However, such arrests can have significant diplomatic consequences, which can greatly inhibit the efficacy of the court in pursuing its warrants and prosecuting outstanding cases. The most prominent example is Sudanese President Bashir's willingness to travel

to other countries on official visits–thus far only to non-ICC states– despite the ICC arrest warrant. This flaw was also present with the ICTY and the ICTR, although they could at least rely on a Security Council resolution mandating international cooperation in enforcing their arrest warrants. In contrast, the Nuremburg and Tokyo tribunals were established where the authority of the judicial proceedings could rely on Allied occupation forces to search out, arrest, and detain the accused.

High costs, slow pace of justice, African disinterest, and resource allocation issues make the Court ineffective.

Grigore, 23 – Just Access Representative to the UN Office on Drugs and Crime

[Sabina Grigore, "Justice Delayed, Justice Denied: Bias, Opacity and Protracted Case Resolution at the International Criminal Court," Just Access, 5-2-2023, https://just-access.de/bias-opacity-and-protracted-case-resolution-at-the-international-criminal-court/?, accessed 12-10-2024; AD]

Two other main areas of criticism faced by the Court concern its high costs and slow pace of justice. The Court is funded by contributions from its member states, and its budget has been criticized for being too high. In addition, the Court's investigations and trials can take years to complete, leading to delays in justice for victims. One critical case in which both of these points of criticism are illustrated relates to the investigations in Afghanistan. In almost 20 years since the prosecutors of the ICC first considered opening an investigation into the crimes that occurred in Afghanistan, there has been little to no action toward bringing justice to Afghan victims. A month after the ICC authorized the Office of the Prosecutor to launch an investigation, the institution had to stop due to a request of the Afghan government to pursue the investigation themselves. Nonetheless, the conflict is of a protracted nature and crimes of an international nature have continued to occur throughout the whole time since the case came under the attention of the ICC.6 As such, limited by its own mandate and by the resource allocation decided upon by the Court, justice has not yet been delivered to the victims affected by the war in Afghanistan.

Moreover, since 2009, the legitimacy of the institution has been shaken by a gradual African disinterest in the Court, when it issued an arrest warrant for Sudanese President Omar Al Bashir, whose country is not a signatory to the Rome Statute. In 2015, the South African government refused to arrest Mr. Bashir. He traveled to South Africa to attend a meeting of the African Union, and South Africa, as a member of the court, was legally required to arrest him. Yet, the government allowed Mr. Bashir to leave the country, claiming that he had immunity as a head of state during the African Union summit meeting. The ICC has issued a judgment on this case, saying that South Africa was wrong about Al Bashir's immunity. His immunity as a head of state has been superseded by UNSC Resolution 1593 (2005) which referred Darfur to the ICC. Concomitantly, sitting heads of state can be held responsible for crimes in their individual capacity, so that Al-Bashir could have been arrested and tried at the ICC. Nonetheless,

South Africa and other African states have expressed deep dissatisfaction with what they consider a tool of Western imperialism.7 As a result, Burundi was the first country to withdraw its membership from the ICC in 2017.8

Most recently, following the arrest warrant of Vladimir Putin, issued by the Pre-Trial Chamber II of the ICC, in connection with the deportation and transfer of children as war crimes,9 and based on the rapid investigations that resulted shortly after the beginning of the war in Ukraine,10 the Court faces another wave of criticism regarding its practices, particularly due to matters of prioritization and resource allocation. Even though the ICC has opened an investigation into crimes committed during the conflict in Ukraine, it has encountered many challenges, including a lack of access to the conflict zone and scant cooperation from Ukrainian authorities. In order to discuss the significance of holding those responsible for international crimes accountable, justice ministers from all over the world gathered in Ukraine in March 2023 for the Justice Ministers' Conference. Ukraine had a crucial opportunity to emphasize the value of ongoing efforts to prosecute offenders at the conference. However, because Ukraine has not ratified the Rome Statute, its cooperation with the Court has been erratic. Despite these challenges, which are also present in other instances investigated by the Court, the ICC dedicated a significant part of its resources to pursuing this case. Moreover, the Court benefitted from a significant increase in the level of support from its members, which has been unprecedented. This imbalanced support received by the ICC within the past year exacerbated the already existing views about an inconsistent application of its mandate, increasing the damaging perception that the Court is biased and politicized.11

The ICC encourages dictators to cling to power, doesn't respect due process, and is too prone to bias.

Carpenter, 14 – senior fellow at the Cato Institute, author of nine books and more than 600 articles and policy studies on international affairs

[Ted Galen Carpenter, "At I.C.C., Due Process Deficiencies Mar Credibility," The New York Times, 12-11-2014, https://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/at-icc-due-process-deficiencies-mar-credibility, accessed 1-12-2025; AD]

Problems with the I.C.C. go far beyond the specifics of the Kenyatta case. Although holding political leaders accountable under international law for odious acts they may have committed is desirable in theory, there are major drawbacks regarding the I.C.C. and similar bodies.

For one, threatening to prosecute dictators and other offenders creates a powerful incentive for them to cling to power, even when a diplomatic deal might get them to go quietly into exile. There may be difficult tradeoffs between securing justice for victims and hastening the end of a brutal regime, but I.C.C. supporters tend to ignore that dilemma.

Even more troubling are the many due process deficiencies in the I.C.C., including the admission of hearsay evidence and testimony from anonymous witnesses. The willingness of international tribunals to reach verdicts and impose long prison sentences based on a simple majority vote is another alarming feature. That situation is exacerbated when a panel sometimes consists of no more than three judges, as in the recent conviction of a Congolese warlord by a two-to-one vote. At a minimum, larger panels should be required, along with a unanimous vote for conviction.

A related defect is that there are insufficient protections against bias, even blatant bias, on the part of judges. Individuals assessing the guilt or innocence of a defendant may be appointees of a government that is an adversary of the defendant's government or political movement. A bedrock principle of due process is that members of a tribunal ought to be objective, but the makeup of I.C.C. panels can violate that fundamental requirement.

The United States is not a participant in the International Criminal Court. Given such problems, it is unsurprising that American leaders have been wary about embracing it. That wariness is warranted and should continue.

Mistrust across Africa and diminished cooperation and engagement from Europe and America render the ICC ineffective.

Hatcher-Moore, 17 – freelance journalist who reports on east Africa

[Jessica Hatcher-Moore, "Is the world's highest court fit for purpose?," The Guardian, 4-5-2017, https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose, accessed 1-12-2025; AD]

The court's first referral was in 2003 when Uganda's President Museveni asked it to investigate the LRA in northern Uganda. The rebel group had been waging war on the Ugandan army for over a decade, recruiting children through abduction, making sex slaves of girls, and forcing boys to kill their loved ones.

But by 2016, when the ICC finally brought a member of the LRA, Ongwen, to trial, Museveni had turned on the "useless" court, criticising it of "western arrogance". He told Der Spiegel: "This is our continent, not yours".

This mistrust of the ICC is echoed across the African continent. Last year, South Africa, Burundi and the Gambia's stated intention to quit as members of the court, and talk of a mass African exodus promoted Kofi Annan to pen an impassioned call for African nations to support the ICC.

Meanwhile, nationalism and disdain for globalised organisations is rising in the west. President Donald Trump has made clear his intention to slash funding for international programmes. Although the US, as a non-member, does not support the ICC directly, it shares intelligence, supports logistics, funds a rewards programme, and is traditionally a major donor to international tribunals.

International law is premised on the idea that nations can't be separate – they must work in harmony. Diminished funding, cooperation, political will and engagement from Europe and America could severely hamper progress towards the UN sustainable development goal 16, to promote peaceful and inclusive societies, justice for all, and effective, accountable institutions at all levels.

So how can we hope to improve international justice for all, and achieve the goal, if its main institution – the ICC – is under threat from multiple directions?

Even with its unprecedented territorial reach and independence, the court has flaws. Without an international police force, it relies on the cooperation of member states, and among its leaders are those the court may one day have to prosecute. Critics highlight the fact that nine out of its 10 investigations to date have focused on Africa. The court

also stands accused of inefficiency, having cost over $1bn (£800m) with a current annual operating budget of €145m (£123.9m) but only convicted four people.

The ICC, says Ugandan human rights lawyer Nicholas Opiyo, made mistakes with the LRA case from the outset. When then chief prosecutor Luis Moreno Ocampo announced the investigation in Uganda, he stood shoulder-to-shoulder in a London hotel with President Museveni. "The court turned up with one of the parties to the conflict," Opiyo says, effectively vindicating the Ugandan army – which also committed serious crimes – of responsibility in the Ugandan civil war.

If Ongwen is prosecuted it would be "justice for the Ugandan government as opposed to justice for the victims," says Opiyo. The trial appears foreign and confusing to victims as it is geographically removed. "To the victims of the LRA, including my own sister, justice means peace," he says. "Victims do not see justice as incarceration; that is not their concern."

The debate over the best way to pursue justice in Uganda has raged for years. In 2008, Kony's representatives visited the ICC to negotiate. The LRA and the government had finalised a peace agreement, but Kony would only sign it if the ICC dropped their case. The court considered his demands, but ultimately rejected them. "What was the impact of that? The LRA is still going and Kony is still at large," says Yvonne McDermott Rees, senior lecturer at Bangor Law School, who specialises in international criminal law.

The problem with international criminal law is that, unlike domestic criminal law, it's idealistic, McDermott Rees says. "The international justice project sets a huge number of goals: to set a historical record, establish peace and security, end impunity, deter future offenders and lead to the reestablishment of the rule of law. But at the end of the day, these are criminal trials and as such their core purpose is to determine criminal liability."

Unqualified judges make court decisions worthless.

Hirsch, 10 – Legal affairs correspondent

[Afua Hirsch, "System for appointing judges 'undermining international courts'," The Guardian, 9-8-2010, https://www.theguardian.com/law/2010/sep/08/law-international-court-justice-legal, accessed 1-12-2025; AD]

A "toxic" system for appointing the world's most senior judges is fundamentally undermining the legitimacy of international courts, a new study claims.

Unqualified judges, in some cases with no expertise on international law and in one case no legal qualifications, have been appointed to key positions because of highly politicised voting systems and a lack of transparency, the Guardian has learned.

Critics say that the practices threaten the future of the international criminal court, which deals with cases of war crimes and crimes against humanity, and the international court of justice, the UN court which deals with disputes between nation states' courts.

"There are a number of judges who really shouldn't be there," said William Pace from the Coalition for the International Criminal Court, which lobbies for reform of the ICC.

Experts point in particular to the case of a Japanese judge who did not have a law degree or any legal qualifications, and was appointed to the ICC after Japan provided financial support.

Fumiko Saiga, who had been overseeing ICC proceedings relating to war crimes in the Democratic Republic of the Congo, died suddenly of a heart attack last year aged 65. There had been claims that she was unqualified for the post.

"To elect a person to the ICC who doesn't even have a law degree for example, is a most unfortunate precedent to have set," said Pace. "We were facing the prospect of a defence lawyer appealing a case on the basis that the judge was not qualified."

"This is deeply troubling for a court which is dealing with some of the most serious criminal cases and the deprivation of liberty for human beings," said Philippe Sands, one of the authors of Selecting International Judges, published tomorrow.

"International judges make decisions every day that affect the lives of people around the world."Although the appointments process for international courts has long been criticised as obscure and open to political interference, little is actually known about the means by which judges are appointed.

"Almost nothing is known about the selection process at international level," said Kate Malleson, professor of law at Queen Mary, University of London, one of the book's co-authors."It's actually very difficult to assess what effect this is having on the quality of the courts' work because so little is known. But anecdotally we know that some judges are first class, and that others are only there as a consequence of a highly politicised system, and who are not necessarily the best candidate," Malleson added. "This has potentially very serious implications for bodies which should have the very best, independent superb judges form around the world."

Nation states, who nominate judges from their own and other countries to stand for positions in international courts, have been accused of "vote trading", a practice where states lend their support to nominees from other countries based on political considerations, rather than judicial expertise.

Last year, Human Rights Watch warned against the practice. "Vote trading over ICC positions could lead to the election of poorly qualified judges, and hence to a bench that will not be the most skilled and representative," the organisation said in a memorandum to the ICC. "Human Rights Watch urges states parties to put aside narrow interests and vote only for the most highly qualified judges."

Although the findings in today's research relate to the ICC and ICJ, there are more than 30 international courts and tribunals covering approximately 200 nations, many of which have faced similar criticisms.

In a fiercely critical speech last year Lord Hoffmann, a former law lord, accused the European court of human rights of choosing judges "in a manner which is totally opaque."

Although some degree of political interference is regarded as inevitable in courts governed by international relations, today's findings argue that the process should be more in line with the appointment of judges within countries.

"At national level, the trend is for more professionalised, depoliticised systems, where we know a lot about the background, characteristics of judges who are chosen and put forward," said Malleson. "Most people assume there is an equally complex rigorous vetting process for international courts, but that is not the case."

The ICC has a weak record – the UN's ad hoc tribunals can fill in instead.

Neier, 19 – President Emeritus of the Open Society Foundations and a founder of Human Rights Watch

[Aryeh Neier, "Indicting the International Criminal Court," Project Syndicate, 5-8-2019, https://www.project-syndicate.org/commentary/icc-criticism-afghanistan-investigation-by-aryeh-neier-2019-05, accessed 1-12-2025; AD]

All told, in the 17 years since it began operating, the ICC has secured lasting convictions against only six people. This weak record contrasts sharply with those of the ad hoc tribunals established by the UN to prosecute the war crimes committed in the former Yugoslavia, Rwanda, and Sierra Leone. Together, these tribunals have secured about 165 convictions, including of top officials, after thorough, credible trials and appellate proceedings.

As the former Assembly presidents' essay acknowledges, "we have never needed the [ICC] more than today." In Syria and Yemen, for example, atrocities are being committed on a daily basis. The ICC should be securing justice for these crimes, not only for the victims, but also to discourage combatants in future conflicts from behaving with such blatant disregard for the rule of law, international norms, and human rights.

But, as it stands, the ICC is unable to act, because Syria and Yemen have not agreed to be subject to the ICC's jurisdiction, and Russia – probably joined by China – would veto a decision by the UN Security Council to refer crimes being committed there to the ICC. China would also veto any resolution referring to the ICC its so-called re-education camps, where roughly a million Uighurs – an ethnic and religious minority that the authorities view as a security threat – are currently detained.

This does not mean, however, that the ICC has no options. For starters, it should indict Filipino President Rodrigo Duterte, who has directed the extrajudicial execution of about 20,000 alleged participants in the illicit drug trade. Though the Philippines recently revoked its ratification of the ICC treaty, the investigation was already underway, meaning that proceedings could continue.

The ICC could also indict those responsible for Myanmar's forcible expulsion of more than 700,000 Rohingyas to Bangladesh, which is a party to the ICC. Carrying out such investigations effectively and without delay would restore the ICC's credibility and bolster its ability to fulfill its intended role as a powerful force for international justice.

Decisions take too long AND inconsistent rulings prevent justice from being delivered.

Grigore, 23 – Just Access Representative to the UN Office on Drugs and Crime

[Sabrina Grigore, "Justice Delayed, Justice Denied: Bias, Opacity and Protracted Case Resolution at the International Criminal Court," Just Access, 5-2-2023, https://just-access.de/bias-opacity-and-protracted-case-resolution-at-the-international-criminal-court/, accessed 1-12-2025; AD]

The ICC is regarded as a necessary institution for advancing international justice and accountability. However, criticisms have been leveled against it regarding its limited engagement with civil society, and the transparency of its activity has been defective.2 On the one hand, the Court is being criticized for not having done enough to raise awareness about its work, because it has not communicated effectively with affected communities, victims, or the general public. Numerous individuals, particularly those living in conflict-affected zones, are uninformed about the ICC's mandate and do not know how to access its services. This lack of awareness and outreach can prevent victims from coming forward to report violations of the Statute, undermining by and large the credibility of the ICC's work.3 Another issue is the lack of transparency of the ICC's activities. Trials and investigations at the ICC take place behind closed doors, and the public has little access to information about active cases.4 Due to this lack of openness, the ICC may come under criticism for bias and unfairness which lead to suspicions and mistrust regarding the activity of the institution as a whole.5

Two other main areas of criticism faced by the Court concern its high costs and slow pace of justice. The Court is funded by contributions from its member states, and its budget has been criticized for being too high. In addition, the Court's investigations and trials can take years to complete, leading to delays in justice for victims. One critical case in which both of these points of criticism are illustrated relates to the investigations in Afghanistan. In almost 20 years since the prosecutors of the ICC first considered opening an investigation into the crimes that occurred in Afghanistan, there has been little to no action toward bringing justice to Afghan victims. A month after the ICC authorized the Office of the Prosecutor to launch an investigation, the institution had to stop due to a request of the Afghan government to pursue the investigation themselves. Nonetheless, the conflict is of a protracted nature and crimes of an international nature have continued to occur throughout the whole time since the case came under the attention of the ICC.6 As such, limited by its own mandate and by the resource allocation decided

upon by the Court, justice has not yet been delivered to the victims affected by the war in Afghanistan.

Moreover, since 2009, the legitimacy of the institution has been shaken by a gradual African disinterest in the Court, when it issued an arrest warrant for Sudanese President Omar Al Bashir, whose country is not a signatory to the Rome Statute. In 2015, the South African government refused to arrest Mr. Bashir. He traveled to South Africa to attend a meeting of the African Union, and South Africa, as a member of the court, was legally required to arrest him. Yet, the government allowed Mr. Bashir to leave the country, claiming that he had immunity as a head of state during the African Union summit meeting. The ICC has issued a judgment on this case, saying that South Africa was wrong about Al Bashir's immunity. His immunity as a head of state has been superseded by UNSC Resolution 1593 (2005) which referred Darfur to the ICC. Concomitantly, sitting heads of state can be held responsible for crimes in their individual capacity, so that Al-Bashir could have been arrested and tried at the ICC. Nonetheless, South Africa and other African states have expressed deep dissatisfaction with what they consider a tool of Western imperialism.7 As a result, Burundi was the first country to withdraw its membership from the ICC in 2017.8

Most recently, following the arrest warrant of Vladimir Putin, issued by the Pre-Trial Chamber II of the ICC, in connection with the deportation and transfer of children as war crimes,9 and based on the rapid investigations that resulted shortly after the beginning of the war in Ukraine,10 the Court faces another wave of criticism regarding its practices, particularly due to matters of prioritization and resource allocation. Even though the ICC has opened an investigation into crimes committed during the conflict in Ukraine, it has encountered many challenges, including a lack of access to the conflict zone and scant cooperation from Ukrainian authorities. In order to discuss the significance of holding those responsible for international crimes accountable, justice ministers from all over the world gathered in Ukraine in March 2023 for the Justice Ministers' Conference. Ukraine had a crucial opportunity to emphasize the value of ongoing efforts to prosecute offenders at the conference. However, because Ukraine has not ratified the Rome Statute, its cooperation with the Court has been erratic. Despite these challenges, which are also present in other instances investigated by the Court, the ICC dedicated a significant part of its resources to pursuing this case. Moreover, the Court benefitted from a significant increase in the level of support from its members, which has been unprecedented. This imbalanced support received by the ICC within the past year exacerbated the already existing views about an inconsistent application of its mandate,

increasing the damaging perception that the Court is biased and politicized.11

ICC arrest warrants don't lead to internal government action.

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[Allard Duursma, "Pursuing justice, obstructing peace: the impact of ICC arrest warrants on resolving civil wars," Conflict, Security & Development, 3-27-2020, https://www.tandfonline.com/doi/abs/10.1080/14678802.2020.1741934, accessed 1-12-2025; AD]

The impact of ICC involvement on peace processes once mediation is underway is quite different. Domestic courts are unlikely to be willing to prosecute government members targeted by the ICC or able to prosecute rebels in practice, in spite of the complementarity principle laid down in the Rome Statute. In countries in which the ICC has targeted individuals, the judicial and the executive branch could be intertwined.34 This means that governments are unlikely to allow domestic courts to prosecute any of its members, let alone domestically prosecute a head of state. Since the domestic prosecution of people on the government and the rebel sides is not a viable route, the only justice mechanism in place is the ICC.35 This undermines the prospect for conflict resolution, since it makes the government side determined to gain a victory rather than conclude a peace agreement. The government side will perceive the conclusion of a peace agreement in which political power is shared with the armed opposition as risky because this might lead to a shift in political power in the future, paving the way for an arrest that leads to a trial in The Hague.36

Indeed, the arrest warrant issued against Sudanese President al-Bashir was perceived in Khartoum as a matter of state survival. As US Special Envoy to Sudan Andrew Natsios commented on this arrest warrant, the regime in Khartoum "will do everything necessary to remain in power and make sure that Bashir is never arrested.' 37 The arrest warrant issued against Libyan President Muammar Gaddafi had a similar effect. The International Crisis Group observed with regard Gaddafi in 2011 that"[t]o insist that he both leaves the country and face trial in the International Criminal Court is virtually to ensure that he will stay in Libya to the bitter end and go down fighting.' 38 The ICC arrest warrant issued against Gaddafi indeed complicated the mediation effort.39 Finally, although the ICC had not yet issued an arrest warrant against President Gbagbo of Côte d'Ivoire prior to the end of the civil war on 11 April 2011, the ICC investigation regarding his role in the violence in Côte d'Ivoire may very well have motivated Gbagbo to continue to resist stepping down from power and conclude an agreement aimed at a transition of political power. The ICC chief prosecutor issued a statement regarding the

situation in Côte d'Ivoire on 21 December 2010 in which he promised that "those leaders who are planning violence will end up in The Hague.' 40 McGovern asserts that with this statement, the chief prosecutor"ensured that Gbagbo would reject any negotiated solution and instead fight to the end.' 41 In short, the targeting of individuals on the government side greatly complicates peace efforts, since continued fighting is often perceived as the only way to circumvent prosecution by the ICC.

In addition, domestic courts could be unable to prosecute rebels who are targeted by the ICC. Notable cases in which domestic courts did have this ability are the Ituri courts in the DRC and the International Crimes Division in Uganda. Although ICC arrest warrants issued against rebels allows for flexibility in terms of decisions about accountability, ICC arrest warrants issued against rebels inhibits the conflict parties from agreeing on an amnesty.42 Rebels are unlikely to lay down their weapons with ICC arrest warrants against some of its members in place, even if they anticipate that they could face a domestic trial based on the complementarity principle. Framing their theoretical argument on the basis of the cost-benefit analyses that conflict parties make, Snyder and Vinjamuri explain how conflict parties will be reluctant to make peace if this means they will have to face trial for any human rights abuses they may have committed.43 ICC arrest warrants issued against the leadership within rebel parties in civil wars thus means that these leaders are likely to see little reason reach a negotiated settlement if this can result in their detention.44 Indeed, while prospects for the resolution of the LRA rebellion seemed positive at first,45 when it became clear to Joseph Kony by January 2008 that facing a domestic trial would be the only option to circumvent the ICC arrest warrant, he started to increasingly show his dissatisfaction with the peace process and eventually decided to not sign the final peace agreement.46

In short, ICC involvement provides strong disincentives to conflict parties to lay down their weapons and resolve the conflict. The prospect of having to face a trial, even if this a domestic trial based on the complementarity principle, pushes conflict parties away from making peace.

Governments decide not to comply with the ICC to mitigate the concerns of rebels.

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[Allard Duursma, "Pursuing justice, obstructing peace: the impact of ICC arrest warrants on resolving civil wars," Conflict, Security & Development, 3-27-2020, https://www.tandfonline.com/doi/abs/10.1080/14678802.2020.1741934, accessed 1-12-2025; AD]

The different impact of mediation and ICC involvement on the one hand and mediation and no ICC involvement on the other hand becomes particularly pronounced when looking at the impact on durable peace agreements that resolve the conflict. A durable peace agreement was concluded in only 4.1 percent of the conflict dyadyears that experienced both mediation and ICC involvement, as opposed to 24.7 percent when mediation took place without ICC involvement in place. International mediation in a conflict dyad-year with ICC involvement is thus relatively unlikely to lead an agreement that terminates the conflict. The only durable peace agreement, according to the UCDP criteria, which came about in a mediation process with ICC involvement is the 23 March 2009 Agreement. Yet, it should be noted that the CNDP leaders decided to leave their government posts in protest over the lack of implementation and formed the M23 rebel group in 2012 to challenge the government anew. In other words, while the UCDP coding of this peace agreement as terminating the conflict might be technically correct because the new challenge came from a group with a new name, the peace agreement certainly does not constitute a successful peace implementation process.

A closer look at why almost no mediation effort in conflicts in which ICC arrest warrants have been issued has led to a durable peace agreement suggest that it is the ICC involvement that is driving this finding rather than that a "reversed causality' effect. That the 23 March Agreement is the only comprehensive agreement and the only agreement that terminated the conflict can be explained by the fact that the Government of the DRC essentially provided a full amnesty to Bosco Ntaganda, the military chief of staff of the CNDP. The ICC issued an arrest warrant against Ntaganda on 22 August 2006 for his role in the military wing of the Union of Congolese Patriots (UPC), though the arrest warrant was not unsealed until 2008. The UPC committed grave human rights abuses in the Ituri region of the DRC between July 2002 and December 2003.59 Ntaganda joined the CNDP, which was led by Laurent Nkunda, in 2006, but in early 2009 Ntaganda assumed leadership over the CNDP and declared that the CNDP would stop fighting the Government of the DRC. Instead, the CNDP would join the government

forces in in fighting the Democratic Forces for the Liberation of Rwanda (FDLR). The Government of the DRC, in return, informally granted Ntaganda immunity from prosecution.60 While this is only one case, the willingness of Ntaganda to make peace with the Government of the DRC suggest that a government not complying with the ICC can mitigate concerns of rebels to make peace.

5.0.11 AT: Russia

Russia will ignore the rulings.

Faulconbridge, 24 – reporter citing Maria Zakharova, spokesperson for Russia's foreign ministry

[Guy Faulconbridge, "Russia dismisses ICC warrants as meaningless provocation," Reuters, 3-6-2024, https://www.reuters.com/world/russia-dismisses-icc-warrants-meaningless-provocation-2024-03-06/, accessed 1-12-2025; AD]

MOSCOW, March 6 (Reuters) - Moscow on Wednesday dismissed the issuance of International Criminal Court (ICC) arrest warrants against two top Russian commanders as a spurious provocation that had no legal significance for Russia.

The ICC said on Tuesday it had issued arrest warrants for Sergei Kobylash and Viktor Sokolov for missile strikes against Ukrainian electricity infrastructure.

Kremlin spokesperson Dmitry Peskov said that as Russia was not a party to the Rome Statute, which established the ICC, Moscow did not recognise the warrants.

"We are not parties to the statute - we do not recognize this," Peskov told reporters when asked about the ICC warrants.s

Maria Zakharova, spokesperson for Russia's foreign ministry, said the arrest warrants aimed only to discredit Russia.

"The latest spurious emissions from this organ do not have any force for us and are legally insignificant," Zakharova told reporters.

In March last year, the ICC issued warrants for the arrest of President Vladimir Putin and Russian Children's Commissioner Maria Lvova-Belova on war crimes charges related to the abduction of Ukrainian children.

The Kremlin dismissed those warrants as outrageous at the time. Russia denies war crimes in Ukraine.

Ukraine has accused Russia of widespread war crimes. The U.N. High Commissioner for Human Rights said last year that Russia had taken inadequate measures to protect civilians and that there were indications of war crimes.

Russia says Ukraine has committed war crimes during the conflict, which Moscow dates from 2014, including the indiscriminate shelling of areas of eastern Ukraine.

Kyiv denies it has committed war crimes and says it is the victim of an aggressive war of occupation by Russia.

Russian officials say the ICC warrants have no real-world impact.

5.0.12 AT: Other countries

Other great powers haven't ratified the ICC either.

BBC, 24 ["International Criminal Court: What is the ICC and what does it do?," British Broadcasting Corporation, 11-21-2024, https://www.bbc.com/news/world-11809908, accessed 1-12-2025; AD]

Which other countries have not joined?

A number of important countries are not under the jurisdiction of the ICC.

Some, including China, India, Pakistan, Indonesia and Turkey, have not signed the treaty.

Others, including Israel, Egypt, Iran, and Russia, have signed but have not ratified it.

Great powers will circumvent the ICC's rulings.

Klobucista and Ferragamo, 24 – B.A. in International Relations, Tufts University; Colby College Graduate

[Claire Klobucista and Mariel Ferragamo, "The Role of the ICC," Council of Foreign Relations, 11-22-2024, https://www.cfr.org/backgrounder/role-icc#chapter-title-0-9, accessed 1-12-2025; AD]

Several major powers echo U.S. complaints. China and India, in abstaining from the court, argue that it would infringe on their sovereignty. Analysts point out that both countries could face investigations if they joined. In 2016, Russia pulled its signature from the treaty after the court classified its 2014 annexation of Crimea as an occupation, and Moscow is unlikely to cooperate with the court's war crimes investigation in Ukraine. In 2021, the Israeli government told the ICC that it would not recognize the court's authority in investigating alleged war crimes within Palestinian territories. Netanyahu said in April 2024 that Israel "will never accept any attempt by the ICC to undermine its inherent right of self-defense." Israel is not an ICC member, but any of the country's leaders, if targeted by an ICC arrest warrant, could be subject to arrest if they travel to any ICC member country.

5.0.13 AT: Article 17 Solves

Article 17 doesn't check the Court's ability to undertake prosecution of Americans.

Casey, 1 – partner in the law firm of Baker & Hostetler LLP

[Lee A., "The Case Against Supporting the International Criminal Court," WashU Law, 2001, https://law.washu.edu/wp-content/uploads/2018/10/The-Case-Against-Supporting-the-International-Criminal-Court.pdf, accessed 12-10-2024; AD]

It is also often asserted that the principle of "complementarity," found in Article 17 of the Rome Treaty, will check the Court's ability to undertake prosecution of Americans. This is the principle that prohibits the ICC from taking up a case if the appropriate national authorities investigate and prosecute the matter. In fact, this limit on the ICC's power is, in the case of the United States, entirely illusory.

First, as with all other matters under the Rome Treaty, it will be solely within the discretion of the ICC to interpret and apply this provision.

Second, under Article 17, the Court can pursue a case wherever it determines that the responsible State was "unwilling or unable to carry out the investigation or prosecution." In determining whether a State was "unwilling" the Court will consider whether the national proceedings were conducted "independently or impartially." The United States can never meet that test as an institutional matter. Under the Constitution, the President is both the Chief Executive, i.e., the chief law enforcement officer, and the Commander-in-Chief of the armed forces. In any particular case, both the individuals investigating, and prosecuting, and the individuals being investigated and prosecuted, work for the same man. Moreover, under command responsibility theories, the President is always a potential – indeed, a likely, target of any investigation. The ICC will simply note that an individual cannot "impartially" investigate himself, and it will be full steam ahead. As a check on the ICC, complimentarity is meaningless.