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***The United States and the International Criminal Court:
A Complicated, Uneasy, Yet at Times Engaging Relationship***

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THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: A COMPLICATED, UNEASY, YET AT TIMES ENGAGING RELATIONSHIP

Leila N. Sadat & Mark A. Drumbl*

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I. INTRODUCTION

The United States is not a party to the International Criminal Court (Court), although it signed the Final Act of the Diplomatic Conference in Rome. Former U.S. Ambassador for War Crimes David Scheffer signed the Rome Statute on behalf of President Clinton on December 31, 2000. That signature was “nullified,” however, on May 6, 2002 during the first term of George W. Bush’s Administration during a campaign waged against the Court that involved the negotiation of Bilateral Immunity Agreements between the U.S. government and more than 100 other countries and the adoption of U.S. federal legislation targeting the Court. The U.S. position toward the Court softened during President Bush’s second term as the Court began its judicial activity and became part of the international institutional landscape. This sense of comfort grew with the election of Barack Obama as President in 2008. The Obama Administration rejected the “empty chair” policy of its predecessor, and began actively participating in meetings of the ICC Assembly of States Parties and engaging and cooperating with the Court to a significant degree. Nevertheless, the Obama Administration has not proposed either joining the Court, or even undoing the 2002 nullification of the signature, although it has increased the focus on atrocity prevention and many government agencies have atrocity prevention and/or criminal investigation as at least part of their mandates. A new section in the criminal division of the Department of Justice works to deny safe haven to human rights violators. Many individuals deported from the United States on the basis of acts that might be characterized as ICC crimes. Finally, U.S. courts routinely cite the Rome Statute as evidence of customary international law in both civil and criminal cases and at least one reported military commission case.

In terms of criminal prosecutions, federal and (to a small degree) state criminal law in the United States codifies some of the crimes that, conceptually, relate to conduct proscribed in the Rome Statute, but coverage is incomplete and jurisdiction may often be lacking. Thus, the United States is *able* to prosecute a limited number of ICC crimes in federal courts as such, particularly genocide,

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torture, and some war crimes including the recruitment or use of child soldiers. Other crimes might be prosecuted as “ordinary” offenses using statutory provisions on murder, rape, etc. There is no U.S. federal legislation on crimes against humanity, although Puerto Rico has a law criminalizing the same, and legislation is now (again) being considered in the Senate. Under the ICC’s “same person/same conduct” test for inadmissibility,¹ this existing U.S. law might be sufficient in many cases to permit the complementarity principle to deprive the Court of jurisdiction in cases being investigated or prosecuted by the United States, although obviously it would depend upon the facts and circumstances of the particular case. However, considerable legal gaps in coverage, particularly as regards crimes against humanity, could prevent U.S. courts from exercising criminal jurisdiction over U.S. and foreign nationals accused of committing ICC crimes, particularly given the presumption against extraterritoriality in the application of U.S. federal criminal law. Others have also argued that the military courts martial system may be inadequate to cover the commission of war crimes.

Sometimes the United States government is supportive of efforts to combat impunity for the commission of ICC crimes abroad, if it perceives this support to be in the U.S. national interest or strong civil society coalitions among otherwise disparate actors support U.S. action (as in the case of Darfur) emerge. At the same time, there appear to be tremendous political barriers to accountability for the commission of ICC crimes by U.S. persons. Indeed, accountability for alleged criminal violations of the laws of war and the torture convention committed following the invasion of Afghanistan in 2001 and Iraq in 2003 has been virtually nonexistent.

As a general matter, this article includes information drawn directly from the website of the American Non-Governmental Organizations Coalition for the International Criminal Court,² and other human rights organizations as well as our own research and prior writings. This article allocates considerable space to analyze current and past government attitudes toward the Court. This seemed particularly germane in an election year which brings with it considerable uncertainty regarding future U.S. policy towards the Court.

II. THE U.S. GOVERNMENT AND THE INTERNATIONAL CRIMINAL COURT

A. U.S. FOREIGN POLICY AND THE ICC

1. The United States in Rome

The United States had been a supporter of the *ad hoc* international tribunals for the former Yugoslavia and Rwanda, contributing significant monies and personnel to these entities,³ as well as

¹ See, e.g., Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11 OA 6, *Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”* ¶ 100 (Appeals Ch., July 24, 2014).

² AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.amicc.org> (last visited June 9, 2016).

³ In 2010 the United States contributed \$42,202,000 to the ICTY (20.97% of the Tribunal’s annual budget) and \$33,607,000 to the ICTR (27.01% of the Tribunal’s annual budget). OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FY2010 US CONTRIBUTIONS TO THE UNITED NATIONS SYSTEM 3 (2011). Congress did not renew the reporting requirements after 2010 and more recent data is not available. The United States is the largest funder of both

furnishing evidence and cooperating with arrests.⁴ Thus, it is not surprising that President Clinton initially expressed general support for the establishment of a permanent international criminal court.⁵

Throughout the 1990s the United States participated in the U.N. Preparatory Committee meetings on the ICC Statute. However, as the negotiations progressed, statements made about the future court by the U.S. Government reflected deep divisions amongst various government agencies and no unified position emerged.⁶ As the 1998 Rome Diplomatic Conference drew near, attacks on the soon-to-be-established Court increased,⁷ and there were indications that the United States was not committed to the Court's establishment.⁸

At and prior to the Rome Conference, the United States did not join the group of like-minded states that included many of its traditional allies.⁹ The government's stated concern was to protect future U.S. defendants from prosecution by the ICC. It also opposed U.S. soldiers being investigated by the Court without U.S. permission.¹⁰ Although many concessions were made towards the U.S. position during the negotiations, the defensive posture of the United States hardened as the Rome Conference progressed. On the last day of the Conference the U.S. delegation submitted two amendments for consideration in an effort to delay adoption of the Statute. After these proposals were rejected,¹¹ the White House instructed the U.S. delegation to request a recorded vote on the

Tribunals and has given an additional \$17.5 million in voluntary contributions. DAVID SCHEFFER, *ALL THE MISSING SOULS*, 28 (2012). *See also id.* at 33-35 (regarding the staffing of the ICTY with American personnel).

⁴ *See* SCHEFFER, *supra* note 3, at 35-44 (discussing the information sharing procedures of various U.S. Government agencies with the ICTY); and at 119-123 (discussing the arrest and eventual transfer to the ICTR of Elizaphan Ntakirutimana, the only indicted fugitive from any of the war crimes tribunals found in the United States).

⁵ *See* President Bill Clinton, *A Commitment to Human Dignity, Democracy, and Peace*, in 1 *ISSUES OF DEMOCRACY: CONFRONTING HUM. RTS. VIOLATIONS* 10, 12-13 (1996).

⁶ The Department of State was largely supportive whilst the Department of Defense opposed the establishment the Court worrying that it would target American soldiers based overseas. The Department of Justice, meanwhile, was concerned that the creation of an international criminal court would disrupt domestic prosecutions, and the Treasury Department was adamant that any international criminal court not have jurisdiction over drug enforcement cases. *See generally* SCHEFFER, *supra* note 3, at 163-98.

⁷ Former Senator Jesse Helms (R-NC) famously quipped that any international criminal tribunal would be “dead on arrival” in the United States unless Washington retained a veto power over potential cases. Barbara Crossette, *Helms Vows to Make War on U.N. Court*, N.Y. TIMES, Mar. 27, 1998, available at <http://www.nytimes.com/1998/03/27/world/helms-vows-to-make-war-on-un-court.html>.

⁸ Leila Nadya Sadat, *The New International Criminal Court, An Uneasy Revolution*, 88 GEO. L.J. 381, 447 (2000) (with S. Richard Carden) [hereinafter Sadat, *Uneasy Revolution*].

⁹ SCHEFFER, *supra* note 3, at 195-96.

¹⁰ Sadat, *Uneasy Revolution*, *supra* note 8, at 448.

¹¹ Norway's motion for “no action” on the U.S. proposals was approved by 113 delegates, with 17 delegates opposing the motion and 25 abstaining. SCHEFFER, *supra* note 3, at 223.

adoption of the Rome Statute.¹² This resulted in a humiliating defeat for the United States as the delegates present at the Rome Conference proceeded to overwhelmingly approve the Statute.¹³

Testifying before the Senate Foreign Relations Committee later that summer, Ambassador David J. Scheffer, head of the U.S. delegation in Rome, identified six objections to the Statute. Three formed the crux of the Clinton Administration's opposition to the Court: First, the Statute adopted a form of jurisdiction over non-state parties; second, the Statute created a Prosecutor who could, on his or her own authority (and with the consent of two judges), initiate investigations and prosecutions; and, finally, the Statute did not clearly require an affirmative determination by the Security Council prior to bringing a complaint for aggression before the Court.¹⁴

Despite these objections and what President Clinton labeled "significant flaws" in the treaty, the United States signed the Rome Statute on December 30, 2000, the last day it was open for signature.¹⁵ President Clinton, however, recommended that his successor not submit the treaty for ratification until these concerns had been satisfied.¹⁶

2. The First Term of the Bush Administration (2000 – 2004)

Despite having continued to engage fully in the post-Rome negotiation process,¹⁷ the United States' position towards the ICC upon the election of George W. Bush took a sharply hostile turn. The newly inaugurated President repeatedly stated that becoming a party to the Court was not in the interests of the United States.¹⁸ Under his Administration (2002-2009) U.S. policy became to "isolate

¹² SCHEFFER, *supra* note 3, at 224.

¹³ 120 delegates supported the adoption of the Rome Statute, with 21 abstaining from the vote and 7 voting against the Statute (including the United States, Israel, and China). *Id.* at 224; Sadat, *Uneasy Revolution*, *supra* note 8, at 448.

¹⁴ The remaining three concerns were that the Statute did not include a ten-year opt-out period from the Court's jurisdiction over war crimes and crimes against humanity for any State Party; that a last-minute resolution appended to the text of the Statute (Resolution E) proposed that drug crimes and terrorism be included within the Court's jurisdiction at a review conference in the future; and finally that the Statute did not allow for reservations of any kind. *Is A U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the S. Subcomm. on Int'l Relations & the S. Comm. on Foreign Relations*, 105th Cong. 10, 12-15 (1998) [hereinafter *Senate Hearing*] (statement of David J. Scheffer, Ambassador at-Large for War Crimes Issues and Head of the U.S. Delegation for the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State). The United States also complained that the Statute was drawn up largely behind closed doors and without the involvement of the U.S. delegation; and that it was adopted against a backdrop of antagonism towards the United States. These complaints seem largely unsubstantiated by the evidence. *See* Sadat, *Uneasy Revolution*, *supra* note 8, at 449-453; Leila Nadya Sadat, *Summer in Rome, Spring in The Hague, Winter in Washington? U.S. Policy towards the International Criminal Court*, 21 *WIS. INT'L. L.J.* 557, 586-89 (2003) [hereinafter Sadat, *Winter in Washington*]; *see also* FANNY BENEDETTI, KARINE BONNEAU & JOHN WASHBURN, *NEGOTIATING THE INTERNATIONAL CRIMINAL COURT* (2013).

¹⁵ Sadat, *Winter in Washington*, *supra* note 14, at 589.

¹⁶ Statement on the Rome Treaty on the International Criminal Court, 37 *WEEKLY COMP. PRES. DOC.* 4 (Dec. 31, 2000), available at <https://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>.

¹⁷ The American Society of International Law, *U.S. Policy toward the International Criminal Court: Furthering Positive Engagement* 5 (2009) [hereinafter *Furthering Positive Engagement*].

¹⁸ *See, e.g.*, Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, 37 *WEEKLY COMP. PRES. DOC.* 1724 (Nov. 28, 2001); Statement on Signing the Department

and ignore” the Court so that it would, in the words of one former U.S. official, John Bolton, “wither and collapse,”¹⁹ and the stated goal of the 2002 National Security Strategy of the administration was to “protect Americans [from] the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.”²⁰

From 2002 until 2006 the United States entered into Bilateral Immunity Agreements (BIA) with over 100 countries that granted immunity from ICC prosecution to U.S. citizens who committed possible ICC crimes in the territory of a Rome Statute State Party.²¹ These BIA rely on a proviso of the Statute stating that the ICC “may not proceed with a request to surrender or assistance which would require the requested State to act inconsistently with its obligations under international law.”²² Countries ratifying the Court’s Statute and refusing to sign a BIA with the United States were sometimes punished with the withholding of economic assistance.²³

The Bush Administration also took the view that the Court should be disabled in order to prevent it becoming a constraint on the preventative use of U.S. military force.²⁴ This led to the adoption of the American Service Members’ Protection Act of 2002 (ASPA),²⁵ which protects members of the United States military from prosecution by the ICC and prohibits military aid to countries that are party to the Court (although the Act allows for exceptions to this prohibition at the discretion of the President). Additionally, in April of 2002, then Undersecretary of State for Arms Control and International Security John Bolton sent a letter to the United Nations stating that, as the United States had no intention of becoming a party to the treaty, it had no legal obligations stemming from its signing of the Rome Statute. The United States then took the unprecedented step of nullifying the U.S. signature of the treaty.²⁶ It is perhaps worth observing that these actions took place

of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, 38 WEEKLY COMP. PRES. DOC. 47-48 (Jan. 10, 2002).

¹⁹ *Senate Hearing, supra* note 14, at 32 (statement by John Bolton, former Assistant Secretary of State for International Organization Affairs and Senior Vice-President, American Enterprise Institute, Washington D.C.).

²⁰ OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 31 (2002).

²¹ *Status of US Bilateral Immunity Agreements (BIAs)*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf (last visited June 10, 2016).

²² Rome Statute art. 98, ¶ 1.

²³ The so-named “Nethercutt Amendment” that authorized this withholding of funds was adopted for the 2005, 2006, and 2008 financial years. It was not renewed by the Obama Administration. LUCIA DiCICCO, AMICC, THE NON-RENEWAL OF THE “NETHERCUTT AMENDMENT” AND ITS IMPACT ON THE BILATERAL IMMUNITY AGREEMENT (BIA) CAMPAIGN 1 (2009).

²⁴ Sadat, *Winter in Washington, supra* note 14, at 591.

²⁵ Pub. L. No. 107-206, 116 Stat. 820 (2002).

²⁶ Letter from Sen. John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), available at <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>. See also Sadat, *Winter in Washington, supra* note 14, at 591. Upon receipt of this letter the U.N. Secretary General included an

at the same time government lawyers were arguing that the Geneva Conventions had become “quaint and obsolete,”²⁷ and the prison camp at Guantanamo Bay was being established,²⁸ suggesting that the largely jurisdictional objections of the Clinton Administration were now accompanied by U.S. objections to the *criminal law and procedure* newly codified in the Statute itself.

From this point until the end of Bush’s term in 2009 the United States adopted an “empty chair policy,”²⁹ no longer participating in multilateral discussions regarding the ICC and declining to take part as an observer in the ICC Assembly of States Parties.³⁰ It also voiced its objections to the Court in the United Nations Security Council, arguing, for example in a 2003 meeting on the renewal of Resolution 1422 (providing immunity from the jurisdiction of the ICC to peacekeepers from non-State Parties) that “[t]he ICC is not ‘the law.’”³¹

3. The Second Term of the Bush Administration (2004 – 2008)

The fundamental shift in policy between the Clinton and Bush Administrations was accompanied by an aggressive and fervent public campaign against the Court.³² Nevertheless, towards the end of President Bush’s second term, the rate of Article 98 agreements being entered into slowed and exemptions to APSA’s provisions were being made by the President to an increasing number of State Parties to the Rome Statute.³³ A definite softening in U.S. attitudes towards the ICC was evident.

Additionally, the United States abstained from the vote on Security Council Resolution 1593 referring the Darfur situation to the Court rather than vetoing the Resolution.³⁴ This appears to have

asterisk next to David Scheffer’s signature on the treaty noting the contents of the missive, SCHEFFER, *supra* note 3, at 243.

²⁷ Memorandum from Alberto R. Gonzales. Counsel to the President, to President George W. Bush (Jan. 25, 2002), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf>. See also Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT’L. L. 309, 310-11 (2006) (outlining both the background and response to this position).

²⁸ The detention facility was established by a Presidential Military Order in late 2001. See Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

²⁹ See Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, 158, 158 n24 (2010) (noting the parallel between the U.S. position towards the ICC and the “empty chair” policy used by French President Charles de Gaulle at meetings of the European Council to protest objectionable proposals).

³⁰ *Furthering Positive Engagement*, *supra* note 17, at 7.

³¹ Press Release, United States Mission to the United Nations, Statement by Ambassador James Cunningham, Deputy United States Representative to the United Nations, on the Renewal of Resolution 1422, Security Council, June 12, 2003 (June 12, 2003), available at <http://www.amicc.org/docs/US1422Stmt12June03.pdf>.

³² Sadat, *Winter in Washington*, *supra* note 14, at 592, 593.

³³ *Furthering Positive Engagement*, *supra* note 17, at 13-14.

³⁴ S.C. Res. 1593 (Mar. 31, 2005). The Resolution was adopted with 11 votes in favor, no votes against, and four abstentions (Algeria, Brazil, China, and the United States). Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

been the result of tremendous pressure from influential civil society groups that had made the “Save Darfur” campaign impossible to ignore.³⁵ Nevertheless, the Security Council Resolution contained a provision providing immunity from ICC prosecution for nationals of non-member states and emphasized that none of the expenses occurred in the referral of the Darfur situation to the ICC would be covered by the U.N.³⁶ Following the adoption of the Darfur Resolution a member of the U.S. Mission to the United Nations stated that the United States continued to hold fundamental objections against both the Court and the Rome Statute,³⁷ although later that year the U.S. House of Representatives adopted a resolution that appeared to acknowledge the authority of the ICC to prosecute the violations of international law that were occurring in Darfur.³⁸

4. The Obama Administration Changes Course (2008 – 2016)

The Obama Administration³⁹ returned to the policy of ‘cautious engagement’ with the Court present during the Clinton years.⁴⁰ Perhaps the most significant indication of this policy change was the attendance of a high-level U.S. delegation at the 8th Session of the Assembly of States Parties in November of 2009.⁴¹ In 2010 the National Security Strategy summarized the U.S. position towards the ICC as follows:

From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. . . . Although the United States is not at present a party

³⁵ The “Save Darfur” campaign brought together almost 200 organizational members, including both conservative and liberal groups as well as traditional human rights organizations. JOACHIM J. SAVELSBERG, REPRESENTING MASS VIOLENCE 85 (2015).

³⁶ S.C. Res. 1593, ¶¶ 6-7 (Mar. 31, 2005).

³⁷ Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005) (outlining the position taken by Anne Woods Patterson, United States Acting Permanent Representative to the United Nations).

³⁸ H.R. Res. 726, 110th Cong. (2007) (enacted).

³⁹ At her January 2009 hearing on her confirmation as Secretary of State, Senator Hillary Rodham Clinton referenced U.S. policy towards the Court:

Along these lines, the Bush administration has indicated a willingness to cooperate with the ICC in the Darfur investigation, a position which the new administration will support. . . . Whether we work toward joining or not, we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.

Hearing on the Nomination of Hillary Rodham Clinton to be Secretary of State before the Comm. on Foreign Relations, 111th Cong. 131 (2009).

⁴⁰ Sadat, *Winter in Washington*, *supra* note 14, at 590.

⁴¹ This delegation was led by Ambassador-at-Large for War Crimes Issues Stephen Rapp and State Department Legal Advisor Harold Koh. AMICC, REPORT ON THE EIGHTH SESSION OF THE ASSEMBLY OF STATES PARTIES, THE HAGUE, NOVEMBER 2009 1 (2009), available at <http://www.amicc.org/docs/ASP8.pdf>.

to the Rome Statute of the International Criminal Court, and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the I.C.C.'s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.⁴²

The Obama Administration has also been “prepared to support the court’s prosecutions and provide assistance in response to specific requests from the I.C.C. prosecutor and other court officials, consistent with U.S. law, when it is in U.S. national interest to do so.”⁴³

This policy has been consistently voiced by both recent U.S. National Security Strategy statements⁴⁴ and at the ICC ASP,⁴⁵ and the United States no longer actively pursues Article 98 agreements.⁴⁶ Moreover, actively assisted the Court and cooperated with the ICC in the arrests of Dominic Ongwen and Bosco Ntaganda (both of whom were transferred to the Court by U.S. Embassies abroad).⁴⁷ Although it still provides no direct financial support to the Court, per the restrictions of the ASPA, it has provided assistance to governments pursuing ICC fugitives, such as Ugandan efforts to capture Joseph Kony and other members of the Lord’s Resistance Army.⁴⁸ Yet its continuing status as a Non-State Party remains evident: There is no U.S. judge at the Court and when the Court’s new premises were formally dedicated in April 2016, the only official U.S. Government representative present was Todd F. Buchwald, Special Coordinator of the Office of Global Criminal Justice, and (in their unofficial capacities) former U.S. Ambassadors for War Crimes Issues Stephen Rapp and David Scheffer, as well as three members of civil society.⁴⁹

5. Future Prospects: Election 2016

Republican presidential candidate Donald Trump has expressed strong opinions regarding international justice. He is reported as condemning the threatened mass withdrawal from the ICC by numerous African countries, stating that African leaders only wish to oppress the poor and accumulate

⁴² OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 48 (2010).

⁴³ *International Criminal Court*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/j/gcj/icc/> (last visited June 10, 2016).

⁴⁴ OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 22 (2015).

⁴⁵ *See e.g.*, Jane Stromseth, Acting Director, Office of Global Criminal Justice, Remarks at the Fourteenth Session of the International Criminal Court Assembly of States Parties (Nov. 19, 2015), *transcribed at* http://www.state.gov/j/gcj/us_releases/remarks/2015/249814.htm.

⁴⁶ *Furthering Positive Engagement*, *supra* note 17, at 14. The last BIA reported to be entered into was with Montenegro in 2007.

⁴⁷ Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Office of Global Criminal Justice, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (Nov. 21, 2013), *transcribed at* http://www.state.gov/j/gcj/us_releases/remarks/2013/218069.htm; Marie Harf, Deputy Spokesperson, U.S. Department of State, Daily Press Briefing (Jan. 13, 2015), *transcribed at* <http://www.state.gov/r/pa/prs/dpb/2015/01/235916.htm>.

⁴⁸ *U.S. Support to Regional Efforts to Counter the Lord’s Resistance Army*, U.S. DEPARTMENT OF STATE (Mar. 24, 2014), <http://www.state.gov/r/pa/prs/ps/2014/03/223844.htm>.

⁴⁹ Richard Dicker, Director of the International Justice Program at Human Rights Watch; William Pace, Convener of the Coalition for the International Criminal Court; and Leila Sadat, Co-Author of this Report.

wealth.⁵⁰ At the same time, the Republican National Platform for the 2016 election rejects the jurisdiction of the ICC, providing:

To shield members of our Armed Forces and others in service to America from ideological prosecutions overseas, the Republican Party does not accept the jurisdiction of the International Criminal Court. We support statutory protection for U.S. personnel and officials as they act abroad to meet our global security requirements.⁵¹

As of this writing, the Democratic national platform for the 2016 election is unavailable. The Party's 2012 platform nonetheless called for increased cooperation with international institutions.⁵² The Party's presumptive nominee, Hillary Rodham Clinton, was not supportive of the Court during her time in the Senate.⁵³ However, as Secretary of State she publicly opined that "it is a 'great regret'" that the United States is not a member of the Court,⁵⁴ suggesting that her views have evolved. It therefore seems likely that a Clinton Presidency would largely continue the policies of the Obama Administration towards the Court.⁵⁵

B. U.S. GOVERNMENT AGENCIES AND THE ICC

A number of U.S. Government agencies deal with ICC crimes in one way or another. The **U.S. Department of Justice**, as mentioned above, has recently established the **Human Rights and Special Prosecutions Section** of its Criminal Division that works to deny safe haven to violators of

⁵⁰ Several sources quote Donald Trump as follows:

It is shameful for African leaders to seek exit from ICC. In my view these leaders want to have all the freedom to oppress their poor people without anyone asking them a question. ... When I saw them gang up against ICC yet they can't even find an amicable solution for the ongoing quandary in Burundi, I thought to myself these people lack discipline and humane heart.

See Ife Olore, *Donald Trump Attacks Buhari, Other African Leaders*, NAIJ.COM, <https://www.naij.com/837405-africans-recolonized-leaders-turn-slaves-donald-trump.html> (last visited June 10, 2016); *There's No Shortcut to Maturity, 'Africa Should be Recolonized,' Says Donald Trump*, HOW AFRICA (Feb. 29, 2016), <http://howafrica.com/there-is-no-shortcut-to-maturity-africa-should-be-recolonized-says-donaldtrump/>. The reader should be aware that the reliability of these sources is uncertain.

⁵¹ *Republican Platform: American Exceptionalism*, GOP, <https://www.gop.com/platform/american-exceptionalism/> (last visited June 10, 2016).

⁵² *The 2012 Democratic Platform: Strengthening Alliances*, DEMOCRATS, <https://www.democrats.org/party-platform#strengthening-alliances> (last visited June 10, 2016).

⁵³ For example, Senator Clinton voted in favor of the ASPA in 2002.

⁵⁴ *Clinton: It is a 'great regret' the US is not in International Criminal Court*, THE GUARDIAN, Aug. 6, 2009, available at <https://www.theguardian.com/world/2009/aug/06/us-international-criminal-court>.

⁵⁵ *See* SCHEFFER, *supra* note 3, at 198; Mark Kersten, *What Would a Hillary Clinton White House Mean for the ICC?*, JUSTICE IN CONFLICT (Apr. 13, 2015), <https://justiceinconflict.org/2015/04/13/what-would-a-hilary-clinton-white-house-mean-for-the-icc/>.

human rights.⁵⁶ The Department's **National Security Division** also includes a Counterterrorism Section.

The **U.S. Department of Homeland Security** includes the **Immigration and Customs Enforcement (ICE)**, **Human Rights Violators and War Crimes Unit (HRVWCU)**. Since 2004, ICE has arrested more than 275 individuals for human rights-related violations, denied more than 139 individuals from obtaining entry visas to the United States and created more than 66,000 subject records on individual human rights violators, preventing entry.⁵⁷ In addition to HRVWCU work, ICE successfully obtained deportation orders to physically remove more than 590 known or suspected human rights violators from the United States. Currently, ICE is pursuing more than 1,900 leads and removal cases that involve suspected human rights violators from nearly 96 different countries.

The **U.S. Department of State** contains the **Bureau of Democracy, Human Rights, and Labor**, as well as the **Office of Global Criminal Justice** ("OGCJ") (headed by Todd F. Buchwald). The OGCJ advises the Secretary of State and the Under Secretary of State for Civilian Security, Democracy, and Human Rights on issues related to war crimes, crimes against humanity, and genocide. In particular, the office helps formulate U.S. policy on the prevention of, responses to, and accountability for mass atrocities. To this end, the OGCJ advises both the U.S. Government and foreign governments on the appropriate use of a wide range of transitional justice mechanisms, including truth and reconciliation commissions, lustrations, and reparations in addition to judicial processes. The office also coordinates U.S. Government positions relating to the international and hybrid courts currently prosecuting persons responsible for genocide, war crimes, and crimes against humanity – not only for such crimes committed in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia – but also in Kenya, Libya, Côte d'Ivoire, Guatemala, and elsewhere in the world. The office works closely with other governments, international institutions, and nongovernmental organizations to establish and assist international and domestic commissions of inquiry, fact-finding missions, and tribunals to investigate, document, and prosecute atrocities in every region of the globe.⁵⁸

Inter-agency initiatives include the **Atrocities Prevention Board (APB)**, which is made up of representatives from several agencies including the **Departments of State, Defense, Treasury, Justice, and Homeland Security**, the **Joint Staff**, the **U.S. Agency for International Development**, the **U.S. Mission to the United Nations**, the **Office of the Director of National Intelligence**, the **Central Intelligence Agency**, and the **Office of the Vice President** – all of whom are at the Assistant Secretary level or higher. The APB is chaired by the National Security Staff's Senior Director for Multilateral Affairs and Human Rights.

Additionally, the **Voluntary Principles on Security and Human Rights** is a multi-stakeholder initiative (MSI) involving governments (including those of the United States and the

⁵⁶ *Human Rights and Special Prosecutions (HRSP)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/criminal-hrsp> (last visited June 10, 2016).

⁵⁷ *Human Rights Violators & War Crimes Unit*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/human-rights-violators-war-crimes-unit> (last visited June 10, 2016).

⁵⁸ *Office of Global Criminal Justice*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/j/gcj/index.htm> (last visited June 10, 2016).

United Kingdom), companies, and non-governmental organizations that promotes implementation of a set of principles that guide oil, gas, and mining companies on providing security for their operations in a manner that respects human rights.

III. U.S. CASE LAW CITING TO THE ROME STATUTE

Searching Westlaw's electronic database, we found 60 U.S. federal judicial cases from 1999 to 2016 that cite to the Rome Statute as an authoritative statement of customary international law.⁵⁹ 52 are civil cases and 8 involve criminal matters (although not prosecutions for ICC crimes).

On the civil side, discussion of the Rome Statute by U.S. courts occurs in a number of contexts, including the *mens rea* standard for aiding and abetting,⁶⁰ corporate liability,⁶¹ and the definition of crimes against humanity.⁶² One of the most interesting examples is the 2013 District Court case of *Sexual Minorities Uganda v. Lively*,⁶³ which held that the Alien Tort Statute furnished jurisdiction when a U.S. national aided and abetted in a crime against humanity. In this case the conduct complained of was the persecution of LGBTI individuals in Uganda, actions the District Court had no difficulty finding constituted "a crime against humanity that unquestionably violates international norms."⁶⁴ In another interesting opinion, the D.C. Circuit Court of Appeals in *Simon v. Republic of Hungary* relied on the definition of 'genocide' in the Rome Statute to support its reversal of a lower court decision in a case brought by Hungarian survivors of the Holocaust.⁶⁵ While the Rome Statute is not binding on the United States, the Fourth Circuit noted in 2011 that "this does not lessen its importance as an international treaty and, thus, of the law of nations."⁶⁶ References to the Rome Statute are often made

⁵⁹ This figure was reached by searching for the phrase "Rome Statute" in Westlaw's Federal Materials database for the time frame 17-07-1998 to 07-06-2016. An identical search for the phrase "International Criminal Court" reveals 95 results, many of which overlap with the "Rome Statute" search. See also LAILEY REZAI, AMICC, ANALYSIS OF CITATIONS OF THE ROME STATUTE IN U.S. FEDERAL CASE LAW 1 (2014)

⁶⁰ See, e.g., *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 257-62 (S.D.N.Y. 2009) (calling the Rome Statute "particularly authoritative" on the subject of aiding and abetting).

⁶¹ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (finding that the Rome Statute was only intended to apply to natural persons and did not extend liability to corporations).

⁶² See, e.g., *Morales v. Brown*, 2015 WL 6167451, at *7 (holding that the Rome Statute "provides the most current definition of a crime against humanity").

⁶³ 960 F. Supp. 2d. 304 (D. Mass. 2013).

⁶⁴ *Id.* at 316.

⁶⁵ 812 F.3d 127, 143 (D.C. Cir. 2016).

⁶⁶ *Aziz v. Alcolac, Inc.*, 658 F.3d. 388, 400 (4th Cir. 2011).

to buttress or support claims regarding the content of customary international law,⁶⁷ particularly in Alien Tort Claims Act litigation.⁶⁸

On the criminal side, the courts have looked to the Rome Statute for the definition of war crimes⁶⁹ and regarding modes of liability for the commission of international crimes. For example, in *United States v. Al-Bahlul* the Court of Military Commission Review placed great emphasis on the ICC Statute in its analysis of Joint Criminal Enterprise in relation to terrorist activity.⁷⁰

IV. U.S. FEDERAL STATUTORY ANALOGUES TO ICC CRIMES

Some of the material in this Section of the Report has been drawn from information taken from the AMICC website.⁷¹

All three ICC crimes over which the Court can currently exercise jurisdiction – war crimes, crimes against humanity, and genocide – are punishable in some fashion under U.S. law. Under the principle of complementarity, the ICC must defer to genuine national investigations and prosecutions provided that the proceedings are not intended to shield the accused from justice.⁷² The capacity of the United States to investigate and try individuals for atrocity crimes, regardless of how they are labeled, means that justice could generally be served in U.S. courts, both civilian and --with respect to war crimes -- military.

However, it is important to note that U.S. courts, as a matter of statutory construction, employ a presumption against the extraterritorial application of U.S. law.⁷³ Thus, unless Congress has evinced a clear intention otherwise, U.S. criminal law is presumed to apply only to conduct occurring within the territorial jurisdiction of the United States.⁷⁴ There are many federal crimes that do either explicitly or through judicial interpretation apply to acts abroad; however, in each case an assessment of Congressional intent is required. Interestingly, one federal court has held that criminal prohibitions

⁶⁷ See extensively, Mark A. Drumbl, *Extracurricular International Criminal Law*, 16 INTERNATIONAL CRIMINAL LAW REVIEW 412 (2016).

⁶⁸ For an in-depth analysis of references to the Rome Statute in U.S. Alien Tort Claims Act litigation, see *id.*

⁶⁹ See *Hamdan v. United States*, 696 F.3d 1238, 1251 (D.C. Cir. 2012) (noting that the Rome Statute's extensive list of war crimes does not include material support for terrorism).

⁷⁰ 820 F. Supp. 2d 1141, 1213-14 (C.M.C.R. 2011).

⁷¹ *US Case Law Citing to the Rome Statute*, AMICC, <http://www.amicc.org/usicc/law> (last visited June 13, 2016).

⁷² Rome Statute art. 17 ¶ (2)(a).

⁷³ "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (internal citation omitted).

⁷⁴ *Id.* This presumption has also been applied to Alien Tort Statute (civil) cases. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

“can have many obvious extraterritorial applications even if [they are] most readily and naturally deployed domestically.”⁷⁵

A. WAR CRIMES

1. U.S. Federal Courts

Some (but not all) war crimes may be prosecuted by U.S. civil courts, whether committed within or outside of the U.S., but only when:

- a. The victim is a U.S. national or member of the U.S. armed forces (18 U.S.C. § 2441(b)); or
- b. The perpetrator is a former service member or a civilian accompanying the military overseas (18 U.S.C. §§ 3261-3267).

In addition, under the **Child Soldiers Accountability Act of 2008**, Public Law 110-340 (October 3, 2008) (18 U.S.C. § 2442 (2008)), U.S. Courts may prosecute individuals for the recruitment or use of child soldiers under the age of 15, a war crime under the Rome Statute, if the crime is committed in whole or in part in the United States or if the offender is a U.S. national, legal alien, habitual resident or is brought to or found in the U.S. after the crime occurred.

2. U.S. Military Courts

U.S. military courts have universal jurisdiction over war crimes to the extent permitted by international law, with the exception of some cases involving civilians. The relevant international law definitions (and their U.S. federal statutory counterparts) are:

- a. **Grave breaches of the Geneva conventions**, Rome Statute Article 8(2)(a): 18 U.S.C. § 2441(c)(1) defines war crimes as conduct “defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;”
- b. **Other serious violations of the laws and customs applicable in international armed conflict**, Rome Statute Article 8(2)(b): 18 U.S.C. §§ 2441(c)(1), (2), (3). 18 U.S.C. § 2441(c)(2) specifically defines a war crime as conduct “prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;”

⁷⁵ United States v. Abu Khatallah, No. 14-cr-00141 (CRC), 2015 WL 9451032, at *11 (D.C. Cir. Dec. 23, 2015)(holding that charges brought under various federal criminal statutes, including murder of a U.S. official and malicious damage caused by explosives, were valid even though they were brought in relation to conduct occurring outside of U.S. sovereign territory. The defendant had been charged with crimes arising out of an attack on the United States Mission in Benghazi).

- c. **War crimes occurring in a conflict of a non-international character**, Rome Statute Articles 8(2)(c), (e): 18 U.S.C. § 2441(c)(3) defines war crimes of non-international armed conflict as conduct “which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party;” and
- d. **War crimes committed by members of the U.S. armed forces or by a U.S. national**, Rome Statute Article 8 generally: 18 U.S.C. §§ 3261-3267 extends jurisdiction to cover certain military and civilian persons who while “employed by or accompanying the Armed Forces outside the United States or while [members] of the Armed Forces” commit serious crimes under Title 18 (if such acts would be crimes if committed within the jurisdiction of the U.S.), excluding civilians who are “national[s] of or ordinarily resident in the host nation” and active military members unless the crimes has been committed with one or more civilian defendant. Former military members are also covered. These statutes also allow for the extradition of such individuals to the country where the crime occurred under applicable treaties and international agreements.

B. CRIMES AGAINST HUMANITY

The United States does not have any current statutory provisions that specifically address “crimes against humanity,” although such legislation was proposed in 2010 by Senator Richard Durbin (D-Ill), and is currently again being considered.⁷⁶ This legislation would amend the federal criminal code to impose a fine and/or prison term of up to 20 years (or any term of years or for life if death results from a violation of the prohibitions of the Act) on any person who commits or engages in conduct that would violate specified federal criminal laws as part of a widespread and systematic attack against any civilian population, with knowledge of the attack. The Act would provide jurisdiction if the alleged offender was a U.S. national, an alien residing in the United States, or a stateless person whose habitual residence is in the United States; or if the offense was committed in whole or in part within the United States.⁷⁷

The American Bar Association (ABA) has urged Congress to enact legislation to prevent and punish crimes against humanity, as well as encouraging the United States Government to take an active role in the negotiation and adoption of a global convention for the prevention and punishment of crimes against humanity. The ABA adopted a Resolution

⁷⁶ Crimes Against Humanity Act of 2010, S. 1246, 111th Cong. (2009).

⁷⁷ S. 1246 (as reported to the Senate, Jul. 21, 2010).

supporting the adoption of federal legislation on Crimes Against Humanity in 2014,⁷⁸ and a taskforce chaired by former Ambassador David Scheffer is currently working on this.⁷⁹

If committed in the United States or by members of the U.S. military most Article 7 crimes would violate domestic U.S. criminal or military laws. If committed outside of the U.S., such crimes may be prosecuted in U.S. civil courts only if they involve torture, attempted torture, or certain forms of international terrorism.

1. Murder, Rome Statute Article 7(1)(a)

Comparable U.S. Statutory Provisions include:

- a. 18 U.S.C. § 32, acts of violence against aircraft and individuals on aircrafts where such acts will likely endanger the safety of the aircraft;
- b. 18 U.S.C. § 33, destruction of persons operating or maintaining motor vehicles committed with the “intent to endanger the safety of any person on board or anyone who believes will board;”
- c. 18 U.S.C. § 37, violence at international airports;
- d. 18 U.S.C. § 115, murder of immediate family members of a U.S. Federal official (including judges, law enforcement officers, etc.) with the intent to interfere with, intimidate, or retaliate against such an official, while engaged in performance of official duties or with intent to retaliate against him or her on account of the performance of official duties;
- e. 18 U.S.C. § 844(f)(3), action causing malicious damage to or destruction of any building, vehicle or other personal or real property owned or possessed or leased by the U.S. by means of fire or explosive;
- f. 18 U.S.C. § 930(c), killing of a person by someone knowingly possessing or causing to be present firearms or other dangerous weapons in a federal facility or in the course of an attack on such a facility;
- g. 18 U.S.C. § 1111, “murder” defined as “unlawful killing of a human being with malice aforethought;”

⁷⁸ *Resolution 300*, A.B.A. CENTER FOR HUM. RTS. (2014).

⁷⁹ *Senator Durbin’s Speech Highlights ABA Working Group on Crimes Against Humanity*, International Criminal Justice Today (Apr. 8, 2015), <https://www.international-criminal-justice-today.org/news/senator-durbins-speech-highlights-aba-working-group-on-crimes-against-humanity/>.

- h. 18 U.S.C. § 1114, killing of any officer or employee of the United States or any agency thereof while such an officer or employee is engaged in official duties and anyone assisting them;
- i. 18 U.S.C. §§ 112, 878, 1116, threats and violence against a foreign official, official guest, or internationally protected person;
- j. 18 U.S.C. § 1119, murder of a U.S. national by a U.S. national outside the United States;
- k. 18 U.S.C. § 1203, hostage taking;
- l. 18 U.S.C. § 1651, piracy (not necessarily including murder) as defined by the law of nations, committed on the high seas;
- m. 18 U.S.C. § 1652, murder or any act of hostility against U.S. citizens committed by a citizen of the U.S. on the high seas under color of authority of any state;
- n. 18 U.S.C. § 1653, acts of piracy by aliens;
- o. 18 U.S.C. § 2280, violence against maritime navigation;
- p. 18 U.S.C. § 2281, violence fixed maritime platforms;
- q. 18 U.S.C. § 2332, killing of a U.S. national while outside of the United States;
- r. 18 U.S.C. § 2332(a), unlawful use of weapons of mass destruction; and
- s. 18 U.S.C. § 2332(b), acts of terrorism transcending national boundaries.

2. Enslavement, Rome Statute Article 7(1)(c)

Comparable U.S. statutory provisions in Title 18, Chapter 77 (Peonage and Slavery) include:

- a. 18 U.S.C. § 1581, holding or returning a person to a condition of peonage; arresting any person with intent to return him or her to such status; or obstructing enforcement of this section;
- b. 18 U.S.C. § 1582, preparing or sailing vessels for slave trade;
- c. 18 U.S.C. § 1583, enticement into slavery;
- d. 18 U.S.C. § 1584, sale into involuntary servitude;
- e. 18 U.S.C. § 1585, seizure, detention, or transportation of persons from a foreign shore with the intent to make them a slave;

- f. 18 U.S.C. § 1586, voluntary service on vessels involved in the slave trade;
- g. 18 U.S.C. § 1587, penalizing captains, masters, and commanders of a vessel that has a slave on board;
- h. 18 U.S.C. § 1588, penalizing those masters, owners, or persons of any vessel who receives on board any person with the knowledge or intent that he or she is to be taken outside of the U.S. to be held or sold as a slave; and
- i. 18 U.S.C. § 242, the willful subjection of individuals under the color of law to the deprivation of any rights, privileges or immunities guaranteed by the Constitution or laws of the United States.

3. Deportation, Rome Statute Article 7(1)(d)

The only comparable statutory provision is 18 U.S.C. § 1201, which covers the unlawful seizing, confining, inveigling, decoying, kidnapping, abducting or carrying away and holding for ransom or reward “or otherwise” any person, or conspiracies or attempts to do the same.

4. Imprisonment, Rome Statute Article 7(1)(e)

Analogous U.S. law includes 18 U.S.C. § 242, as discussed above under “Enslavement” and 18 U.S.C. § 1201, as discussed above under “Deportation.”

5. Torture, Rome Statute Article 7(1)(f) (See Subsection C below)

6. Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, Rome Statute Article 7(1)(g)

Comparable U.S. Statutory Provisions include:

- a. 18 U.S.C. § 2421, knowingly transporting any individual with the intent that such an individual engage in prostitution or any sexual activity for which a person can be charged with a criminal offense;
- b. 18 U.S.C. § 2422, knowingly persuading, inducing, enticing or coercing any individual to travel to engage in prostitution or any sexual activity for which a person can be charged with a criminal offense; and
- c. 18 U.S.C. § 2423, knowingly transporting an individual under 18 years of age with the intent that he or she engage in prostitution or any sexual activity for which a person can be charged with a criminal offense.

7. Persecution, Rome Statute Article 7(1)(h)

No specific U.S. statutory provision covers extermination. However, 18 U.S.C. § 242 (deprivation of rights under color of law) punishes those individuals who willfully subjects those individuals to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States on account of race, color or alienage.

C. TORTURE

The U.S. Torture Act of 1994 (18 U.S.C. § 2340 *et seq.*) defines torture as:

[A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.⁸⁰

The Act sets the punishment of imprisonment for not more than 20 years; or, if torture resulted in the death of victim, punishment by death or imprisonment for any term of years or life. For jurisdiction, the alleged offender must be a U.S. national or present in the United States, presumably permitting the exercise of universal jurisdiction. In addition to similar references in list form with genocide, § 2340 is also cross-referenced by 18 U.S.C. § 1841, protection of unborn children—such that an offender of alleged torture that leads to the death of an unborn child is guilty of a separate offense for the death of the child.⁸¹ 18 U.S.C. § 2340B allows for the application of State or local law and forecloses the creation of procedural or substantive rights in a civil proceeding.

The only case to be prosecuted under the Torture Act thus far is that of Charles McArthur Emmanuel (also known as Charles ‘Chuckie’ Taylor), the son of Liberian warlord Charles Taylor, for acts of torture committed against Liberian nationals in Liberia and Sierra Leonean refugees in Liberia. Taylor was convicted of torture in January of 2009 and sentenced to ninety-seven years in prison, a ruling that was upheld on appeal.⁸² In reaching its decision the Court sustained the extraterritorial application of the Torture Act and its constitutionality.⁸³ The trial judgment in the case described torture as a *jus cogens* offence.⁸⁴ Some scholars have argued that this case is the first true exercise of

⁸⁰ 18 U.S.C. § 2340(1) (1994).

⁸¹ 18 U.S.C. § 1091 (genocide) is not included in the extensive list of other violent crimes.

⁸² *United States v. Belfast*, 611 F.3d. 783 (11th Cir. 2010).

⁸³ *Id.* at 809-811.

⁸⁴ *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *9-10 (S.D. Fla. July 5, 2007).

universal criminal jurisdiction by the U.S. Government.⁸⁵ It has been suggested that the *Taylor* case provides a template for future prosecutions of U.S. officials under the Torture Act.⁸⁶

The Torture Victims Protection Act of 1991⁸⁷ (TVPA) allows for the filing of civil suits in the United States against individuals who committed acts of torture or extrajudicial killing in their official capacity for a foreign nation. Note, however, that both the Torture Act and the TVPA are limited in their application by the Foreign Sovereign Immunity Act of 2005,⁸⁸ which restricts the availability of remedies when the defendant is a state actor. Generally speaking, the principle obstacle to the use of private law remedies against human rights violators in the United States is not substantive international law but rather domestic procedural law.⁸⁹

D. GENOCIDE

U.S. federal law originally permitted the prosecution of genocide in U.S. courts if the crime was committed in whole or in part the United States or if the offender was a U.S. national, legal alien or habitual resident.

This legislation was originally sponsored by then-Senator Joseph Biden, now Vice President, in 1987. Known as the “Proxmire Act” because it was introduced by Senator William Proxmire (D-WI), the law was a significant achievement. Proxmire was an ardent proponent of ratifying the Genocide Convention. In 1967, Proxmire vowed to deliver a speech each day on the Senate floor until ratification was achieved. Calling the Senate’s failure to ratify “a national shame,” Proxmire presented a total of 3,211 speeches over 19 years.⁹⁰

The Proxmire Act was amended by the Genocide Accountability Act of 2007, Public Law 110-151 (December 21, 2007) (GAA). The GAA closes a loophole in the Proxmire Act. Genocide involves a series of acts (e.g. killing, causing serious bodily or mental harm) committed against members of a national, religious, racial, or ethnical group with the intent to destroy the group, in whole or in substantial part, as such. The GAA permits the following additional categories of individuals suspected of genocide abroad to be prosecuted for genocide in U.S. courts: aliens lawfully admitted for permanent residence; stateless persons whose “habitual residence” is in the United States; and individuals “brought into, or found in the United States, even if the offense occurred outside the United States.”

⁸⁵ See Thomas J. G. Scott, *Prosecuting Charles Taylor’s Son for Torture: A Step towards the Domestication of International Law*, 8 LOY. U. CHI. INT’L L. REV. 33 (2010).

⁸⁶ See William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT’L L. & POL. 1 (2015).

⁸⁷ Pub. L. No. 102-256, 106 Stat. 73 (1991).

⁸⁸ 28 U.S.C. §§ 1602-1611 (2005).

⁸⁹ See Eric Engle, *The Alien Tort Statute and the Torture Victims’ Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 1 (2006).

⁹⁰ Richard Severo, *William Proxmire, Maverick Democrat Senator from Wisconsin, is dead at 90*, N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/us/william-proxmire-maverick-democratic-senator-from-wisconsin-is-dead-at.html>.

Previously, genocide only was considered a crime if committed within the United States *or* by a U.S. national outside the United States. Consequently, a non-U.S. national accused of committing genocide elsewhere (*e.g.* in Bosnia, Sudan, or Rwanda) and lawfully resident in the United States could not be prosecuted in U.S. courts for genocide. That individual could only be prosecuted for immigration fraud or customs law irregularities; and deported to his or her home country to face possible prosecution there.⁹¹

E. FEMALE GENITAL MUTILATION

18 U.S.C. §116; Female Genital Mutilation (FGM). FGM refers to cutting and other procedures that injure the female genital organs for non-medical reasons. FGM is a federal crime in the United States when carried out on girls under the age of 18, and it is also illegal to send or attempt to send a girl out of the United States to have FGM performed. The law applies to persons who perform the acts, as well as to those persons who aid and abet them: 18 U.S.C. § 2. The crime is punishable by up to five years in prison, fines, or both.

V. U.S. STATE LAW ANALOGUES TO ICC CRIMES

At the state level, while most states criminalize terrorism, the case law is relatively sparse, and no state criminalizes directly ICC crimes, although they presumably could do so constitutionally. One exception is Puerto Rico, which has a crimes against humanity statute.⁹²

A search by term in the statutes and legislation of all fifty states for the three ICC crimes (genocide, war crimes, and crimes against humanity) yielded mostly “recognition” legislation⁹³ with few criminal code results. State legislatures appear most concerned with preventing genocide and other atrocity crimes through education and awareness. Multiple state civil codes contain numerous commissions, councils, and codes dedicated to the establishment and function of such programs.⁹⁴ Criminal sanctions against genocide specifically are few and far between.

⁹¹ Mark A. Drumbl, *Introductory Note to Genocide Accountability Act*, 47 I.L.M. 125, 125 (2008).

⁹² P.R. LAWS ANN. tit. 33, § 4934 (2004).

⁹³ There were 2,734 search results for “genocide” in U.S. Statutes and Legislation, ranging from establishing Holocaust and Genocide commissions, creating education code provisions for the teaching of genocide, setting aside memorial days for the Armenian genocide or Kristallnacht, and prohibiting economic dealings with complicit corporate entities in response to Darfur genocide. A similar search for “war crimes” (filtered to remove references to the United Nations War Crimes Commission) revealed 186 results. The majority of these results were again “recognition” legislation, however a number of states have passed resolutions in recent months supporting the eradication of the radical Islamic group ISIL/ISIS. A search by term in the statutes and legislation of the States for the term “crimes against humanity” revealed 552 results, most of which were also of a “recognition” nature.

⁹⁴ *See, e.g.*, 24 PA. STAT. AND CONS. STAT. § 15-1554 (West 2014) (allowing the instruction of holocaust, genocide, and human rights violations to students); 72 PA. STAT. AND CONS. STAT. §§ 3837.4, 3837.6 (West 2010) (prohibiting the investment of state public funds in Sudan until the genocide in the Darfur region has been halted for at least twelve months).

VI. MISCELLANEOUS FEDERAL LEGISLATION PERTAINING TO ATROCITY CRIMES

A. DARFUR / SUDAN

- Proposed House Bill 1692, 113th Cong. (introduced April 24, 2013): Sudan Peace, Security, and Accountability Act of 2013; This legislation seeks an end to human rights violations in Sudan, provides accountability for those violating human rights, and reinvigorates peace efforts;
- Senate Resolution 402, 112th Cong. (2012): Unanimous condemnation of Joseph Kony and the Lord's Resistance Army for committing crimes against humanity and mass atrocities, and supporting efforts to remove LRA commanders from the battlefield;
- Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, 120 Stat. 1869 (2006);
- Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (2007);
- Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497, 118 Stat. 4012 (2004);
- Sudan Peace Act, Pub. L. No. 107-245, 116 Stat. 1504 (2002).

B. ISIS/ISIL

- Proposed Senate Resolution 340, 114th Cong. (introduced December 18, 2015); Expressing the sense of Congress that the so-called Islamic State in Iraq and al-Sham (ISIS or Da'esh) is committing genocide, crimes against humanity, and war crimes, and calling upon the President to support the creation of an international criminal tribunal with jurisdiction to punish these crimes, and to use every reasonable means, including sanctions, to destroy ISIS and disrupt its support networks;
- Proposed House Concurrent Resolution 75, 114th Cong. (introduced September 9, 2015); Expressing the sense of Congress that the atrocities perpetrated by ISIL against religious and ethnic minorities in Iraq and Syria include war crimes, crimes against humanity, and genocide. Also urging the member states of the United Nations to coordinate to punish those responsible for these ongoing crimes, by the collection and preservation of evidence and, if necessary, the establishment and operation of appropriate tribunals;
- Proposed House Bill 4208, 114th Cong. (introduced December 10, 2015): Authority for the Use of Military Force Against the Islamic State of Iraq and the Levant Act; Declaring that ISIL has "threatened genocide and committed vicious acts of violence against religious and ethnic minority groups;"

- Consolidated Appropriations Act 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015); Section 7033(d): Atrocities Prevention. Ordering an evaluation of the persecution of, including attacks against, Christians and people of other religions in the Middle East by violent Islamic extremists and the Muslim Rohingya people in Burma by violent Buddhist extremists, including whether either situation constitutes mass atrocities or genocide (as defined in section 1091 of title 18, United States Code), and a detailed description of any proposed atrocities prevention response recommended by the APB.

C. SYRIA

Proposed House Concurrent Resolution 121, 114th Cong. (introduced March 15, 2016); Expressing the sense of the Congress condemning the gross violations of international law amounting to war crimes and crimes against humanity by the Government of Syria, its allies, and other parties to the conflict in Syria, and calling for a war crimes tribunal where these crimes could be addressed. Urging other nations to apprehend and deliver into the custody of such a Syrian war crimes tribunal persons indicted for war crimes, crimes against humanity, or genocide in Syria, and to provide information pertaining to such crimes to the tribunal.

D. CAMBODIA

Consolidated Appropriations Act 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015); provides funding for democracy programs and research and education programs associated with the Khmer Rouge genocide in Cambodia.

E. NIGERIA / BOKO HARAM

Proposed House Resolution 528, 114th Cong. (introduced November 16, 2015); Declaring Boko Haram a threat to human rights because of its relentless drive to commit genocide in Nigeria, and providing humanitarian assistance for the victims of Boko Haram through the Victims of Terror Support Fund.

VII. ACCOUNTABILITY OF U.S. PERSONS FOR THE COMMISSION OF ICC CRIMES

U. S. courts, and particularly federal courts, are generally considered to be independent from the executive and legislative branches of government. U.S. federal judges are granted life tenure and salary protection under the U.S. Constitution,⁹⁵ and accountability for both criminal and civil wrongs is generally demanded by the American public and enforced by the courts and legislature. Even sitting U.S. Presidents have been called to account before the courts in limited cases, as the famous examples

⁹⁵ U.S. CONST. art III, § 1.

of Richard Nixon⁹⁶ and William Clinton⁹⁷ remind us. The United States also has a robust military justice system which operates under the Uniform Code of Military Justice (UCMJ), with more than 4,000 JAG lawyers,⁹⁸ a highly regulated system of courts martial,⁹⁹ and a Federal Court of Military Appeals.¹⁰⁰ U.S. service members accused of war crimes would be tried by a court-martial under the UCMJ for violations of the laws of war, as codified in the UCMJ, although some have argued that the gaps between the UCMJ and the provisions of the ICC Statute or so extensive that they might not satisfy Rome Statute standards regarding complementarity.¹⁰¹

At the same time, following the attacks of September 11, 2001, and the U.S. military response thereto, credible allegations involving violations of the laws of war and human rights violations were raised concerning members of the Executive Branch, U.S. military forces, CIA officials and private military contractors. There have been allegations of prisoner abuse and war crimes regarding the conduct of U.S. forces in Afghanistan, allegations of torture committed against prisoners detained in U.S. custody, most notoriously the military prison located at Guantanamo Bay¹⁰² and the Abu Ghraib prison in Iraq,¹⁰³ and allegations involving the excessive use of force against civilians and civilian

⁹⁶ United States v. Nixon, 418 U.S. 683 (1974).

⁹⁷ Clinton v. Jones, 520 U.S. 681 (1997).

⁹⁸ As at September 2015 the Army employed 1,910 active duty judge advocates, the Air Force 1,154, the Navy 843, and the Coast Guard 194. ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENCE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY AND AIR FORCE, PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2014 TO SEPTEMBER 30, 2015 6-7 (2015), available at <http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf> [hereinafter *Annual Report Submitted to the Committees on Armed Services*].

⁹⁹ See R. CHUCK MASON, CONG. RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW (2013).

¹⁰⁰ See *Annual Report Submitted to the Committees on Armed Services*, supra note 98, at 13-17 (giving informal summaries of select decisions from the Court's September 2014 term). Appeals can be made from decisions of the Court of Appeals for the Armed Forces to the U.S. Supreme Court, however, certiorari is usually denied, Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305, 348 n241 (2015).

¹⁰¹ Thomas Wade Pittman & Matthew Heaphy, *Does the United States Really Prosecute its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court*, 21 LEIDEN J. INT'L L. 165 (2008).

¹⁰² See, e.g., Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, <http://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>; Bob Woodward, *Guantanamo Detainee was Tortured, Says Official Overseeing Military Trials*, WASH. POST, Jan. 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>; David Rohde, *Exclusive: Detainee Alleges CIA Sexual Abuse, Torture, Beyond Senate Findings*, REUTERS, June 2, 2015, <http://www.reuters.com/article/us-usa-torture-khan-idUSKBN0O11TW20150602>.

¹⁰³ The allegations of abuse at Abu Ghraib led to the opening of an investigation into the conduct of U.S. armed forces at the confinement facility. See MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), available at <https://fas.org/irp/agency/dod/taguba.pdf>. See also Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL Insight Vol. 8, Issue 10, May 21, 2004, available at <https://www.asil.org/insights/volume/8/issue/10/international-legal-issues-surrounding-mistreatment-iraqi-detainees> (last visited June 15, 2016).

objects in the Afghan and Iraq theatres.¹⁰⁴ A full assessment of these allegations and the U.S. responses thereto is beyond the scope of this article. Nonetheless, given the serious nature of the allegations, the widespread chronicling of them by observers inside and outside the U.S. government including UN Fact-finding commissions and human rights bodies,¹⁰⁵ human rights organizations,¹⁰⁶ the International Committee of the Red Cross,¹⁰⁷ and the United States Senate itself, which issued a 6,000 page report on torture on December 9, 2014,¹⁰⁸ it is important to address them as at least some of the allegations could, if proven, constitute ICC crimes.

There have been only a handful of criminal prosecutions brought with respect to any of these allegations; the cases that have been pursued have largely concerned low-level individuals.¹⁰⁹ The U.S. government has generally not pursued accountability for the commission of ICC crimes by U.S. persons and has generally opposed civil suits seeking redress as well, either invoking immunities, the States Secrets doctrines, or other legal procedures. This has been true of both the Bush and the Obama Administrations.¹¹⁰ Human Rights organizations and scholars have argued that lawsuits seeking accountability – or demands for criminal redress – have been systematically blocked by all three branches of government.¹¹¹ Although the U.S. is not a party to the Rome Statute, some of the

¹⁰⁴ See, e.g., JOHN HAGAN ET AL., IRAQ AND THE CRIMES OF AGGRESSIVE WAR 150-52 (2015); JOHN SIFTON, HUMAN RIGHTS WATCH, “ENDURING FREEDOM”: ABUSES BY U.S. FORCES IN AFGHANISTAN 11-21 (2004).

¹⁰⁵ See, e.g., Comm. against Torture, Concluding Observations on the Third to Fifth Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 (2014).

¹⁰⁶ See, e.g., AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: ‘TARGETED KILLING’ POLICIES VIOLATE THE RIGHT TO LIFE (2012); REED BRODY, HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES (2011); SIFTON, *supra* note 104; AMRIT SINGH, OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION (2013).

¹⁰⁷ See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY (2007).

¹⁰⁸ SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. Rep. No. 113-288 (2014). Much of the report remains classified.

¹⁰⁹ Only around a dozen soldiers were convicted of charges in relation to Abu Ghraib, and the Department of Defense absolved all senior U.S. military officials of responsibility, HAGAN ET AL., *supra* note 104, at 79. The most severe sentence was handed down to Specialist Charles Graner, whose 10 year prison term for his role in the abuse was upheld by the United States Court of Appeals for the Armed Forces, *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010).

¹¹⁰ Both administrations entered into Status of Force Agreements with countries ‘hosting’ U.S. troops. These agreements generally include immunity from criminal and civil jurisdictions for U.S. military personnel. See INTERNATIONAL SECURITY ADVISORY BOARD, REPORT ON STATUS OF FORCE AGREEMENTS 16-20 (2015), available at <http://www.state.gov/documents/organization/236456.pdf>. Further, at the request of the Obama Administration, in 2014 Iraq granted U.S. soldiers immunity from prosecution. Prior refusal to grant such immunity had led to the decision to withdraw all U.S. troops in late 2011. See *US Troops in Iraq Will Get Immunity From Prosecution, Bolstering Fight With Isis*, THE GUARDIAN, Dec. 4, 2014, <https://www.theguardian.com/us-news/2014/dec/04/us-troops-in-iraq-will-get-immunity>.

¹¹¹ See, e.g., AMNESTY INTERNATIONAL, USA: CHRONICLE OF IMMUNITY FORETOLD (2013), available at <http://www.amnestyusa.org/sites/default/files/amr510032013en.pdf>; ELIZABETH HOLTZMAN, CHEATING JUSTICE (2012) (with Cynthia L. Cooper); PHILIPPE SANDS, TORTURE TEAM: DECEPTION, CRUELTY AND THE COMPROMISE OF

countries that have been the situs of U.S. military activities are Members of the ICC. Thus, the Court could potentially have jurisdiction over the actions of U.S. persons for the commission of ICC crimes, particularly if the United States cannot either for political or legal reasons investigate or prosecute those crimes itself.

VIII. CONCLUSION

This article demonstrates that the United States has a complicated relationship to questions of complementarity in the Rome Statute. With a vigorous system of federal and state criminal justice, the United States is more than capable of prosecuting ICC crimes effectively. And sometimes the United States is supportive of efforts to combat impunity for the commission of ICC crimes abroad, if it perceives this support to be in the U.S. national interest or strong pluralist civil society coalitions supporting U.S. action (as in the case of Darfur) emerge. However, there are considerable legal gaps in coverage, particularly as regards crimes against humanity and war crimes, that could prevent U.S. courts from exercising criminal jurisdiction over U.S. and foreign nationals accused of committing ICC crimes, particularly given the presumption against extraterritoriality in the application of U.S. federal criminal law. Finally, there appear to be tremendous political barriers to accountability for the commission of ICC crimes by U.S. persons. For this reason, the United States continues to have an uneasy relationship with the International Criminal Court and is likely to do so for some time.

LAW (2008); THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE (Marjorie Cohn, ed., 2011).