THE U.S. AND THE ICC: NO MORE EXCUSES

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INTRODUCTION

More than fourteen years after its creation and twelve years after it began to function, the International Criminal Court ("ICC") still does not have direct support from the United States as a party to its constitutive instrument. There had been prior excuses for the U.S. not becoming a party to the Rome Statute. For example, it had been claimed that there might be unfounded or politicized prosecutions involving unprofessional prosecutors and judges and that a new definition of aggression that could later be created might prevent the United States from using armed force that is permissible under the United Nations Charter. Others had thought that by not becoming a party to the treaty, the U.S. could assure that U.S. nationals would not be prosecuted before the ICC. Are any of these excuses valid today, whether or not they had been previously?

I. PRIOR EXCUSES

A. Previously Stated Concerns

1. Unfounded Prosecutions

One of the stated reasons for U.S. concern had been that the ICC might engage in "unfounded charges" against U.S. officials,[1] despite obvious limitations of its jurisdiction that are set forth in the Rome Statute of the ICC[2] with respect to the types of crimes that can be prosecuted before the ICC.[3] For example, in December 2000 President Clinton expressed this concern but added that the U.S. had "worked effectively to develop procedures that limit the likelihood of politicized prosecutions,"[4] which had been an additional and related concern of the United States. Giving an example, President Clinton then stated that "U.S. civilian and military

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1. *See, e.g.*, William Clinton, Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000) [hereinafter Clinton Statement], *available at* http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html.

2. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute of the ICC].

3. *See id*. arts. 5–8.

4. Clinton Statement, *supra* note 1.

negotiators helped to ensure greater precision in the definitions of crimes within the Court's jurisdiction."[5]

With more precise definitions appearing in the Rome Statute of the ICC and the subsequent creation of the Elements of Crimes,[6] one would assume that ICC use of "unfounded" charges had become most unlikely. Nonetheless, in subsequent years the Bush Administration also expressed concern that ICC jurisdictional provisions left U.S. officials "subject to 'an unaccountable prosecutor' and 'unchecked judicial power.'"[7] This is especially true since the United States had been unsuccessful in limiting all prosecutions before the ICC to those authorized by the United Nations Security Council and, therefore, a U.S. control available through exercise of its veto power.[8] Contrary to stated fears of rogue prosecutors, it is obvious that prosecutors would be "accountable" before Pre-Trial, Trial, and Appellate Chambers of the ICC if they tried to deviate from the definitions set forth in the Rome Statute of the ICC or the Elements of Crimes.[9] With respect to "unchecked judicial power," it may be noted that

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5. *Id.*; *see also* M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 457 (1999) (stating that "the articles dealing with procedure and with the definition of crimes were substantially as the United States wanted").

6. *See* Elements of Crimes, pt. II-B, ICC Doc. No. ICC-ASP/1/3 (Sept. 9, 2002). Concerning the creation of the Elements of Crimes, see, for example, 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, 575–76 (2003); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 56, 74–75 (2002).

7. Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERK. J. INT'L L. 528, 537 (2011) (quoting John R. Bolton, Under Sec'y for Arms Control and Int'l Security, Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002)); *see also* Christopher T. Cline, *Perspectives of a Non-Party to the International Criminal Court Treaty*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 107, 111 (2008) (complaining of ICC "functioning without accountability to a superior body, such as the United Nations Security Council"); Prashant Sabharwal, *Manifest Destiny: The Relationship Between the United States and the International Criminal Court in a Time of International Upheaval*, 18 NEW ENG. J. INT'L & COMP. L. 311, 319 (2012).

8. *See, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 553 (3d ed. 2007); Fairlie, *supra* note 7, at 534–35; Sabharwal, *supra* note 7, at 320; William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 709, 712–19 (2004); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 800 (2001).

9. *See* Sadat, *supra* note 6, at 588 (noting that the Rome "Statute contains extensive safeguards designed to limit the Prosecutor's scope of action, many of which are the direct result of U.S. government proposals"); Scheffer, *supra* note 6, at 76, 81–82 ("Rules of Procedure and Evidence regulate the prosecutor's actions"), 92–93; Stephen Eliot Smith, *Definitely Maybe: The Outlook for U.S. Relations With the International Criminal Court During the Obama Administration*, 22 FLA. J. INT'L L. 155, 178 n.152 (2010) (citing Christopher Keith Hall, *The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight Against Impunity*, 17 LEIDEN J. INT'L L. 121, 125 (2004); Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15); Ruth

the Supreme Court of the United States is seemingly more unchecked,[10] but no one would seriously argue that its judicial power and independence should be subject to political control, the very circumstance associated with unacceptable "politicized" prosecutions and institutions.[11]

2. Politicized Prosecutions

Another stated concern of the United States had been the fear that the ICC might permit "politicized" prosecutions of U.S. officials,[12] but President Clinton noted that this was far less likely after efforts to provide greater precision with respect to definitions of the crimes within the jurisdiction of the ICC had been successful.[13] Moreover, as noted above, ICC prosecutors are accountable in several ways to an independent judiciary that is itself subject to policing for improper judicial conduct and politicized prosecutions. For these reasons, prior fears of unfounded charges and politicized prosecutions have themselves become unfounded.

Commentators have also noted that actual practice before the ICC during the last ten years should allay any lingering fears of politicized prosecutions.[14] As U.S. Ambassador Stephen Rapp noted in 2010 with

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Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124, 128–29 (2001) (the Prosecutor "will have no independent power to issue legal process or to open an investigation. Instead, he must secure the agreement of the three-member pretrial chamber before he can even begin an investigation or issue legal process. Moreover, when he applies to the pretrial chamber for authorization, he must notify all other parties to the statute and all states that 'would normally exercise jurisdiction over the crimes concerned.' This latter phase includes both the territorial state and the state of nationality of the accused.").

10. U.S. Supreme Court Justices are not elected, might someday be impeached, but otherwise serve for life or until resignation. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 1. Judges of the ICC are elected by the Assembly of States Parties for a term of years, *see* Rome Statute of the ICC, *supra* note 2, arts. 36(6)(a), (9)(b), are subject to rules concerning their required judicial independence, *see id*. art. 40, can be excused from a case or disqualified as a judge, *see id*. art. 41, and can be removed from office, *see id*. art. 46.

11. *See* van der Vyver, *supra* note 8, at 799–800 (rightly noting "[t]he paradox of submitting, on the one hand, that the ICC will inevitably (or may) become politicized or might not act impartially, and on the other hand, proposing that a Security Council veto of ICC actions is an appropriate remedy") (citations omitted).

12. *See, e.g.*, Clinton Statement, *supra* note 1; Cline, *supra* note 7, at 113; Fairlie, *supra* note 7, at 533, 536–37 n.48, 550 n.129, 559; Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 357 (1999); John Washburn, *The International Criminal Court Arrives—The U.S. Position: Status and Prospects*, 25 FORDHAM INT'L L.J. 873, 876–77 (2002) (also noting a number of safeguards built into the Rome Statute).

13. *See* Clinton Statement, *supra* note 1.

14. *See, e.g.*, Fairlie, *supra* note 7, at 548 n.119, 549 (noting what should be "the positive perception . . . that the ICC judiciary stands ready to ensure a fair trial"), 559, 573; Sabharwal, *supra* note 7, at 325–26 (noting that "the Prosecutor has demonstrated a rather cautious and measured approach toward opening investigations," only one out of seven then current cases was initiated by the

respect to a prior U.S. concern about politicized prosecutions, "[t]hus far, the Court has been appropriately focused."[15] There is no reason why the Court will not continue to focus on the crimes and procedures set forth in the Rome Statute that necessarily limit its jurisdiction and proceedings.

3. The Crime of Aggression

One stated worry of the United States was whether the crime of aggression that would be prosecutable before the ICC might limit permissible use of armed force under the United Nations Charter.[16] This might have been possible if the definition of aggression encompassed the use of armed force that is not prohibited under Article 2, paragraph 4 of the U.N. Charter[17] or that is permissible as Security Council authorized enforcement action under Article 42,[18] individual or collective self-defense under Article 51,[19] or regional action under Article 52[20] of the U.N. Charter. Because there has not always been agreement concerning what constitutes an act of aggression,[21] there was a danger that a new definition of the crime of aggression for ICC prosecution might deviate from the law of the Charter.

Prosecutor, "he also refrained from charging excessively expansive counts," and "judges and staff have displayed exceptional professionalism"); Smith, *supra* note 9, at 178–80 (demonstrating why politicized prosecution is now "even more improbable"); *see also* Judge Richard Goldstone, *The Future of International Criminal Justice: The Crucial Role of the United States*, 18 ILSA J. INT'L & COMP. L. 615, 623 (2012) (explaining that "a professional office such as the Office of the Prosecutor would not be able to get away with . . . [unprofessional] bias").

15. *See* Ambassador Stephen J. Rapp, Ambassador-at-Large, Office of Global Criminal Justice, U.S. Dep't of State, comments, U.S. Dep't of State, Special Briefing: U.S. Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference (June 15, 2010), *available at* http://geneva.usmission.gov/2010/06/15/u-s-engagement-with-the-icc/.

16. *See, e.g.*, David, *supra* note 12, at 355, 359–61; Fairlie, *supra* note 7, at 551–53; Harold Hongju Koh, U.S. Dep't of State Legal Advisor, The U.S. and the International Criminal Court: Report From the Kampala Review Conference, at 4 (June 16, 2010) [hereinafter ASIL discussion] (one of the U.S. objectives at Kampala was the ensure that "those lawful uses of force remain acts that we are able to do, particularly in situations such as humanitarian intervention"), *available at* http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

17. *See* U.N. Charter art. 2, para. 4; Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 536–37 (2002).

18. *See* U.N. Charter art. 42; Paust, *supra* note 17, at 544–45; Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT'L L. REV. 43, 43–45 (2012).

19. *See* U.N. Charter art. 51; Paust, *supra* note 17, at 533–44; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 238–52 (2010); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569, 569–72 (2011).

20. *See* U.N. Charter art. 52; Paust, *supra* note 17, at 545–47.

21. *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 8, at 604, 612–13.

This danger of deviation is no longer present. First, the definition of the crime of aggression adopted during the Review Conference in Kampala in June 2010 is unavoidably tied to a requirement that "an act of aggression" constitute a "violation of the Charter of the United Nations."[22] Second, the act must be a "manifest" violation of the Charter,[23] thereby leaving aside conduct that is not in obvious violation. Third, the act must be manifestly in violation because of "its character, gravity and scale."[24] Within the definitional amendment to the Rome Statute, there is also an express reference to the 1974 Resolution on the Definition of Aggression.[25] The 1974 Definition expressly affirmed in its preamble "that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations," and declared in Article 2 that "[t]he first use of armed force by a State in contravention of the Charter shall

22. Rome Statute of the ICC, *supra* note 2, art. 8 *bis*, para 1 ("'crime of aggression' means the planning, initiation or execution . . . of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"); *see* Surendran Koran, *The International Criminal Court and Crimes of Aggression Beyond the Kampala Convention*, 34 HOUS. J. INT'L L. 231, 253 (2012).

23. Rome Statute of the ICC, *supra* note 2, art. 8 *bis*, para. 1; *see* Koran, *supra* note 22, at 253; Claus Kress & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUSTICE 1179, 1193 (language that finally appears in art. 8 *bis*, para. 1 limits the reach of U.N. G.A. Res. 3314), 1200 ("the objective requirement of manifest illegality . . . has the effect of excluding from the state conduct element any use of armed force that falls into the 'grey area' of the prohibition of the use of force"), 1211 (" the requirement of 'manifest illegality' takes due regard of the fact that regrettably, the primary norm of the prohibition of the use of force suffers from considerable ambiguity"); Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 506, 522–23 (2011).

24. Rome Statute of the ICC, *supra* note 2, art. 8 *bis*, para. 1; *id*. Annex III, para. 7 ("It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter . . . the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself"); *see also* Kress & von Holtzendorff, *supra* note 23, at 1193 ("the criterion of 'character' (mainly) refers to the problem of the 'grey area'"), 1206 (the U.S. submitted the "no one component" sentence quoted above), 1207 ("the first sentence of the Understanding makes it plain that the Court must always look at all three components, although they need not all be present to the same degree," and, regarding the "character" criterion, "[j]udges will thus always have to ascertain that the state use of armed force is of a character that makes its illegality reasonably uncontroversial"); Stephen J. Rapp, ASIL discussion, *supra* note 16, at 9 ("We, in terms of character, gravity, and scale, said . . . it had to be a combination of them, and then, significantly, that it had to be the most serious and dangerous form of the illegal use of force"); Koran, *supra* note 22, at 253–54. Of course, the ICC must address more generally whether a case is "of sufficient gravity." Rome Statute of the ICC, *supra* note 2, art. 17(1)(d); *see also* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400, 1400 (2009).

25. Rome Statute of the ICC, *supra* note 2, art. 8 *bis*, para. 2; G.A. Res. 3314, 29 U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (Dec. 14, 1974) [hereinafter 1974 Definition] (referring to Resolution on the Definition of Aggression).

constitute *prima facie* evidence of aggression,"[26] thereby limiting aggression to armed force "in contravention" of the Charter. It also declared in Article 3 that the list of acts set forth therein might qualify as acts of aggression "subject to and in accordance with the provisions of Article 2,"[27] thereby affirming the limitation in Article 2 to use of armed force "in contravention" of the Charter.[28]

Additionally, a state like the United States can become a party to the Rome Statute and opt out of the ICC's jurisdiction over the crime of aggression.[29] For this reason, among others, Legal Adviser Harold Koh declared that the Amendments to the Rome Statute adopted at Kampala "ensure total protection for U.S. armed forces and other nationals going forward."[30] In view of the fact that crimes of aggression before the ICC must be manifest violations of the Charter and that the U.S. can opt out of ICC coverage of alleged acts of aggression by the United States, there is no longer a valid reason for the U.S. to refuse to become a party to the treaty. Certainly the U.S. should no longer worry that the crime of aggression will inhibit use of armed force by the United States that is permissible under the United Nations Charter.

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26. 1974 Definition, *supra* note 24, art. 2. Similarly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, having recognized that "[a] war of aggression constitutes a crime against the peace" and articulating certain state duties with respect to use of force, declared that "[n]othing in the foregoing . . . shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful." G.A. Res. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970).

27. 1974 Definition, *supra* note 24, art. 3; *see also* Koran, *supra* note 22, at 253.

28. *See* 1974 Definition, *supra* note 24, art. 6 ("Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.").

29. Rome Statute of the ICC, *supra* note 2, art. 15 *bis*, para. 4 (the ICC cannot "exercise jurisdiction over a crime of aggression committed by a State Party . . . if that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar"); Fairlie, *supra* note 7, at 557; Koh, *supra* note 16, at 5; *cf.* Van Schaack, *supra* note 23, at 584–89 (addressing issues concerning interpretation and future application of the opt out provision).

30. Koh, *supra* note 16, at 5. With respect to the role of the U.N. Security Council, Koh added:

> One channel goes through an exclusive Security Council trigger, which the U.S. has been urging. The second goes through a prior Security Council review with three conditions. If the Security Council doesn't make a determination that aggression occurs, the prosecutor has to offer a reasonable basis for proceeding. That decision would require a majority vote of six judges, and the Security Council would still have the authority to stop the prosecution with a red light, Chapter 7 resolution.

Id.

B. The Seeming Real Preference of Some Within the United States

Although some have expressed concern about unfounded or politicized prosecutions of U.S. nationals and whether or not the definition of the crime of aggression that will be prosecutable before the ICC will deviate from what are permissible uses of force under the United Nations Charter, I suspect that for some, the real reason for early opposition to U.S. ratification of the Rome Statute was a preference for a functional immunity of U.S. nationals from prosecution. This preference is sometimes hidden in an effort to achieve a primacy for national jurisdiction over that of the ICC in a context when U.S. prosecutions had been notably absent with respect to crimes against humanity and, at best, quite rare with respect to war crimes.[31] Writing in January 2001, Ruth Wedgwood, Harold Jacobson, and Monroe Leigh noted that "[t]he principal objection raised by the [Clinton] administration . . . was that American nationals . . . could in certain contingencies be subjected to trial in the new court without the specific consent of the United States."[32] As they pointed out:

> From the point of view of our European allies, it is bad enough that the exemption [of non-party state nationals proposed by the U.S.] has sometimes come as a rather strident demand for American exceptionalism, which reinforces their innate suspicion that the United States is giving way to hegemonic ambitions. They find it the more objectionable because it virtually guarantees that the court would be unable to exercise jurisdiction over nationals of rogue states who, through lack of caution or otherwise, happen to come into the custody of the court and are unlikely in any event to belong to a state that is party to the Rome Statute.[33]

In 1999, U.S. legislation contained a section that had been created in an attempt to assure that there would be no extradition or transfer of a U.S. citizen from any foreign country to the ICC.[34] Over several years, the U.S.

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31. *See* Fairlie, *supra* note 7, at 572 n.256 (also noting a declared U.S. preference for "national" prosecutions); Scheffer, *supra* note 6, at 64–65.

32. Wedgwood, Jacobson & Leigh, *supra* note 9, at 126.

33. *Id*. at 126. Wedgwood, Jacobson & Leigh add that a "main purpose . . . [of the ICC jurisdictional provisions is] to deprive war criminals of the impunity they have heretofore enjoyed by virtue of the protection of their states of nationality." *Id.* at 127.

34. See Prohibition on Extradition or Transfer of United States Citizens to the International Criminal Court, Pub. L. No. 106-113, Div. B, § 1000(a)(7), 113 Stat. 1536(a)–(b) (1999); PAUST, BASSIOUNI, ET AL., *supra* note 8, at 556–57.

Executive also entered into a large number of "Article 98" bilateral agreements with foreign countries in an effort to exempt U.S. persons from transfer to the ICC and had used economic sanctions against countries that refused to enter into such agreements.[35] Curiously, by following the strictures of such a mixture of legislation and Article 98 agreements, and thereby seeking to deny the possibility of ICC prosecution, U.S. nationals who are reasonably accused of having participated in certain international crimes could be left in the courts or military commissions of foreign countries that exercise territorial or universal jurisdiction[36] and do not provide important due process safeguards that must be complied with during prosecution before the ICC.

Foreclosing an ICC option would not be in the best interests of U.S. nationals or the United States. As I have written previously,

> The United States may wish to strengthen the primacy of ICC jurisdiction so that a U.S. national can at least be transferred to the ICC and enjoy a panoply of due process guarantees in a neutral forum. Adherence to the Rome treaty could provide greater options for protection of U.S. nationals than nonadherence. It could also provide the United States flexibility with respect to prosecution or extradition of foreign nationals accused of international crimes committed outside the United States.[37]

Wedgwood, Jacobson, and Leigh had noted similarly that it would be preferable for a state to have the option of transferring an accused to the ICC

> where he might receive a fairer trial than in the courts of the country where the offense was committed. Indeed, that is clearly one of the principal advantages to be derived from becoming a party to the international criminal court. After all, the proposed court would be

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35. *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 8, at 557; Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 336–37 (2005); Cline, *supra* note 7, at 117–18; Fairlie, *supra* note 7, at 538; Sabharwal, *supra* note 7, at 321; Sadat, *supra* note 6, at 558–60.

36. Professor van der Vyver has rightly noted that, despite the existence of the ICC and whether or not the U.S. becomes a party, all states retain a competence to prosecute crimes within the jurisdiction of the ICC under the customary principle of universal jurisdiction. *See* van der Vyver, *supra* note 8, at 811–16. Regarding universal jurisdiction, see for example, PAUST, BASSIOUNI ET AL., *supra* note 8, at 155–211. This competence is also implicitly recognized in the preamble to the Rome Statute, which affirms the concomitant "duty of every state to exercise its jurisdiction over those responsible for international crimes." Rome Statute of the ICC, *supra* note 2, pmbl.

37. Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 15 (2000).

> obliged to respect the due-process protections that, largely at American insistence, were written into the Statute of Rome and that will be reinforced by the Rule of Evidence and Procedure, which will apply to the ICC's proceedings. With few exceptions, international, treaty-bound due-process protections are likely to be more extensive in an ICC trial. . . .[38]

Today, if a U.S. pilot is captured in Iran and is accused of having committed war crimes in Afghanistan (a party to the Rome Statute[39]), would it be useful for both Iran and the U.S. to agree to Iran's rendering of the pilot to the ICC for investigation by the ICC Prosecutor?

During the Bush-Cheney era, outright hostility to ICC jurisdiction became the policy. For example, Under Secretary John Bolton announced that "[w]e will take the actions necessary to ensure that our efforts . . . to protect Americans [and that "our global security commitments"] . . . are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court, whose jurisdiction [allegedly] does not extend to Americans."[40] As Professor Leila Sadat noted in 2003, the Bush Administration made significant efforts to assure that U.S. nationals enjoyed "impunity from the ICC."[41] Perhaps of great concern to those reasonably accused of participation in international crimes was the statement of ICC Prosecutor Moreno-Ocampo in March 2007 that George W. Bush and others might face war crimes investigations with respect to unlawful conduct of coalition forces in Iraq.[42]

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38. Wedgwood, Jacobson & Leigh, *supra* note 9, at 127.

39. Since Afghanistan is a party, one of the alternative circumstances set forth in Article 12 would be satisfied if alleged crimes took place at least partly within Afghanistan. *See* Rome Statute of the ICC, *supra* note 2, art. 12(2)(a). Since Iran is not a party, Iran technically cannot refer a situation to the ICC under Article 14(1), but the Prosecutor could proceed under Articles 13(c) and 15. *See id*. arts. 12–15.

40. Fairlie, *supra* note 7, at 537 n.58 (quoting John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., Remarks to the Am. Enter. Inst.: American Justice and the Int'l Crim. Ct. (Nov. 3. 2003)); *see also* Cline, *supra* note 7, at 112 (claiming that ICC jurisdiction over U.S. nationals "threatens the sovereignty of the United States"); Smith, *supra* note 9, at 167; van der Vyver, *supra* note 8, at 804 (a main purpose of the U.S. had been to seek a "dispensation" of international criminal law for U.S. citizens); Washburn, *supra* note 12, at 878–79 (addressing U.S. demands for total exemption of U.S. nationals from prosecution).

41. Sadat, *supra* note 6, at 558; *see also id*. at 557 n.3 (quoting Secretary of Defense Rumsfeld), 584–86 (regarding fear of jurisdiction over U.S. nationals that can obtain without U.S. "consent"), 593 n.131 (providing apt recognition that this type of opposition may have been tied to a realization that conduct of various U.S. nationals during the Bush-Cheney era could be prosecuted as war crimes).

42. *See, e.g.*, Alexis Unkovic, *ICC Prosecutor Says Bush, Blair Could Face War Crimes Investigation*, JURIST (Mar. 19, 2007), http://jurist.org/paperchase/2007/03/icc-prosecutor-says-bush-blair-could.php.

Fear of prosecution before the ICC was not the Bush Administration's only worry. There were also efforts to prosecute former members of the administration in Germany, Italy, Spain, and Switzerland that were mostly unsuccessful due to significant political pressure from the U.S. Executive.[43] Quite clearly, the U.S. Executive was not merely seeking impunity for U.S. nationals before the ICC, but also impunity before national courts. Subsequently, the Obama Administration generally abandoned the rule of law by refusing to faithfully execute the law and engage in good faith prosecution of various members of the Bush-Cheney era who are reasonably accused of having international criminal responsibility arising out of their participation in President Bush's admitted "program" of secret detention (or forced disappearance) and coercive interrogation.[44] The failure of the Obama Administration to initiate prosecution of those who are reasonably accused has resulted in a situation where, because there had been and will be no national U.S. efforts to prosecute, potential ICC jurisdiction over some of the accused is even stronger.

II. ADDITIONAL CONTEXTUAL REALITIES

A. Changes Regarding the Article 12 Circumstance

Today, there are 121 parties to the Rome Statute of the ICC.[45] One of the circumstances listed in Article 12 of the Rome Statute that can allow the exercise of jurisdiction by the ICC over nationals of non-parties to the treaty is met if "[t]he State on the territory of which the conduct in question occurred" is a party to the treaty.[46] Afghanistan is a party. If conduct relevant to a crime within the jurisdiction of the ICC has allegedly been committed by a U.S. national in Afghanistan, therefore, any party to the treaty who gains custody of the U.S. national can refer the matter to the Prosecutor under Articles 13, paragraph a, and 14, paragraph 1 of the treaty, or the Prosecutor can initiate an investigation under Articles 13,

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43. *See, e.g.*, Jordan J. Paust, *Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials*, 34 HOUS. J. INT'L L. 57, 80–82, 81–82 n.102 (2011).

44. *See generally* Jordan J. Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TULANE J. INT'L & COMP. L. 151, 160–62 (2010); Paust, *supra* note 43, at 81 n.102, 84–85; *see also infra* notes 55–56.

45. *See The States Parties to the Rome Statute*, ICC, http://www2.icc-cpi.int/Menus/ASP/states+parties/ (last visited Feb. 11, 2013).

46. *See* Rome Statute of the ICC, *supra* note 2, art. 12(2)(a).

paragraph c, and 15 of the treaty.[47] Because there are 121 parties to the treaty who might gain custody of a U.S. national accused, the chances of this circumstance occurring with respect to alleged criminal conduct in Afghanistan have increased over the years whether or not the U.S. becomes a party. Additionally, the chances of a U.S. national being reasonably accused of having committed an international crime in the future within the territory of any other party to the treaty have increased markedly. Because the circumstance listed in Article 12(2)(a) of the treaty can be met in some cases and because there is no immunity from ICC jurisdiction merely because the United States has not ratified the treaty,[48] a desire to protect U.S. nationals from prosecution before the ICC is not a valid or viable reason for not becoming a party to the treaty.

B. The Reality Regarding Complimentarity

Under Article 17 of the Rome Statute, "a case is inadmissible where," for example,

> (a) *The case* is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; [or]
>
> (b) *The case* has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.[49]

Text writers have generalized that in view of Article 17 and the principle of complimentarity, which involves deference in certain specific instances to viable and genuine national jurisdiction, the ICC should accept cases "only where national authorities are unwilling or unable [genuinely] to handle them."[50] However, the ICC was created with a determination "to put an end to impunity for the perpetrators" of "the most serious crimes of

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47. *See generally* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 26 (1999); Paust, *supra* note 36, at 1–3, 5–7; *see also supra* note 32.

48. *See supra* note 47.

49. Rome Statute of the ICC, *supra* note 2, art. 17(1)(a)–(b) (emphasis added).

50. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STANFORD J. INT'L L. 1, 6 (2005); *see also* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 287 (2010); William W. Burke-White, *Proactive Complimentarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 64–65, 77–79, 87–88 (2008); Philippe Kirsh, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 501, 505 (2007); Fairlie, *supra* note 7, at 560–63.

concern to the international community" and to assure that such crimes "must not go unpunished," but because "their effective prosecution must be ensured,"[51] national courts would recognizably play an important role in prosecuting the most serious crimes of concern to the community in view of the unavoidable customary "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[52] Deference to national prosecutions of such crimes is clearly not the only policy at stake, and it is not the primary purpose of the Rome Statute, which is to create a permanent International Criminal Court. Furthermore, the specific provisions of Article 17 necessarily limit complimentarity.[53]

In any event, Article 17 of the Rome Statute cannot preclude admissibility of cases involving alleged criminal conduct of various members of the former Bush Administration who authorized and/or abetted crimes that took place at least partly in Afghanistan. Article 17 is no obstacle because (1) those reasonably accused have not been prosecuted and, as explained below, the United States is "unable genuinely to carry out the investigation or prosecution"[54] of alleged crimes against

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51. Rome Statute of the ICC, *supra* note 2, pmbl.

52. *Id*. This duty has been recognized especially in modern international criminal law treaties and has long been part of customary international law expressed, for example, as the duty *aut dedere aut judicare* (*i.e.*, to either hand over or initiate prosecution). *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 8, at 10 (noting that the duty "*aut dedere . . . aut punire*" was addressed by Hugo Grotius in 1624), 12, 17–19, 27, 131–32, 134–35, 138–41, 143–44, 155, 169, 452; Paust, *supra* note 43, at 63–69. In the 1700s, Blackstone had early recognized that "where the individuals of any state violate" the law of nations, "it is then . . . the duty of the government under which they live to animadvert upon them with a becoming severity" and, if individuals are not punished, the state becomes an "accomplice or abettor." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1765); *see also* United States v. Klintock, 18 U.S. 144, 147–48 (1820) (piracy "is an offense against all. It is punishable in the Courts of all . . . [and our courts] are authorized and bound to punish"); *Ex parte* dos Santos, 17 F. Cas. 949, 953 (C.C.D. Va. 1835) (quoting Emerich de Vattel: "'duty to punish or surrender'"); Henfield's Case, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (Jay, C.J.) (ought also to prosecute and punish them for an international crime); *id*. at 1108 (Wilson, J.) (alternative duty to punish an international crime); Respublica v. De Longchamps, 1 U.S. 111, 117 (1784) ("it is now the interest as well as the duty of every government to punish with becoming severity all the individuals . . . who commit this offence" against the law of nations); Territorial Rights-Florida, 1 Op. Att'y Gen. 68, 69 (1797) ("it is the interest as well as the duty of every government to punish" customary international crimes).

53. *But see* Michael A. Newton, *The Complimentarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 120 (claiming that complimentarity should not merely override a limited deference but also "prioritizes the authority of domestic forums to prosecute the crimes defined in Article 5"), 133 ("to preserve the primacy of domestic jurisdictions"), 137 (claiming rather remarkably that "the clear preference of the ICC is to maintain the sovereign authority of states") (2010).

54. *See* Rome Statute of the ICC, *supra* note 2, art. 17(1)(a). The definite article "the" instead of the indefinite "an" in the phrase "*the* investigation or prosecution" (emphasis added) emphasizes that reference is made to the same case that is before the ICC, and so does use of the definitive article "the" in the phrase "*the* case" in Article 17(1)(a) and (b). *Id*. art. 17(1)(a)–(b) (emphasis added). "*The* case"

humanity within the jurisdiction of the ICC, such as the secret detention or forced disappearance of persons,[55] and (2) the Obama Administration is

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is necessarily the same case that is before the ICC, which would also be "the case" or crime identified as such in Articles 6–8. *See id*. art. 18(1) (the Prosecutor will notify States that "would normally exercise jurisdiction over *the crimes* concerned") (emphasis added); Linda A. Keller, *The Practice of the International Criminal Court: Comments on the Complimentarity Conundrum*, 8 SANTA CLARA J. INT'L L. 199, 207–08 ("practice of the ICC . . . may support the concern that the state must investigate or prosecute crimes that match ICC provisions . . . that the state action relate to the precise charges brought before the ICC" and "the state must also be focused on the same predicate act . . . or same factual basis"), 209 ("the 'case' . . . has been interpreted to mean a specific incident such that the state proceedings must encompass [at least] the same person and conduct") (2010); Newton, *supra* note 53, at 146–48. Newton states:

> It is essential for states to criminalize the conduct that makes up the crimes listed in Article 5. [I]n order to preserve the right to investigate and prosecute these crimes, it is essential that states adequately implement the ICC crimes. . . . [T]he lack of statutory authority that parallels ICC crimes has led to recent warnings that legislative amendments are needed . . . [and] without acceptable implementation of the substantive ICC crimes, the Prosecutor or Pre-Trial Chamber may have no other alternative but to find that a state is 'unable genuinely' to investigate or prosecute, since the state's legal system will not allow such a prosecution. . . . For example, where a national has committed genocide but the domestic forum has not criminalize genocide, the state may either refrain from prosecution, or may choose to prosecute the person for murder or another inferior crime. In either situation, the ICC Prosecutor may arguably be permitted to step in an prosecute that state's national due to the inability of the state to prosecute the full conduct under its criminal system.

Id.; Xavier Philippe, *The Principles of Universal Jurisdiction and Complimentarity: How Do the Two Principles Intermesh?*, 88 INT'L REV. RED CROSS 375, 390 (2006) ("[an obvious requirement is that] the definition of international crimes in domestic legislation . . . be in line with their definition at the international level"); Dawn Sedman, *Should the Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complimentarity Principle?*, *in* FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 259, 266 (Carsten Stahn & Larissa van den Herik eds., 2010) ("complimentarity is not satisfied" if a state is "prosecuting for an ordinary crime"); *see also supra* note 51; *infra* notes 61, 67. *But see generally* Kevin Jon Heller, *A Sentence-Based Theory of Complimentarity*, 53 HARV. INT'L L.J. 85 (2012) (arguing for a relaxation of "the hard mirror" approach to complimentarity, that results in denial if domestic prosecution is for an "ordinary" crime, in favor of a same or greater sentence approach).

Importantly, Article 17(1)(c) is quite different because it addresses a special circumstance where an accused "has already been tried *for conduct* which is the subject of the complaint, and a trial is not permitted under Article 20, paragraph 3." Rome Statute of the ICC, *supra* note 2, art 17(1)(c) (emphasis added). The focus on "conduct" in such a circumstance might allow the ICC to declare that a complaint is inadmissible where the accused has already been tried for an "ordinary" domestic crime covering the "same conduct" if the domestic trial was not "for the purpose of shielding the person concerned from criminal responsibility" or otherwise runs afoul of Article 20, paragraph 3(b). *See id*. arts. 17(1)(c), 20(3)(a)–(b); Linda A. Carter, *The Principle of Complimentarity and the International Criminal Court: The Role of* Ne Bis in Idem, 8 SANTA CLARA J. INT'L L. 165, 167–68, 176–80 n.40, nn.44–47, 185 (2010) ("same facts" but "different crimes" should not preclude ICC prosecution) (citing WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 205 (2006); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 192–93 (3d ed. 2007)); *see also* Heller, *supra*, at 89, 91 (focusing on Articles 17(1)(c) and 20(3)). *But see* Sharon A. Williams & William A. Schabas, *Article 17 Issues of Admissibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES 605, 617 (Otto Triffterer ed., 2d ed. 2008) (same conduct approach may not serve goals of complimentarity process).

55. Concerning the crime of secret detention or forced disappearance, see, for example, Rome

either unwilling or genuinely unable to carry out an investigation or prosecution of war crimes within the jurisdiction of the ICC.[56] With respect to alleged war crime responsibility, (1) no such case is currently "being investigated or prosecuted" within the meaning of Article 17(1)(a), and (2) only rare cases have "been investigated" within the meaning of Article 17(1)(b).[57] Further, the shameful decision of the Obama Administration to end criminal investigations may have "resulted from the unwillingness or inability"[58] of the U.S. "genuinely to prosecute" within the meaning of the same provision of the treaty. In any event, with respect to the vast majority of former members of the Bush Administration who are reasonably accused, there is obvious inaction and, as the Appeals Chamber of the ICC has ruled, "inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court."[59] In each

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Statute of the ICC, *supra* note 2, art. 7(1)(i), (2)(i); JORDAN J. PAUST, BEYOND THE LAW—THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 34–41, 193–97 (2007); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 411–13 (2006); Paust, *supra* note 43, at 80–81 n.102; Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1200, 1205, 1209, 1212, 1215, 1222, 1224, 1229, 1236–38 (2007); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 CASE W. RES. J. INT'L L. 309, 309–10, 313, 315–16, 326, 336, 338 (2006); Diane Marie Amann, *The Committee Against Torture Urges an End to Guantanamo Detention*, ASIL INSIGHTS (June 8, 2006), http://www.asil.org/insights/2006/06/insights060608.html.

56. With respect to alleged war crime responsibilities, *see, e.g.*, THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 2–3, 9, 13, 15, 43, 147–48, 179, 246, 249–50, 263, 281–83, 287, 293–99, 311, 315, 317 (Marjorie Cohn ed. 2011); M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION (2010); PAUST, *supra* note 55, at 1, 12–20, 26–30; Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086, 2094 (2005); Bassiouni, *supra* note 55, at 411–13; Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U.L. REV. 1535, 1544–45, 1554–57, 1559–69 (2009); Paust, *supra* note 43, at 151–52 n.1 (listing writings of additional textwriters, including those of Jóse E. Alvarez, M. Cherif Bassiouni, Christopher L. Blakesley, Marjorie Cohn, Benjamin G. Davis, David E. Graham, Aya Gruber, Scott Horton, Peter Margulies, Jamie Mayerfield, Jennifer Moore, Ved P. Nanda, Mary Ellen O'Connell, Jens David Ohlin, Leila Nadya Sadat, Philippe Sands, David Scheffer, Evan Wallach, David Weissbrodt & Amy Bergquist, and W. Bradley Wendel); Paust, *supra* note 43, at 80–81 n.102; Michael P. Scharf, Symposium, *Keynote Address: The T-Team*, 19 MICH. ST. J. INT'L L. 129, 130–31, 134–35 (2010).

57. *See* Paust, *supra* note 43, at 84–85; Paust, *supra* note 44, at 161.

58. *See* Rome Statute of the ICC, *supra* note 2, art. 17(2)–(3) (concerning unwillingness or inability).

59. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 8, Judgment, ¶ 78 (Sept. 25, 2009). The Appeals Chamber also noted that one of the objects and purposes of the Rome Statute, to put an end to impunity, must be considered when interpreting the treaty. *Id.* ¶ 79; *see also* Thomas Obel Hansen, *A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complimentarity*, 13 MELBOURNE J. INT'L L. 217, 220–21 nn.8–12 (2012) ("Markus Benzing . . . argues that the '[m]ere inaction of a state in the face of crimes having been or being committed thus leads to admissibility. . . .' This interpretation, which appears widely

such circumstance, the cases remain admissible before the ICC and the principle of complimentarity set forth in Article 17 does not stand in the way of ICC investigation and prosecution of former members of the Bush Administration who are reasonably accused of having authorized, abetted, or perpetrated relevant crimes against humanity and war crimes.[60]

With respect to two core crimes within the jurisdiction of the ICC, genocide and other crimes against humanity, it is evident that the United States is basically unable to prosecute them. The United States has no federal statute authorizing the prosecution of crimes against humanity as such, and the present statute regarding genocide is one that nearly guarantees that the United States cannot prosecute a person reasonably accused of genocide.[61] Therefore, neither core crime can be prosecuted as

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accepted in contemporary accounts of the complimentarity principle, has consistently been endorsed by the ICC").

60. International interest in possible prosecution with regard to detention and interrogation practices is evidenced by the recent request of a U.N. special rapporteur for the Obama administration to turn over the results of a U.S. Senate investigation into alleged torture of detainees. Colum Lynch, *U.N. rights advocate seeks release of findings on CIA detention*, WASH. POST (Mar. 04, 2013), *available at* http://articles.washingtonpost.com/2013-03-04/world/37439427_1_rights-advocate-human-rights-council-rights-and-fundamental-freedoms.

61. *See, e.g.*, Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 719, 723–27 (2009) (also offering draft legislation regarding customary crimes against humanity beyond those covered in the Rome Statute); Newton, *supra* note 53, at 146–48 (quoted *supra* note 54); Paust, *supra* note 43, at 163; Scheffer, *supra* note 6, at 87–88 (identifying the need to amend U.S. criminal legislation in order "to track thoroughly all of the specific crimes in Articles 5–8 of the ICC Treaty" and noting that if this does not occur a claim "could be raised that a gap in U.S. law renders the United States 'unable' to investigate and prosecute the specific crime") (citing Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 428–35 (2001)); *see also* Edoardo Greppi, *Inability to Investigate and Prosecute Under Article 17*, *in* THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 63, 66 ("inability" applies when there is an "existence of legislative impediments, such as an amnesty law, or a statute of limitations, making it impossible for the national judge to start proceedings"), 67 (when domestic "'criminal laws do not adequately proscribe war crimes and crimes against humanity'"), 69 ("[i]t appears reasonable that complimentarity . . . [applies] only for States complying with their international obligations, that is, having adopted an implementation legislation which enables them to investigate and prosecute the perpetrators of international crimes") (MAURO POLITI & FEDERICA GIOIA eds., 2008); deGuzman, *supra* note 24, at 1407 ("[f]or genocide and crimes against humanity, the contextual aspects of the definitions seek to distinguish these crimes from 'ordinary' crimes as least in part through elements suggesting gravity"); Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 224–25 (2002–2003) (states "must . . . ensure that all ICC crimes are incorporated into national legislation" and "the crime of murder found in national law is not the same as a crime against humanity"); Matt Halling, *Push the Envelope—Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 LEIDEN J. INT'L L. 827, 839 (2010) ("Complimentarity requires that states prosecute crimes as they are spelled out in the Rome Statute; the prosecutions have to be for 'crimes against humanity,' not the murders, rapes, and so on" in domestic law); *see also supra* note 54. Because the genocide legislation is inadequate, the United States also remains in material breach of the Genocide Convention. *See* Paust, *supra*, at 722, 724, 728.

such by the United States unless adequate legislation is created or it is recognized, contrary to the general assumption, that legislation is not actually needed in the U.S. for prosecution of customary international crimes, as had been the case in the past.[62] In any event, for several decades, adequate legislation has not been created and there has been no attempt to prosecute U.S. or foreign persons for genocide or crimes against humanity as such, even though several lawsuits have been successfully brought in federal district courts for civil sanctions against several perpetrators of such crimes.[63] Most notably, lawsuits in the U.S. with respect to genocide, war crimes, and other criminal conduct were successful against Radovan Karadzic,[64] who is presently being prosecuted before the International Criminal Tribunal for Former Yugoslavia and was not prosecuted by the United States. For these reasons, it is likely that the United States remains unable to prosecute genocide or other crimes against humanity that are otherwise properly prosecutable before the ICC, whether or not the United States will also remain unwilling. Therefore, Article 17 presently poses no barrier to ICC prosecution of U.S. nationals for genocide or other crimes against humanity.[65]

With respect to war crimes within the jurisdiction of the ICC, the United States has two sets of legislation that would allow prosecution of persons accused of war crimes.[66] However, there have been no prosecutions of any person for war crimes in U.S. federal district courts for at least the last several decades,[67] despite the fact that there have been

62. *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 8, at 219–30, 237–41.

63. *See, e.g.*, JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 21–25, 449–51, 461, 479, 497–98 (3d ed. 2009).

64. *See* Kadic v. Karadzic, 70 F.3d 232, 241–43 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

65. Paust, *supra* note 61, at 722–23.

66. *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 8, at 241–49; PAUST, VAN DYKE & MALONE, *supra* note 63, at 157–63. One set of statutes (10 U.S.C. § 818 (which incorporates all of the laws of war by reference as offenses against the laws of the United States) coupled with federal district court jurisdiction under 18 U.S.C. § 3231) allows prosecution of any violation of the laws of war in U.S. federal district courts. Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 8–12, 23, 26–27 (1971). Another statute (the War Crimes Act, 18 U.S.C. § 2441) allows prosecution of only a limited set of war crimes.

67. *See also* PAUST, BASSIOUNI, ET AL., *supra* note 8, at 152–53, 247; Paust, *supra* note 43, at 85; Jordan J. Paust, *US Inaction: Aiding and Abetting Nazis After the Fact*, JURIST (Nov. 19, 2010), http://jurist.org/forum/2010/11/us-inaction-aiding-and-abetting-nazis-after-the-fact.php (noting a disclosure in a redacted 2006 Department of Justice report that the U.S. has been a safe haven state for certain alleged Nazi accused); Tung Yin, *Eric Holder: Prosecutorial Discretion and Extrajudicial Deaths*, JURIST (Sept. 26, 2012), http://jurist.org/forum/2012/09/tung-yin-holder-discretion.php (questioning the lack of prosecution of alleged CIA persons with respect to the deaths of two detainees in 2002 and 2003).

The U.S. has prosecuted some persons in military courts-martial for conduct that could have been charged as war crimes, but mostly merely for violations of domestic military law as such. *See, e.g.*,

several successful civil cases brought in U.S. courts against violators of the laws of war.[68] The United States seems, therefore, to be generally unwilling to prosecute any person of any nationality in its federal district courts for war crimes, and Article 17 of the Rome Statute will predictably continue to pose no barrier to ICC prosecution of U.S. nationals for war crimes.

Of course, a viable and policy-serving complimentarity is within the control of the United States and could operate if the U.S. creates adequate legislation for prosecution of genocide and crimes against humanity and is genuinely willing to prosecute U.S. nationals for genocide, crimes against humanity, and war crimes. New legislation and a new willingness to end impunity and abide by the rule of law would clearly be transformative. In any event, the failure to do so has clearly not protected U.S. nationals from possible jurisdiction before the International Criminal Court.

CONCLUSION

Whatever the degree of validity of prior excuses for not ratifying the Rome Statute of the ICC, with the articulation of core crimes prosecutable before the ICC in Articles 6–8 of the Rome Statute and creation of the Elements of Crimes, the ten-year record of ICC practice, the creation of

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PAUST, BASSIOUNI, ET AL., *supra* note 8, at 291–305. However, where persons have not been tried for conduct that would constitute a war crime and the U.S. has merely investigated or is investigating or prosecuting violations of domestic military law, this does not comply with ICC complimentarity set forth in Article 17(1)(a)–(b) of the Rome Statute because "the case" charged cannot be "the case" before the ICC unless it is for the same "war crime" as such. *See supra* note 54; *see also* Burke-White, *supra* note 50, at 78 (the case against a particular accused must involve at least "the same underlying factual events" and complimentary is inoperative if proceedings have been merely against "certain groups of suspects (such as lower level perpetrators)"); Carter, *supra* note 54, at 181 ("presumably the ICC would not be barred by Article 20 because the prosecution for such a minor crime of assault" could be shielding the person where murder is demonstrated); Fairlie, *supra* note 7, at 568–69 n.240 (noting that in view of ICC practice the domestic charges must be for "precisely the same conduct that is the focus of the ICC charges."); *see also supra* note 61. Moreover, use of the U.S. military justice system is "susceptible to many . . . criticisms" more generally, because the process is "focused largely on concerns of efficiency and necessity. Military LOAC [law of armed conflict] investigations are likely best understood primarily as tools to ensure good order and discipline as means to the end of military mission accomplishment rather than as means to justice, humane warfare, or even international legal compliance." Sean Watts, *Domestic Investigation of Suspected Law of Armed Conflict Violations: United States Procedures, Policies, and Practices*, in 14 Y.B. INT'L HUMANITARIAN L. 85, 104 (2012). Concerning difficulties involved in connection with military prosecutions and consequential failures to prosecute certain persons, *see, e.g.*, Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW, Sept. 2010, at 12; Major John M. Hackel, *Planning for the Strategic Case: A Proposal to Allow the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 241–44, 248–58, 268–79 (2009).

68. *See, e.g.*, PAUST, VAN DYKE & MALONE, *supra* note 63, at 25–26, 475–76.

the Kampala definition of aggression that requires a manifest violation of the U.N. Charter, and creation of an opt out provision with respect to the crime of aggression that the U.S. can take advantage of, the prior excuses have become unfounded. The fact that there are now 121 parties to the treaty and that Article 12(2)(a) of the treaty assures that there is no immunity of U.S. nationals from ICC jurisdiction over crimes covered in Articles 6–8 that occur at least partly in the territory of one or more of 121 countries underscores the fact that a desire to protect U.S. nationals from ICC prosecution is not a viable reason for not becoming a party to the treaty. In reality, there are no longer any meaningful excuses.