

# A MEETING OF THE MINDS IN ROME: ENDING THE CIRCULAR CONUNDRUM OF THE U.S.-ICC RELATIONSHIP

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“This is a great regret that we are not a signatory. I think we could have worked out some of the challenges that are raised concerning our membership. But that has not yet come to pass.”<sup>1</sup>

—United States Secretary of State, Hillary R. Clinton

## I. INTRODUCTION

During a blistering hot Roman summer in 1998, the world achieved something remarkable. With Grotian-like zeal, countries from every corner of the world agreed to the Rome Statute of the International Criminal Court (“ICC”).<sup>2</sup> In doing so, the international community took the first and most difficult step towards establishing a comprehensive international criminal justice system that could reach any individual in any land. The colossal nature of this international “legislative” moment cannot be understated.<sup>3</sup> Permitting the investigation and prosecution of individuals within sovereign states by an international authority—no matter how

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1. Ewen MacAskill, Editorial, *Clinton: It is a ‘great regret’ the U.S. is not in International Criminal Court*, THE GUARDIAN (Aug. 6, 2009), <http://www.guardian.co.uk/world/2009/aug/06/us-international-criminal-court>.

2. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, *available at* [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) [hereinafter Rome Statute].

3. LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 11–14, 78–79, 108–09, 277 (2002).

jurisdictionally limited—is an immense divergence from the Westphalian concept of international law.<sup>4</sup>

Yet, what was ‘remarkable’ about the events in Rome is truly in the eye of the beholder. To its supporters, the Rome Statute is a remarkable progression toward the institutionalization of the international rule of law, fair trial and due process rights, and the fight against impunity for mass atrocities.<sup>5</sup> The moment of its passage was recounted in the following way:

Extraordinary scenes of tension and jubilation followed. . . . As U.N. staff moved swiftly through the crowded aisle counting hand votes, tension mounted. . . . The defeat by enormous majorities of the amendments offered by India and by the U.S. insured the passage of the Statute and were greeted by uproarious celebrations.<sup>6</sup>

To one of its key critics, the United States of America (“U.S.”), the Rome Statute was a remarkable departure from the previous international world order.<sup>7</sup> The U.S. lead negotiator in Rome, then-U.S. Ambassador at large for War Crimes, David Scheffer, described the immediate aftermath of the Rome Statute’s passage:

There was enormous applause and glee throughout the large room. Almost everyone stood and applauded and yelled, with civil society delegates in the room congratulating government delegates with the Italian delegation literally jumping up and down. They knew they

4. *Id.* at 8.

For if many aspects of the Rome Treaty demonstrate the tenacity of traditional Westphalian notions of sovereignty, there are nonetheless elements of supranationalism and efficacy in the Statute that could prove extremely powerful. Not only does the Statute place State and non-State actors side-by-side in the international arena, but the Court will put real people in real jails. Indeed, the establishment of the Court raises hopes that the lines between international law on the one hand, and world order on the other, are blurring, and that the normative structure being created by international law might one day influence or even restrain the Hobbesian order established by the politics of States.

*Id.*

5. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRONICLE (Sept. 24, 2012), <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2012/deliveringjustice/theroleoftheinternationalcriminalcourt>.

6. John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT’L L. REV. 361, 372 (1999).

7. PATRICIA PINTO SOARES, THE ICC AT EIGHT: ASSESSING US POLICY AND INTERNATIONAL CRIMINAL LAW: RECIPROCAL INFLUENCES, CTR. FOR TRANSATLANTIC RELATIONS, SAIS JOHN HOPKINS UNIV. 19–23 (2010) [hereinafter SAIS JOHN HOPKINS US-ICC REPORT], <http://transatlantic.sais-jhu.edu/partnerships/Cornerstone%20Project/eu%20us%20cornerstone%20patricia%20pinto%20soares%20Final.pdf>; 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, 713–14 (2004) (explaining that the true reason for U.S. objections to the ICC is that it takes power away from the UN Security Council to supervise or otherwise direct multilateral efforts on international peace and security).

had buried us, and they were ecstatic over achieving a treaty after so many years of tough negotiations. I remained seated, however, as I could hardly stand and applaud my own defeat on the vote.<sup>8</sup>

Whether it was exuberance or dejection, all of the delegates in Rome, as well as government officials in capitals around the world, were reacting to more than just the passage of the Rome Statute. They were also observing a split between the U.S.—historically one of international justice’s most ardent supporters—and the *future* of the international criminal justice system.

Since this momentous occasion, the U.S. has slowly but surely become an outsider in a field it was chiefly responsible for creating starting with its achievements at the Nuremberg trials.<sup>9</sup> David Crane, an American, the first lead prosecutor at the Special Court for Sierra Leone (“SCSL”) aptly compared this reclusive role to being outside in the cold, faced pressed up against the living room window, looking into a house that you helped build.<sup>10</sup>

Certainly the U.S., or any State, does not have to ratify the Rome Statute in order to make a positive contribution to the field of international criminal justice. Yet, not being a formal member of the ICC is a far cry from the role the U.S. has historically occupied in similar situations. After all, the field of international law first gained momentum when the U.S. insisted, in a post World War II climate, upon trials for the defeated Nazis at a time when the United Kingdom and the Soviet Union were calling for summary executions of their vanquished foes.<sup>11</sup> Further, U.S. leadership was instrumental in the creation and successes of, most notably, the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, SCSL, and Extraordinary Chambers in the Courts of Cambodia.<sup>12</sup> Despite its historical prevalence in international

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8. DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 223 (2012).

9. Jess Bravin, *U.S. to Pull Out of World Court on War Crimes*, WALL ST. J., May 6, 2002, at A4, available at [http://www.amicc.org/docs/May6\\_2\\_02.pdf](http://www.amicc.org/docs/May6_2_02.pdf).

10. David Crane, Address at the American Bar Association Annual Meeting, at 148 (Aug. 3, 2012), available at [http://www.americanbar.org/content/dam/aba/events/meetings\\_travel/2012\\_annual\\_final\\_program\\_book.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/meetings_travel/2012_annual_final_program_book.authcheckdam.pdf).

11. *Nuremberg Trial Fact Sheet*, FACING HISTORY AND OURSELVES, <http://tj.facinghistory.org/reading/nuremberg-trials-fact-sheet> (last visited Feb. 11, 2013).

12. Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Towards the International Criminal Court*, 36 CORNELL INT’L L.J. 415, 416, (2004); Justice Richard J. Goldstone, *U.S. Withdrawal from ICC Undermines Decades of American Leadership in International Criminal Justice*, INT’L CRIM. CT. MONITOR, June 2002, at 3, [http://www.thirdworldtraveler.com/International\\_War\\_Crimes/USWithdrawal\\_ICC\\_Goldstone.html](http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html); Council on Foreign Relations, Speech by John

criminal justice, every time one of these United Nations (“UN”) *ad hoc* or hybrid internationalized tribunals closes, the U.S.’s role diminishes.

This progression from leader to outsider is detrimental to the U.S. and arguably to the ICC as well. The ICC stands to benefit from greater U.S. engagement, particularly U.S. ratification or accession to the Rome Statute.<sup>13</sup> To be clear, the 122 State Parties and counting to the Court<sup>14</sup> have achieved what was previously thought improbable, making the ICC a reputable court of law and respected international actor in ten short years.<sup>15</sup> In doing so, these State Parties have shown that the U.S. is not absolutely necessary to establish and build an international criminal tribunal.

Yet, a non-U.S. trajectory does not aid the process of fulfilling the ICC’s lofty mandate of ending impunity for mass atrocities; and, more acutely, it does not aid the ICC’s process of becoming the most effective, efficient, and influential international institution that it can and should be.<sup>16</sup> The U.S. has exceptional capacity, knowledge, and experience in international criminal law and justice, and its government has a combination of economic, intelligence, logistical, and diplomatic resources shared by few, if any, other countries.<sup>17</sup> This array of resources and capabilities can be pivotal in international criminal cases.<sup>18</sup> If the ICC could put these resources to use consistently and robustly, it is not hard to imagine the immeasurable benefits.

As it stands, the U.S. is self-ostracized from a field it once led; the ICC is making progress but certainly needs more support from States like the U.S. The solution seems simple enough: the U.S. and ICC together work

Bellinger III, Legal Adviser to the U.S. Sec’y of State (Nov. 14, 2008), <http://www.cfr.org/international-criminal-courts-and-tribunals/bellingers-speech-international-criminal-justice/p17777> (“[T]he United States’ strong and consistent support for international criminal justice—in the former Yugoslavia, in Rwanda, and in Sierra Leone, Cambodia, and Lebanon.”).

13. SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 108–10, 115–16, 119 (concluding that the US is a “‘wish to have’ partner for the ICC.”); Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 UCLA J. INT’L L. & FOREIGN AFF. 1, 26 (1999) (“[h]aving the most powerful state in the world on board would position the Court to challenge the many hurdles of national sovereignty which will confront it.”) [hereinafter Gallarotti & Preis].

14. INT’L CRIM. CT., THE STATE PARTIES TO THE ROME STATUTE, <http://www2.icc-cpi.int/Menu/ASP/states+parties> (last visited Feb. 11, 2013).

15. Richard Dicker, *The Court of Last Resort*, FOREIGN POLICY (June 29, 2012), <http://www.hrw.org/news/2012/06/29/icc-court-last-resort>.

16. *Id.*

17. *Id.*; SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 105 (“[t]he political and economic power of the United States, allied to its intelligence expertise, makes it a major wish-to-have partner”).

18. *Id.*

diligently towards finding a way for the former to become a State Party. The U.S.-ICC relationship, however, is complicated by a difficult shared history, domestic and international politics, differences on law and procedure,<sup>19</sup> and a lack of comprehensive interactions with one another.<sup>20</sup> The common response to the question of why the U.S. is not a State Party to the ICC is the perceived unacceptable level of exposure of U.S. citizens, namely military personnel, to ICC jurisdiction.<sup>21</sup> This alleged culprit is, however, quite simply pretense. The likelihood of the ICC exerting jurisdiction over U.S. citizens is so small and easily managed that it is not a serious explanation of the U.S.-ICC divide.<sup>22</sup> The divide is far more pragmatic.

This Article's explanation for what prevents a U.S.-ICC marriage, or at least more robust American governmental support of the ICC, is that the U.S. and ICC find themselves in a circular conundrum. The U.S. is hesitant to join the ICC or even provide robust and regular support to it—as evidenced by its anti-ICC legislation—until the latter improves its functional ability to carry out all aspects of its mandate on its own and to do so consistently in a complicated geopolitical environment.<sup>23</sup> However, the ICC, for its part, cannot overcome all the challenges it faces without more comprehensive and sustained support from powerful States, including the U.S.<sup>24</sup> So, ICC improvement requires U.S. support, and U.S.

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19. Scheffer, *supra* note 8, at 188, 231–32.

20. The first U.S. official interaction with the ICC was in 2009, seven years after it began operations. U.S. Stephen J. Rapp, Ambassador-at-large for War Crimes Issues, Dep't of State, Address to Assembly of State Parties (Nov. 19, 2009), [http://www.state.gov/j/gcj/us\\_releases/remarks/2009/133316.htm](http://www.state.gov/j/gcj/us_releases/remarks/2009/133316.htm).

21. ELLEN GRIGORIAN, CONG. RESEARCH SERV., THE INTERNATIONAL CRIMINAL COURT TREATY: DESCRIPTION, POLICY ISSUES, AND CONGRESSIONAL CONCERNS 9 (1999); Colonel Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, U.S. ARMY STRATEGY RESEARCH PROJECT, at 5–8 (2007), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA471361>.

22. See *infra* note 108 and accompanying text.

23. Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, COUNCIL ON FOREIGN RELATIONS (2010), <http://www.cfr.org/international-criminal-courts-and-tribunals/rome-kampala/p21934> (“Moreover, the ICC has failed to accumulate a record of accomplishment to date that could be used to overcome political resistance.”).

24. Daniel Donovan, *International Criminal Court: Successes and Failures of the Past and Goals for the Future*, INT'L POLICY DIGEST (Mar. 23, 2012), <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>; Eric Leonard, *ICC Effectiveness Depends on Member State Cooperation*, JURIST—HOTLINE (Jan. 3, 2012), <http://jurist.org/hotline/2012/01/eric-leonard-icc-effectiveness.php>; see Moses Retselisitsoe Phooko, *How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court*, 1 NOTRE DAME J. INT'L COMP. & HUMAN RIGHTS L. 182, 207–08 (2011); Steven D. Roper & Lilian A. Barria, *State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects*, 21 LEIDEN J. INT'L L. 457, 460–61 (2008).

support requires ICC improvement; *neither* can happen without the other. As a result, it is clear that the biggest impediment to comprehensive progress in U.S.-ICC relations and possible U.S. ratification is not primarily a philosophical or political divide,<sup>25</sup> but more a function of practical realities. Of course, the practical and political are intertwined. However, major progress in the practical is central to solving the political. This will require simultaneous progress towards one another by each party.

The purpose of this Article is to help find a starting point to solve this problematic circle. The goal of improving the U.S.-ICC relationship should be desirable to both parties, as progress substantially benefits both, not to mention the cause of international criminal justice. This Article does not seek to judge either the U.S.'s or ICC's role in their relationship, but rather to lay out the best ways to increase U.S. support of the ICC.

Accordingly, the Article will set the stage in Section II by discussing a brief history of the U.S.-ICC relationship, with emphasis on major impediments in place on the U.S. side, namely American anti-ICC legislation. Section III will provide further context by looking at specific critiques and difficulties the ICC has faced. It is not the purpose of this Article to postulate on the validity of such critiques but address them as we find them. The nature of these challenges exhibits the ICC's side of the conundrum.

Next, in Section IV, this Article will examine precisely why the U.S.-ICC circular conundrum should and must be resolved. It will address the specific benefits that each would gain from a closer partnership while also highlighting negative consequences that have resulted from their current arms-length relationship. Finally, this Article will outline recommendations on how this cycle can be broken. Like any problem of this character, the circle perpetuates itself unless it is interrupted. Yet, such interruptions or leaps of faith need not be radical. The U.S.-ICC relationship can reach a new, mutually beneficial height if both sides take incremental steps towards each other. Of course, it is more easily written

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25. Plenty of scholars have argued that politics and philosophy are at the heart of the U.S. opposition to the ICC. *See, e.g.,* 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 (2004), <http://ejil.oxfordjournals.org/content/15/4/701.full.pdf>. While certainly the U.S. saw and continues to see the ICC as undermining UN Security Council powers and other associated concerns, this and other political base analysis of U.S. opposition to the ICC still boils down to practical matters. The U.S. fears a court independent of UN Security Council oversight because it cannot predict or otherwise counterbalance how such a court would act in practice. If an independent ICC functions effectively and efficiently and does not act in an illegal or overtly political manner, than the U.S. or any State for that matter would not have any reason to be concerned.

than done. The suggestions put forth herein, however, are reasonable and attainable with concerted efforts from both sides.

## II. ANTI-ICC LEGISLATION IN THE U.S.

At the closure of the five-week diplomatic conference the Rome Statute of the International Criminal Court was adopted on July 17, 1998.<sup>26</sup> The vote resulted in 120 in favor, 7 against, with 21 states abstaining.<sup>27</sup> The U.S. was one of the seven countries that voted against the treaty along with Iraq, Israel, Libya, The People's Republic of China, Qatar, and Yemen.<sup>28</sup> The U.S. vote against the Rome Statute came against a backdrop where the U.S. Senate voted in support of the concept of a permanent international criminal court,<sup>29</sup> and President Clinton encouraged the establishment of such a court only a year earlier.<sup>30</sup> On the very last day that it was open for signature, however, Ambassador Scheffer took a last-minute train from Washington, D.C. to New York City and trudged through the snow to sign the Rome Statute at the United Nations on December 30, 2000, with President Clinton's authorization.<sup>31</sup>

The complicated relationship between the U.S. and ICC began years prior to the finalization of the Rome Statute at the Preparatory Commission ("PrepCom"). The PrepCom was established in Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court when it became clear that additional documents would be necessary in order to create a fully functioning ICC.<sup>32</sup> At the time, eight such documents were identified and included in Resolution F of the Final Act of the Rome Diplomatic conference.<sup>33</sup> The U.S. played an active role in

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26. Rome Statute, *supra* note 2.

27. *U.S. at Odds with Global Criminal Court*, DESERET NEWS, June 12, 2000, at A02 [hereinafter *U.S. at Odds*], available at <http://www.deseretnews.com/article/799651/US-at-odds-with-global-criminal-court.html?pg=all>.

28. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHTS (1998), <http://www.asil.org/insigh23.cfm>.

29. Jim Anderson, *U.S. Shies Away From International Criminal Court*, DEUTSCHE PRESSE-AGENTUR (July 18, 1999).

30. See Benjamin Ferencz, *A Prosecutor's Personal Account: From Nuremberg to Rome*, 52 J. INT'L AFF. 455, 462 (1999), available at <http://www.benferencz.org/index.php?id=4&article=82>.

31. DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 240–43 (2012).

32. G.A. Res. 53/105, ¶ 4, U.N. Doc. A/RES/53/105 (Jan. 26, 1999); see also *U.N. Preparatory Commission for International Criminal Court Begins First Session*, M2 PRESSWIRE (Feb. 17, 1999) [hereinafter *First Session*].

33. G.A. Res. 51/207, U.N. Doc. A/CONF.183/10 (July 17, 1998).

many of the PrepCom meetings.<sup>34</sup> In fact, compromises were made during the meetings in order to retain U.S. involvement and allay its fears of unrestricted prosecution of American nationals.<sup>35</sup> For example, the ICC had automatic jurisdiction over genocide and crimes against humanity, but not over war crimes—those most likely to be charged against U.S. nationals.<sup>36</sup> The provision would also allow the U.S. to prosecute its own citizens prior to the ICC's involvement.<sup>37</sup> This trend of U.S. attempts to gain unique coverage continued even after the Rome Statute's passage. During the last meeting in which non-State Parties were able to participate on November 27, 2000,<sup>38</sup> the U.S. attempted to exempt its citizens through unspecified international agreements.<sup>39</sup>

After President Clinton's departure from the White House, the U.S. relationship with the ICC took on a considerably harsher tone under President Bush, in large part due to his administration's post-9/11 hard power strategy.<sup>40</sup> In addition to anti-ICC legislation, the Bush administration "unsigned" the Rome Statute with the filing of the controversial Bolton letter at the United Nations.<sup>41</sup> Further, the U.S. stopped sending observer delegations to the ICC's annual Assembly of States Parties ("ASP").<sup>42</sup> In the latter years of the Bush administration, the relationship began to thaw with U.S. acquiescence to the UN Security Council referral of the Sudan to the ICC.<sup>43</sup> The onset of President

34. Elizabeth Neuffer, *War Crimes Tribunal Adopted as U.S. Votes 'No,'* BOS. GLOBE, July 18, 1998, at A1.

35. Elizabeth Neuffer, *War Crimes Tribunal Adopted as U.S. Votes 'No,'* BOS. GLOBE, July 18, 1998, at A1; Jeremy Rabkin, *This Court Would be Criminal; Congressional Republicans' Just War on the International Criminal Court,* WKLY. STANDARD, June 26, 2000, at 19.

36. See *supra* note 35.

37. *Q & A International Criminal Court,* BBC (Mar. 11, 2013), <http://www.bbc.co.uk/news/world-11809908>.

38. *U.S. Wants Deal Exempting Americans From U.N. Court by Dec. 31,* DOW JONES INT'L NEWS (Oct. 18, 2000) [hereinafter DOW JONES INT'L NEWS].

39. See Jim Wurst, *Politics: Disagreement Over Meaning of Criminal Court Compromise,* INTER PRESS SERV. (July 2, 2000), <http://www.ipsnews.net/2000/07/politics-disagreement-over-the-meaning-of-criminal-court-compromise/>.

40. From the perspective of President Bush's administration, the ICC represents the "international system" and an unwarranted check on U.S. hard power. STEVEN E. SCHIER, *PANORAMA OF A PRESIDENCY: HOW GEORGE W. BUSH ACQUIRED AND SPENT HIS POLITICAL CAPITAL* 128 (2009).

41. DOW JONES INT'L NEWS, *supra* note 38.

42. See ABA Sec. of Int'l Law, Sec. of Crim. Justice Res. 108A (2008), *available at* <http://www.amicc.org/docs/ABAResolution108Areport.pdf>.

43. S.C. Res. 1593, U.N. Doc. S/Res/1593 (2005), *available at* <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>; see also Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), *available at* <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.



Obama's tenure saw further positive developments in the U.S.-ICC relationship including: the U.S. returning observer delegations to the ASP;<sup>44</sup> the start of constructive support of the ICC on a case-by-case basis;<sup>45</sup> and the U.S. vote in favor at the UN Security Council referral of the Libya situation to the ICC.<sup>46</sup>

As is evident from this brief synopsis, the U.S.-ICC relationship is fraught with history and complications. This point is no better captured than in the aforementioned U.S.'s anti-ICC legislation. These pieces of legislation distance the U.S. from the ICC and undermine the Court. Such legislation either restricts U.S. cooperation with, or funding to, the ICC. Other laws punished foreign countries for not taking an equally hostile approach to the Court.<sup>47</sup> Some of these anti-ICC laws have been repealed or diminished over the past few years.<sup>48</sup> Despite these steps towards a less antagonistic relationship, the remaining U.S. laws still in place greatly impede upon closer relations between the two.

One such notable law, Public Law No. 106-113, §§ 705–706, also known as the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act<sup>49</sup> (“FSA”), prohibits U.S. funds from being used to support the ICC.<sup>50</sup> It further prohibits extradition of U.S. citizens to foreign countries obligated to cooperate with the ICC unless the foreign country delivers a guarantee that the U.S. citizen will not be sent to the

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44. *International Criminal Court*, U.S. DEPT. OF STATE (Dec. 15, 2012), <http://www.state.gov/j/gc/jicc/index.htm>.

45. Press Release, Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the U.N., at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court (Oct. 17, 2012), <http://iipdigital.usembassy.gov/st/english/texttrans/2012/10/20121017137632.html?CP.rss=true#axzz2FSocn1Or>.

46. S.C. Res. 1970, U.N. Doc. S/Res/1970 (Feb. 26, 2011), available at <http://www.unhcr.org/refworld/docid/4d6ce9742.html>; see also Kevin Jon Heller, *Security Council Refers the Situation in Libya to ICC*, OPINIO JURIS (Feb. 27, 2011), <http://opiniojuris.org/2011/02/27/security-council-refers-the-situation-in-libya-to-the-icc/>.

47. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206 (2002) (as amended Oct. 17, 2006 and Jan. 28, 2008) (The original version of the law prohibited US military assistance to certain ICC States Parties unless they “entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.”).

48. “Nethercutt Amendment” to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2005, Pub. L. No. 108-447 (2004); see also Lucia DiCicco, *The Non-Renewal of the “Nethercutt Amendment” and its Impact on the Bilateral Immunity Agreement (BIA) Campaign*, AM. NON-GOV. ORGS. COAL. FOR THE INT’L CRIM. CT. (Apr. 30, 2009), <http://www.amicc.org/docs/Nethercutt2009.pdf>.

49. Foreign Relations Authorization Act, Pub. L. No. 106-113, §§ 705–706, 113 Stat. 1501 (1999), available at <http://www.gpo.gov/fdsys/pkg/PLAW-106publ113/pdf/PLAW-106publ113.pdf>.

50. Foreign Relations Authorization Act, Pub. L. No. 106-113, §§ 705–706 (1999).

ICC.<sup>51</sup> These provisions remain law and have been broadly construed to prevent any financial support of the ICC, no matter how nominal.<sup>52</sup> Further, this blanket prohibition on U.S. financial assistance to the ICC has no waivers.<sup>53</sup> As a result, this prohibition limits the U.S. to giving only “in-kind” contributions to the ICC.<sup>54</sup> Together with other anti-ICC legislation, the end result of FSA is that the U.S. cannot supply the ICC with comprehensive, institution building finances and support, a form of assistance that would be best for the Court at this still-early stage of its development.<sup>55</sup>

Another obstructionist piece of U.S. legislation is the American Service-Members Protection Act of 2002 (“ASPA”), or Public Law 107-206.<sup>56</sup> Sometimes referred to as the “Hague Invasion Act,” ASPA was adopted originally in August 2002, shortly after the administration “unsigned” the Rome Statute.<sup>57</sup> ASPA effectively prevents any American citizen or ‘allied person’ from being prosecuted by the ICC; if such a person is detained by the ICC, the U.S. President is able to use “all means necessary and appropriate” to ensure their release.<sup>58</sup> It also prohibits military aid to State Parties to the ICC with a few exceptions, namely when “important to the national interest of the United States.”<sup>59</sup> Moreover, its provisions essentially made U.S. support of peacekeeping missions contingent on ICC immunity for U.S. personnel.<sup>60</sup>

In close conjunction with ASPA, the U.S. negotiated Bilateral Immunity Agreements (“BIAs”) with some 102 other states,<sup>61</sup> whereby

51. *Id.* § 706.

52. See generally AM. NON-GOV. ORGS. COAL. FOR THE INT’L CRIM. CT., *Anti-ICC Legislation*, <http://www.amicc.org/usicc/legislation> (last visited Mar. 5, 2013).

53. Foreign Relations Authorization Act, Pub. L. No. 106-113, §§ 705–706 (1999).

54. Harold Hongju Koh & Stephen J. Rapp, Special Briefing, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (June 15, 2010), [http://www.state.gov/j/gcj/us\\_releases/remarks/2010/143178.htm](http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm).

55. Kip Hale, *The Price We Must Pay for International Criminal Justice*, HUFFINGTON POST (Nov. 19 2012), available at [http://www.huffingtonpost.com/kip-hale/international-criminal-court-funding\\_b\\_2149834.html](http://www.huffingtonpost.com/kip-hale/international-criminal-court-funding_b_2149834.html).

56. American Servicemembers’ Protection Act of 2002, Pub. L. No. 107-206, § 2002 (as amended October 17, 2006 and January 28, 2008) [hereinafter ASPA].

57. Letter from John R. Bolton, then Under Sec’y of State for Arms Control and Int’l Sec., to The Honorable Kofi Annan, Sec’y Gen. of the U.N. (May 6, 2002) [hereinafter Bolton Letter], available at <http://amicc.org/docs/bolton.pdf>.

58. ASPA, *supra* note 56, § 2002.

59. *Id.* § 2007(b).

60. See H.R. 1646, 107th Cong. § 635(a) (2002), available at <http://www.gpo.gov/fdsys/pkg/BILLS-107hr1646eh/pdf/BILLS-107hr1646eh.pdf>.

61. AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT’L CRIM. CT., *Countries Concluding Bilateral Immunity Agreements* (2013), <http://amicc.org/usicc/bialist> (listing the 102 nations who signed BIA agreements with the U.S.).

States agreed to ensure that the ICC would not gain jurisdiction over American citizens on their territory.<sup>62</sup> The original version of the ASPA prohibited U.S. military assistance to certain ICC State Parties unless they entered into a BIA.<sup>63</sup>

It did not take long for the U.S. government, however, to realize the ills of its anti-ICC effort. Specifically, the U.S. Department of Defense strongly criticized the effects of ASPA and the BIAs campaign.<sup>64</sup> Many complained about the restriction of International Military Education and Training (“IMET”) and Foreign Military Funds (“FMF”) in countries where BIAs were not signed.<sup>65</sup> Senior Pentagon officials stated that such constraints undermined U.S. national security interests.<sup>66</sup>

Consequently, ASPA has been twice amended since its initial introduction. The first amendment occurred on October 17, 2006, when it was amended to remove IMET restrictions for all countries.<sup>67</sup> This move came after President Bush had issued presidential waivers of IMET prohibitions to many States due to pressure from the Department of Defense.<sup>68</sup> Similarly, in January 2008, Congress again amended APSA to eliminate FMF restrictions on all States.<sup>69</sup> During this same time, other anti-ICC laws were allowed to expire, all of which were impediments to a mutually beneficial U.S.-ICC relationship.<sup>70</sup>

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62. ASPA, *supra* note 56, § 2004.

63. *Id.* §§ 2005(c)(2)–(c)(3).

64. *Fiscal Year 2006 Defense Budget: Hearing on Request for U.S. European Command, U.S. Pacific Command, and U.S. Southern Command Before the H. Armed Servs. Comm.*, 105th Cong. (2005) (Testimony of Bantz J. Craddock) [hereinafter Craddock Hearing], available at <http://www.amicc.org/docs/Craddock%20Statements%203-05.pdf>; see U.S. Congressional Hearing, Senate Armed Services Committee, Testimony of Vice Admiral Lowell Jacoby, <http://www.amicc.org/docs/Jacoby%20Statements%203-05.pdf>; Rick Maze, *New Rules May Hinder U.S. Training for Foreign Troops*, DEFENSE NEWS, May 9, 2005, at 14, available at <http://www.amicc.org/docs/Defense%20News%205-9-05.pdf>.

65. *Fiscal Year 2006 National Defense Authorization Budget Request: Hearing before the H. Armed Servs. Comm.*, 109th Cong. (2005) (Statement by General B. J. Craddock, U.S. Army Commander, United States Southern Command).

66. Craddock Hearing, *supra* note 64.

67. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1222, 120 Stat. 2423 (2006).

68. Memorandum of President George Bush on Waiving Prohibition on United States Military Assistance With Respect to Various Parties to the Rome Statute Establishing the International Criminal Court (Oct. 2, 2006), available at <http://www.gpo.gov/fdsys/pkg/WCPD-2006-10-09/pdf/WCPD-2006-10-09-Pg1708-2.pdf>.

69. Press Release, The White House, President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law (Jan. 28, 2008), available at <http://www.amicc.org/docs/White%20House%20Statement%2028%20January%202008.pdf>.

70. *Anti-ICC Legislation*, AMICC, <http://www.amicc.org/usicc/legislation> (last visited Aug. 19, 2013) (listing anti-ICC legislation that is no longer in effect).

Despite this pullback, the remaining provisions of ASPA prohibit the U.S. government from cooperating with or assisting the ICC on a wide range of matters.<sup>71</sup> Considering that the ICC depends almost exclusively on State cooperation and assistance for much of its enforcement and related functioning, this type of legislation is particularly harmful. However, ASPA includes presidential waivers that allow for such cooperation and assistance to occur.<sup>72</sup> These waivers, in conjunction with the Dodd Amendment in ASPA, are precisely the means with which President Obama currently authorizes U.S. support to the ICC on a case-by-case basis.<sup>73</sup> Nevertheless, a future administration could just as easily refrain from using these waivers and/or utilizing the Dodd Amendment, which would again reinstate an almost complete blackout on U.S.-ICC relations.

### III. CHALLENGES AT THE ICC

In its first ten years,<sup>74</sup> the ICC has faced a number of significant challenges, a fact that is not unexpected for a court in its infancy and with an unprecedented mandate.<sup>75</sup> These include, *inter alia*, issues pertaining to the expediency of proceedings, prosecutorial decisions, and investigative tactics.<sup>76</sup> These institutional growing pains are surmountable if sustained efforts to improve the long-term functionality of the ICC are undertaken—

71. *See, e.g.*, ASPA, *supra* note 56, § 2004 (prohibition on general requests for cooperation, interrogatory letters, extradition inquiries, use of appropriated funds, mutual legal assistance, and investigative activities); § 2005 (prohibition on participation in relevant peacekeeping operations), § 2006 (prohibition on direct or indirect transfer of national security and law enforcement information).

72. ASPA, *supra* note 56 (Amendment No. 3787 to Amendment No. 3597 Senator Dodd's second-degree amendment to ASPA 2002).

73. *Id.* "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." *Id.* *See, e.g.*, Elise Keppler, *The ICC Ten Years On: Challenges and Opportunities for Africa*, THINK AFRICA PRESS (Aug. 16, 2012), <http://thinkafricapress.com/legal/icc-completes-decade-challenges-and-opportunities-africa>; *Tenth Anniversary of the Rome Statute of the International Criminal Court*, THE COMMONWEALTH (July 1, 2012), <http://www.thecommonwealth.org/news/248257/020712romestatute.htm>; Ian Paisley, Op-ed, *Peace Must Not be the Victim of International Justice*, N.Y. TIMES (Mar. 16, 2012), [http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html?\\_r=0](http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html?_r=0).

74. The Court became operational on July 1, 2002 with the 60th ratification of the Rome Statute. *About the Court*, Int'l Crim. Ct., <http://www.10a.icc-cpi.info/index.php/en/about> (last visited Feb. 11, 2013).

75. *See, e.g.*, Elise Keppler, *supra* note 73; TENTH ANNIVERSARY OF THE ROME STATUTE, *supra* note 73; Ian Paisley, *supra* note 73.

76. Rene Blattmann & Kirsten Bowman, *Achievements and Problems of the International Criminal Court: A View from Within*, 6 J. INT'L CRIM. JUST. 711, 712 (2008).

a critically important fact at the heart of current U.S. resistance and of changing that position.<sup>77</sup> Yet, as will be discussed, the current predicament is getting countries, both State and non-State Parties, to provide the appropriate levels of support needed to achieve such improvements to the Court.

In order to understand the relevant issues facing the Court fully, it is vital to keep in mind that, akin to any international organization like the ICC, state cooperation is a crucial factor in the ability of the institution to perform its core functions.<sup>78</sup> In all stages of its activities, the ICC relies on the cooperation of states and international organizations to carry out its key responsibilities.<sup>79</sup> The ICC requires support and cooperation, *inter alia*, with respect to the arrest and surrender of suspects,<sup>80</sup> protection and relocation of witnesses,<sup>81</sup> and enforcement of sentences,<sup>82</sup> just to name a few.<sup>83</sup> Hence, the more State Parties to the Rome Statute and the more invested States are in the ICC process, the better able the Court is to carry out its duties.<sup>84</sup>

Turning now to challenges, the decisions made by the ICC's Office of the Prosecutor ("OTP") over the past ten years have come under scrutiny from commentators and States alike.<sup>85</sup> One specific critique was that the investigative strategy used by the OTP relied heavily on intermediaries to complete investigations.<sup>86</sup> Due to the nature of its work, the Court is active in situations of ongoing conflict, which gives rise to security challenges when trying to gather evidence on the ground.<sup>87</sup> The task of many field

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77. Mahmood Mamdani, *The New Humanitarian Order*, THE NATION (Sept. 10, 2008), available at <http://www.thenation.com/article/new-humanitarian-order>.

78. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 164–67 (1999).

79. Rene Blattmann & Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT'L CRIM. JUST. 722, 723 (2008).

80. Rome Statute, *supra* note 2, arts. 89–92.

81. *Id.* arts. 87, 93.

82. *Id.* arts. 103–06.

83. The ICC is dependent on countries to execute its arrest warrants because it does not have a police force. This causes delays and obstacles in getting custody of suspects. Thus, President Bashir and two other ICC suspects, Sudanese government officials, remain free as Khartoum unleashes a new round of atrocities in southern Sudan. Edith M. Lederer, *ICC Asks UN to Help Arrest Sudan's President*, THE GUARDIAN (June 5, 2012), <http://www.guardian.co.uk/world/feedarticle/10274746>.

84. Bruce Knotts, *Letter to the Editor*, WALL ST. J., June 19, 2012, at A12.

85. Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFFAIRS (Spring 2009), <http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders>.

86. OPEN SOCIETY JUSTICE INITIATIVE, REPORT, INTERMEDIARIES AND THE INTERNATIONAL CRIMINAL COURT: A ROLE FOR THE ASSEMBLY OF STATES PARTIES (Dec. 2011), <http://www.opensocietyfoundations.org/sites/default/files/intermediaries-20111212.pdf>.

87. Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L L. & FOREIGN AFF. 207, 210 (2009).

offices, such as those in the Democratic Republic of the Congo, Uganda, Chad, and Central African Republic is, *inter alia*, to conduct investigations on behalf of the OTP.<sup>88</sup> Often due to cited security reasons for staff and victims, the field presence has been lessened, postponed, or cancelled, thus necessitating the use of evidence accumulated by others.<sup>89</sup>

Other investigative problems, such as internal decision-making and institutional limitations, and many other additional explanations are behind this use of secondary evidence.<sup>90</sup> Nevertheless, if greater emphasis inside and outside of the ICC was placed on the importance of capable investigative staff being on the ground, and if this investigative staff were equipped with appropriate intelligence and security support, this would increase the likelihood of collecting more probative and reliable evidence.<sup>91</sup>

The way that the OTP has handled sexual and gender-based violent crimes has also been unsatisfactory to some.<sup>92</sup> The Rome Statute established jurisdiction to try various situations of sexual violence, including rape, sexual slavery, forced prostitution or sterilization, and forced pregnancy.<sup>93</sup> Despite the legal jurisdiction to pursue various forms of sexual violence cases and clear indications of such criminal behavior in its cases,<sup>94</sup> the ICC has not upheld charges of sexual violence to date.<sup>95</sup> Furthermore, it has been pointed out that sexual violence was charged in only eight of the fifteen ICC cases, despite evidence to support such

88. Katy Glassborow, *ICC Investigative Strategy Under Fire*, INST. FOR WAR & PEACE REPORTING (Oct. 17, 2008), <http://www.globalpolicy.org/component/content/article/164/28571.html>.

89. Andrew Cayley, *Witness Proofing—The Experience of a Prosecutor*, 6 J. INT'L CRIM. JUST. 780 (2008) (One of the OTP's original senior trial attorneys for Darfur, Andrew Cayley, described the difference between the ICTY's approach to investigating and the ICC's approach to investigating colorfully: "Cassese went personally to Kober prison and interviewed very sensitive witnesses. He demanded access with nothing more than a Security Council resolution. The OTP got no further than the Hilton Hotel.").

90. See Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFFAIRS (Spring 2009), <http://www.amicc.org/docs/WorldAffairsJournalSpring2009.pdf>.

91. AM. UNIV. WASH. COLLEGE OF LAW, INTERNATIONAL CRIMINAL COURT LEGAL ANALYSIS AND EDUCATION PROJECT, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR 1–14 (Oct. 2012), available at <http://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf>.

92. Laurie Green, *First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court*, 11 INT'L CRIM. L. REV. 529, 529–30 (2011).

93. Rome Statute, *supra* note 2, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

94. David Smith, *ICC Acquits Congolese Militia Leader over Atrocities*, THE GUARDIAN (Dec. 18, 2012), <http://www.guardian.co.uk/law/2012/dec/18/icc-acquits-congolese-militia-leader-atrocities>.

95. *Id.*

charges.<sup>96</sup> In over half of those eight cases, the charges were struck down at the confirmation of charges stage.<sup>97</sup>

Brigid Inder, who was recently appointed as OTP special gender advisor to address these concerns, attributed these poor numbers to three factors: insufficient amounts of evidence being put forward, lack of quality evidence, and inadequate framing of the charges.<sup>98</sup> Again, it is the lack of emphasis on obtaining proper access to evidence in combination with internal decision-making that are at the core of this challenge facing the ICC.

Another critique that the ICC faces is the lack of speed at which cases are completed. To date, eighteen cases in eight situations have been brought before the ICC.<sup>99</sup> In the past ten years, however, the ICC has completed two trials, the Thomas Lubanga<sup>100</sup> and Mathieu Ngudjolo Chui cases.<sup>101</sup> The Lubanga case took six years total to prosecute at the pretrial and trial stages.<sup>102</sup> The case ended in a conviction on March 14, 2012.<sup>103</sup> The OTP and the Congolese militia leader filed notices of appeal, however, so the case will be further litigated.<sup>104</sup> These statistics raise questions about the right of the accused to be tried without undue delay,<sup>105</sup> not to mention case and trial management practices and the use of Court resources.

This often cited complaint, the speed-of-trial criticism, of the international criminal tribunals overlooks important considerations. The

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96. Brigid Inder, Address at University of New South Wales “Justice for All?” Conference (Feb. 18, 2012), available at <http://www.intlawgrris.com/2012/02/icc-and-gender-justice.html>.

97. *Id.*

98. *Id.*

99. *Situations and Cases*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Mar. 5, 2013).

100. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04–01/06, Judgment Pursuant to Article 74 of the Statute (Mar 14, 2012).

101. Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04–01/07, Judgment Pursuant to Article 74 of the Statute (Dec 18, 2012).

102. Stephanie Kammer, *Deconstructing Lubanga, The ICC’s First Case: The Trial and Conviction of Thomas Lubanga Dyilo*, AM. NON-GOV. ORGS. COAL. FOR THE INT’L CRIM. CT. & COLUMBIA UNIV. INST. FOR THE STUDY OF HUMAN RIGHTS, at 4 (2012), [http://www.amicc.org/docs/Deconstructing\\_Lubanga.pdf](http://www.amicc.org/docs/Deconstructing_Lubanga.pdf).

103. Eric Posner, *The Absurd International Criminal Court*, WALL ST. J., June 11, 2012, at A13.

104. Wairagala Wakabi, *Congo-Kinshasa: Lubanga to Appeal ICC Conviction but Prosecutor Wants Him to Get Longer Jail Term*, ALLAFRICA (Oct. 4, 2012), <http://allafrica.com/stories/201210050491.html>.

105. Ralph Zacklin, *The Failings of Ad Hoc Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543–44 (2004) (“The delays in bringing detainees to trial—and the trials themselves—have generally been so lengthy that questions have been raised as to the violation by the tribunals of the basic human rights guarantees set out in the International Covenant on Civil and Political Rights (ICCPR) [sic]. Justice delayed is justice denied, which also raises the question of whether justice has been done to the victims.”).

international criminal cases, by their nature, have built-in characteristics that slow them down no matter how efficient the process, such as number of witnesses and massive oral and documentary translation needs.<sup>106</sup> Moreover, it is sometimes preferable for cases to progress slowly due to the complicated, constantly unfolding nature of the situations under investigation and prosecution.<sup>107</sup> Also, a new court like the ICC is navigating its rules and procedures for the first time and litigating a plethora of unprecedented issues. This process takes time and careful consideration, particularly considering the novel nature of the ICC's victim participation and reparations scheme.<sup>108</sup> Despite all of these often overlooked factors, the ICC inefficiencies are still apparent and in need of timely resolution.<sup>109</sup> It is very likely that the cases and situations will only get increasingly complex.

These delays in process as well as the other issues raised in this section could have been avoided or better prepared for<sup>110</sup> with more robust capacity support from States, particularly from countries with a multitude of resources, diplomatic and political power, and unique know-how in international criminal justice like the U.S.<sup>111</sup> The ICC can do much to

106. Int'l Crim. Ct., Office of the Prosecutor, *Measures Available to the International Criminal Court to reduce the Length of Proceedings: Informal Expert Paper*, at 3 (2003), available at [http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length\\_of\\_proceedings.pdf](http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length_of_proceedings.pdf) ("Due to the fact that international crimes typically involve atrocities committed on a massive scale, international criminal justice has to cope with cases which are more extensive and complex than most national cases. In particular, hundreds of witnesses will have to be interpreted and heard and volumes of documentary evidence will have to be translated and evaluated. The complexity will be multiplied whenever more than one conflict fall to be addressed concurrently.").

107. See generally Alex Whiting, *In International Criminal Prosecutions, Justice Delayed can be Justice Delivered*, 50 HARV. INT'L L.J. 323 (2009), available at [http://www.harvardilj.org/site/wp-content/uploads/2010/07/HILJ\\_50-2\\_Whiting.pdf](http://www.harvardilj.org/site/wp-content/uploads/2010/07/HILJ_50-2_Whiting.pdf).

108. Rome Statute, *supra* note 2, arts. 68, 75. The Rules of Procedure and Evidence include gender specific provisions, which are applicable to the Victims and Witnesses Unit, to ensure that survivors of sexual violence are not discriminated against or further traumatized in court. Rules of Procedure and Evidence of the Int'l Crim. Ct., Rules 16–18, 112 (v), ICCASP/1/3 (2002). The Rules of Procedure and Evidence include gender specific provisions, which are applicable to the Victims and Witnesses Unit, to ensure that survivors of sexual violence are not discriminated against or further traumatized in court. For example, Rule 112(iv) allows the recording of questioning by the Prosecutor if this "could assist in reducing any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence." Additionally, the judiciary and staff of the ICC must be composed of both men and women, and during gender sensitive trials there must be an expert on dealing with crimes of sexual violence. These rules are mandatory and must be followed. The Court also provides protection, support, and reparations for victims and witnesses to help victims rebuild their lives.

109. Daniel Donovan, *International Criminal Court: Successes and Failures of the Past and Goals for the Future*, INT'L POLICY DIGEST (Mar. 23, 2012), <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>.

110. See Erik Mose, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 929–32 (2005).

111. Gallarotti & Preis, *supra* note 13, at 26 ("Having the most powerful state in the world on



address these concerns, and is undertaking “lessons learned” exercises and other initiatives to accomplish an upgrade in its functional performance.<sup>112</sup> Yet, to achieve critical improvements, such as arresting fugitive and putting forth better evidence in more efficient trials, the States hold the key.<sup>113</sup> The ICC, by its nature as an international institution, is limited in what it can accomplish.<sup>114</sup>

#### IV. REASONS TO BREAK FREE

We now see the practicalities at play in the US-ICC relationship. The U.S. has placed legislative impediments to better relations with the ICC and ratification of the Rome Statute, while the ICC has a number of institutional challenges partly caused by State cooperation and assistance issues. Simply put, the U.S. is more likely to move increasingly closer to the ICC as it has in the past few years only if the ICC overcomes some capacity driven and performance issues.<sup>115</sup> The situation at the ICC, however, will likely remain substantially the same without the support of States like the U.S. that have unique ability and resources to help.<sup>116</sup> Describing the U.S.-ICC relationship, although helpful, only explains the circumstances at play. Reasons must be put forth as to *why* these practical hurdles should be overcome. To foster change, we need comprehensive and persuasive answers to relevant, critical policy questions. These questions, simple as they may be, are at the core of this dilemma. First, why should the U.S. be interested in improving relations with, or becoming a member of, the ICC? And second, why should the ICC itself focus its limited time and resources on the tall feat of garnering greater engagement from the U.S.?

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board would position the Court to challenge the many hurdles of national sovereignty which will confront it.”).

112. Judge Sang-Hyum Song, President of the Int’l Crim. Ct., Remarks to the 11th Session of the Assembly of States Parties, The Hague (Nov. 14, 2012), available at <http://www.icc-cpi.int/NR/rdonlyres/0EEEEED0E-5BA8-4894-8AB5-3C2C90CD301B/0/ASP11OpeningPICCSongENG.pdf>.

113. Roper & Barria, *supra* note 24, at 457.

114. *Id.* at 458.

115. *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement, Report of the Independent Task Force*, AM. SOC. OF INT’L LAW, at 17 (Mar. 2009) [hereinafter ASIL US-ICC Task Force], <http://www.asil.org/files/asil-08-discpaper2.pdf>.

116. SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 119; Moses Retselisitsoe Phooko, *supra* note 24, at 207–08; Roper & Barria, *supra* note 24, at 460–61; Leonard, *supra* note 24.

A. *Reasons for the U.S. to Improve Relations with, and Ultimately Join, the ICC*

1. *The ICC is not a Threat*

There are a bevy of compelling and interrelated benefits for the U.S. to push for concrete advancements in the U.S.-ICC relationship. Before discussing these benefits, however, it is important to address the most persistent misapprehension within the U.S. about the ICC, which is that the ICC is a threat to the U.S. sovereignty in the form of unjust prosecution of American citizens, among other related problems.<sup>117</sup> Since the Rome Statute's inception, and through the first ten years of the ICC's existence, many have argued meticulously and cogently that ICC jurisdiction over Americans is unlikely for many reasons.<sup>118</sup> There is no need to redo those impressive efforts here. Yet, it is worth stating that no matter how one analyzes this jurisdictional issue, it is no longer a credible argument that ICC jurisdiction over U.S. officials or citizens is a legitimate concern.<sup>119</sup>

The Rome Statute and the other ICC core documents clearly make the ICC a court of last resort. ICC jurisdiction over the citizens of any developed and engaged domestic jurisdictions is almost impossible, provided domestic investigations and prosecutions do in fact occur and are done in good faith and not as a ploy to shield perpetrators from due

117. SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 12–26; Gallarotti & Preis, *supra* note 13, at 26–33.

118. David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 997–1004, 1065–68 (2008), [http://www.law.northwestern.edu/jclc/backissues/v98/n3/9803\\_983.Scheffer\\_Cox.pdf](http://www.law.northwestern.edu/jclc/backissues/v98/n3/9803_983.Scheffer_Cox.pdf) (explaining, *inter alia*, that the ICC and the principle of complementarity would be highly deferential to US courts asserting jurisdiction over Americans, that compliance with the ICC would not offend American extradition jurisprudence and law, the Rome Statute does not offend Article III and other relevant provisions of the US Constitution and that the due process protections in the Rome Statute would survive judicial scrutiny by an American court); ABA, Sec. of Int'l Law and Prac., Sec. of Crim. Justice, Sec. of Individual Rights and Responsibilities, Recommendation that the United States Government Accede to the Rome Statute of the Int'l Crim. Ct., at 5–9 (Feb. 19, 2001), [http://www.iccnw.org/documents/ABARes\\_onUSFeb01.pdf](http://www.iccnw.org/documents/ABARes_onUSFeb01.pdf) (highlighting the Rome Statute is consistent with the Bill of Rights, due process protections for Americans, and against baseless prosecutions by the ICC Prosecutor); *see also* Sam Sasan Shoamanesh, *The ICC and the Middle East: A Needed Relationship*, JURIST FORUM (Sept. 24, 2009), [http://www.law.northwestern.edu/journals/jclc/backissues/v98/n3/9803\\_983.Scheffer\\_Cox.pdf](http://www.law.northwestern.edu/journals/jclc/backissues/v98/n3/9803_983.Scheffer_Cox.pdf).

119. SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 26 (“If the ICC poses a threat to US sovereignty it is much more a symbolic rather than an effective one”); Gallarotti & Preis, *supra* note 13, at 30 (“It would appear that U.S. opposition to the Court is founded on exaggerated perceptions of the Court’s potential threat to U.S. national interests, and that therefore the downside risks for the U.S. created by the existence of the Court are not great.”).

prosecution.<sup>120</sup> The ICC jurisdictional regime is very deferential and non-invasive to its member States, especially those with highly sophisticated and international justice conscious domestic judiciaries like that of the U.S.—were it to join.<sup>121</sup> Additionally, temporal jurisdiction only starts *after* the date of ratification, so all alleged past crimes would not be within the ICC’s jurisdiction.<sup>122</sup> New ratifying States can also remove war crimes from the Court’s potential jurisdiction for a seven year period.<sup>123</sup> Finally, as a matter of practice, the ICC has shown that its prosecutorial strategy and decision-making is not motivated by politics, contrary to early American concerns about political prosecutions.<sup>124</sup> The ICC has a substantial set of *de jure* and *de facto* checks and balances that ensure that only meritorious cases go forward and that States are given every opportunity to assert their jurisdiction.<sup>125</sup>

## 2. *Enhancing the U.S.’s Ability to Influence Positive Change*

The most compelling argument for greater U.S. engagement with the ICC is the added value to a multitude of U.S. policy interests. Broadly speaking, the strengthening of U.S. support for, and regularization of its engagement with, the Court will significantly contribute to U.S. influence in numerous arenas.

For decades, the pedigree of American leadership on human rights and international rule of law was unquestioned.<sup>126</sup> The U.S. trumpeted the importance of human rights and rule of law, and fostered great

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120. Rome Statute, *supra* note 2, art. 15 (Pretrial Chamber oversight of Prosecutor); art. 17(1)(a–d) (principle of complementarity and gravity threshold).

121. Scheffer & Cox, *supra* note 118, at 1003; ASIL US-ICC Task Force, *supra* note 115, at 44 (“It must not be forgotten that a properly functioning complementarity regime ensures that the ICC only has jurisdiction to try Americans if the United States does not or cannot exercise its primary jurisdiction.”).

122. *Id.* art. 11(2).

123. *Id.* art. 124.

124. Koh & Rapp, *supra* note 54 (commenting that the track record of the ICC has not shown political taint); Wes Rist, *The Conservative Case for the International Criminal Court Six Years In*, JURIST (July 30, 2008), <http://jurist.org/forum/2008/07/conservative-case-for-international.php>; John Bellinger III, *Congress Should Review Policies Toward War Crimes Court*, WASH. POST (June 21, 2012), [http://www.washingtonpost.com/congress-should-review-policies-toward-war-crimes-court/2012/06/21/gJQAN9RgtV\\_story\\_1.html](http://www.washingtonpost.com/congress-should-review-policies-toward-war-crimes-court/2012/06/21/gJQAN9RgtV_story_1.html) (“The court has proved less threatening to U.S. personnel and interests than many Americans first feared.”).

125. Shoamanesh, *supra* note 118.

126. President Jimmy Carter, Op-ed, *A Cruel and Unusual Record*, N.Y. TIMES, June 25, 2012, at A19 (discussing the U.S. leadership on human rights and the impact it has had); Vincent Warren, *Supreme Court Holds U.S. Rights Legacy in the Balance*, CNN (Sept. 27, 2012), <http://edition.cnn.com/2012/09/27/opinion/warren-supreme-court-alien-tort-law> (explaining the historical significance of U.S. leadership on human rights).

advancements in these fields around the world by making them foreign policy priorities.<sup>127</sup> However, the American trumpet does not move others like it has in the past. Given the unfortunate increase in need for advancements in human rights and rule of law around the globe,<sup>128</sup> the U.S. cannot take for granted opportunities to bolster its reputation and expertise. There is not a more visible and striking venue where the U.S. can dramatically reaffirm as well as resurrect its “smart” and “soft” power<sup>129</sup> than at the ICC.<sup>130</sup>

If the U.S. were to remove existing barriers to a more open and supportive relationship with the ICC, it would take an important first step in correcting the aforementioned paradox of the U.S. not being a formal part of the ICC. This course correction would also mitigate the damage caused by the most tangible item that others point towards when seeking to undercut American credibility in human rights and the rule of law: U.S. non-ratification of the Rome Statute.<sup>131</sup>

By breaking new ground on U.S.-ICC relations, new avenues of influence that are currently shut to the U.S. will emerge as well. For example, the U.S. does not find any challenge or threat from the existing ICC cases with an arrest warrant, and actually finds these cases to be in its foreign policy and national interests.<sup>132</sup> By removing domestic and symbolic barriers to support of the ICC, the U.S. would gain greater leverage with other countries that it is trying to persuade to cooperate with the Court on these cases.<sup>133</sup>

Achieving concrete progress in U.S.-ICC relations is a condition precedent to ratification of the Rome Statute, which would present an even more monumental opportunity for U.S. to solidify its reputation as a

127. Carter, *supra* note 126.

128. See, e.g., Rami G. Khouri, *The Arab Awakening*, THE NATION (Aug. 24, 2011), <http://www.thenation.com/article/162973/Arab-awakening> (example of unprecedented worldwide opportunity for advancement of human rights and the rule of law).

129. Tysha Bohorquez, Review, “Soft Power—The Means to Success in World Politics,” UCLA INT’L INST. (Dec. 1, 2005), <http://www.international.ucla.edu/article.asp?parentid=34734>.

130. See COUNCIL ON FOREIGN RELATIONS, REPORT OF AN INDEPENDENT TASK FORCE, FINDING AMERICA’S VOICE: A STRATEGY FOR REINVIGORATING U.S. PUBLIC DIPLOMACY 30–31 (Sept. 2003), <http://www.cfr.org/us-strategy-and-politics/finding-americas-voice/p6261>.

131. See Jim Lobe, *Bush ‘Unsigns’ War Crimes Treaty* (May 5, 2002), [http://www.alternet.org/story/13055/bush\\_unsigns\\_war\\_crimes\\_treaty](http://www.alternet.org/story/13055/bush_unsigns_war_crimes_treaty) (quoting numerous experts on how the U.S. non-ratification and “unsigning” of the Rome Statute hurts the U.S. reputation in international affairs).

132. Interview by Geraldine Coughlan with Stephen Rapp, U.S. Ambassador-at-Large for War Crimes, *U.S. Supports International Justice*, INT’L JUSTICE TRIBUNE, Mar. 30, 2011, at 4 [hereinafter Rapp Interview], available at <http://sites.rnw.nl/pdf/ijt/ijt125.pdf>.

133. SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 109, 116, 117; Megan Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT’L L. 528, 542–43, 572 (2012).

human rights and rule of law champion.<sup>134</sup> Specifically, if sufficient progress were made for the U.S. to ratify, it would motivate other countries to join the ICC family (e.g., Turkey, other Middle Eastern allies) and force others to consider ratification in order not to be outflanked (e.g., China, Russia, India).<sup>135</sup> The cascading effect of American membership in the ICC would provide an enormous boost to U.S. credentials as well as the universality of the Rome Statute and the fight against impunity.<sup>136</sup>

### 3. *Bolster U.S. Support of Global Rule of Law*

Broadening and regularizing U.S.-ICC relations will profoundly enhance the establishment of the rule of law around the world, a long-held objective of the U.S.<sup>137</sup> By and through such federal agencies as the U.S. Agency for International Development, the U.S. has, over decades, contributed substantial resources around the world to support the rule of law and the protection of human rights.<sup>138</sup> As previously mentioned, the Rome Statute is structured to defer to proven domestic judiciaries that have the political will to investigate and prosecute international atrocity crimes.<sup>139</sup> Yet, the inverse is also true in that the Rome Statute legal regime permits the ICC to intervene in countries with a weak criminal justice infrastructure or with little to no political drive to investigate and prosecute international atrocity crimes.<sup>140</sup> Accordingly, the ICC regime incentivizes developing countries to build up their judicial and political apparatuses in order to achieve similar deference from the ICC.<sup>141</sup> Were

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134. JENNIFER K. ELSEA, CONG. RESEARCH SERV., US POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 29 (2006).

135. See SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 99 (discussing the ability of States to influence each other's international legal behavior).

136. Stacy, Scheffer, et al., *International Rights Prosecution by 2022*, GLOBAL BRIEF (Feb. 6, 2012), <http://globalbrief.ca/blog/2012/02/06/what-will-have-been-the-consequences-of-international-human-rights-prosecutions-by-2022/>.

137. *USAID History*, USAID (Dec. 12, 2012), <http://www.usaid.gov/who-we-are/usaid-history>.

138. *Democracy, Human Rights, and Governance*, USAID, <http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance> (last visited Feb. 11, 2013); *Where We Work*, USAID, <http://www.usaid.gov/where-we-work> (last visited Feb. 11, 2013).

139. Rome Statute, *supra* note 2, art. 17.

140. *Id.*

141. Carey Shenkman, *Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Outside Armed Conflict*, 87 N.Y.U. L. REV. 1210, 1239 (2012), available at <http://www.nyu.edu/lawreview/sites/default/files/pdf/NYULawReview-87-4-Shenkman.pdf>; William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 57–58, 69, 87 (2008); Marieke Wierda, Briefing, *The Potential of Complementarity*, INT'L CTR. FOR TRANSITIONAL JUSTICE (Sept. 2009), <http://www.ictj.org/sites/default/files/ICTJ-Global-ICC-Complementarity-2009-English.pdf> (“Even if the motivation is to avoid the ICC, the pursuit of domestic criminal justice conducted to an

the U.S. to commit to helping build the ICC as an institution, as well as commit diplomatically and politically to the Rome Statute regime, it would also be a lift to its long-standing effort to develop the rule of law in countries around the world.

#### *4. Support U.S. Interest in Atrocity Prevention & the Institution of Peace*

In addition to long-standing security and regional interests in preventing conflicts, the U.S. has made it a strategic and moral responsibility to prevent atrocities. In 2011, President Obama issued a presidential study directive to assess and suggest reforms needed for the formation of an Atrocity Prevention Board that would acclimate governmental entities towards detecting signs of atrocities and deploying resources to prevent their perpetration or continuation.<sup>142</sup> In this respect, it is readily apparent that long-term prevention requires credible accountability mechanisms.<sup>143</sup> For instance, in domestic criminal justice settings, crime prevention is accomplished through education, persuasion, and restricting access to resources, but also through the threat of police investigation and judicial consequences.<sup>144</sup> In 2012, the National Security Advisor's report to President Obama arrived at a similar conclusion, stating that "accountability" was an essential component of preventing atrocities.<sup>145</sup>

The U.S. also has an interest in stopping atrocities and instituting lasting peace in their wake. In this regard, evidence exists that indictments, or even the specter of them, can hasten the end of atrocities and stigmatize individuals contributing to the violence, provided that international pressure and support to back these measures exists as well.<sup>146</sup> Furthermore,

international standard and the development of new domestic capacities should be seen as overall gains.").

142. Press Release, The White House, Presidential Study Directive on Mass Atrocities (Aug. 4, 2011) [hereinafter Press Release, Presidential Study], available at <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>.

143. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 12 (2001), available at <http://www.asil.org/ajil/recon2.pdf>.

144. See ABA, *Standards on Prosecutorial Investigations*, Standard 2.1(c)(v), [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pinvestigate.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html) (last visited Aug. 19, 2013).

145. Press Release, The White House, Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities (Apr. 23, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro>.

146. Emily C. Barbour & Matthew C. Weed, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, CONG. RESEARCH SERV., at 24 (Mar. 16, 2010),

the imposition of accountability measures, either during or after conflicts, have been shown to foster lasting peace across borders as well as societies more adherent to human rights, rule of law, and democracy.<sup>147</sup> By systematically supporting the ICC as an institution, its cooperation-based regime, and the positive benefits of its jurisdiction, the U.S. would gain a dependable partner in preventing atrocities, ending violence, and instituting peace.

Furthermore, more robust U.S. support of the ICC is a cost-effective way to support both worldwide atrocity prevention and the development of rule of law in domestic jurisdictions. Specifically, breaking down barriers to large-scale investments in the ICC would consolidate U.S. resources, as such investments would be going towards *both* the fortification of an effective international safeguard needed for long-term atrocity prevention, as well as the creation of incentives for domestic jurisdictions to build up their own political and judicial capacities to address international atrocity crimes.

##### 5. Allow the U.S. to Influence ICC's Development

Much of the discussion thus far has focused on improving the U.S.-ICC relationship to a point short of ratification. Some believe that a very cooperative non-State Party position is the most advisable, not to mention the best feasible posture considering that U.S. ratification is not realistic in the immediate future.<sup>148</sup> Frankly, it is true that improvements to the U.S.-ICC relationship need to occur before an open and legitimate conversation about ratification can take place at all in the U.S.<sup>149</sup> It is also true that the U.S. could benefit greatly by simply having a strong relationship of trust and support with the Court as a non-State Party and nothing more.<sup>150</sup> Yet,

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[http://www.amicc.org/docs/R41116\\_20100316.pdf](http://www.amicc.org/docs/R41116_20100316.pdf); Jacqueline Geis & Alex Mundt, *When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action*, THE BROOKINGS INST.-UNIV. OF BERN PROJECT ON INTERNAL DISPLACEMENT, at 15–19 (Feb. 2009) [hereinafter *Brookings Report*], [http://www.brookings.edu/~media/research/files/papers/2009/4/peace%20and%20justice%20geis/04\\_peace\\_and\\_justice\\_geis](http://www.brookings.edu/~media/research/files/papers/2009/4/peace%20and%20justice%20geis/04_peace_and_justice_geis); Akhavan, *supra* note 143, at 9; Aryeh Neier, *A President in the Dock*, PROJECT SYNDICATE (Mar. 9, 2009), <http://www.project-syndicate.org/commentary/a-president-in-the-dock>.

147. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 177–99 (2011).

148. Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference* (Apr. 2010), <http://www.cfr.org/international-criminal-courts-and-tribunals/rome-kampala/p21934>.

149. ASIL US-ICC Task Force, *supra* note 115, at 23–24.

150. See David Scheffer, *America's Embrace of the International Criminal Court*, JURIST (July 2, 2012), <http://jurist.org/forum/2012/06/dan-scheffer-us-icc.php> (discussing that at the very least, de

these benefits are limited, and it is not in the U.S.'s short or long-term interest to maintain an indefinite non-State Party status.<sup>151</sup> The full extent of all the aforementioned and other benefits requires ratification.

While the primary attractions of membership for the U.S. are positive in nature, one of the other main motivating factors for U.S. ratification has to be the long-term negative consequences if the U.S. does not join. After the Rome Statute's passage in 1998,<sup>152</sup> and in the early years of its operation,<sup>153</sup> there was a common belief that the ICC would flounder without formal U.S. support.<sup>154</sup> After ten years of operations with some notable successes, it is evident that the Court is here to stay.<sup>155</sup> Although far from flawless, the international community has proven that it can put together and run an international tribunal without formal U.S. involvement. The Court will surely improve over time with or without the U.S.'s support, albeit not as quickly or surely as with it. What should alarm the U.S., therefore, is not the inevitability of the ICC's existence without the U.S., but the inevitability of its success without the U.S. Thus, for the U.S. to enjoy the benefits of the ICC's success, as it did at the ICTY,<sup>156</sup> it must revisit ratification at some point in a concerted and earnest fashion.

facto membership is a "win-win" for the U.S. and the ICC).

151. *Id.*

152. Douglass Cassel, *The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step*, 6 BROWN J. WORLD AFF. 41, 42 (1999), available at <http://www.iccnw.org/documents/CasselRomeTreaty.pdf> ("Before going into effect, the treaty must be ratified by 60 states. Especially in view of U.S. opposition, that will take years, at minimum."); Michael Montgomery, *The United States Versus the International Criminal Court*, AMERICAN RADIOWORKS, <http://americanradioworks.publicradio.org/features/justiceontrial/icc.html> (last visited Aug. 19, 2013) (expressing "surprise" that the requisite 60 ratifications occurred so quickly when so many thought it would take "years").

153. See Hussein Solomon, *ICC Needs U.S. Support*, BITTERLEMONS-INTERNATIONAL (Aug. 14, 2008), <http://www.bitterlemons-international.org/inside.php?id=980> (inferring that the "absence of the U.S." at the ICC could "damn" it like it did to the League of Nations).

154. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

155. Fairlie, *supra* note 133, at 548; David Crane, International Law Symposium Keynote Address: *When You Get to the Fork in the Road, Take It: Reflections on Fifteen Years of Developments in Modern International Criminal Law*, 8 LOY. U. CHI. INT'L L. REV. 1, 9 (2010).

156. The ICTY is a helpful explanatory parallel. Like the ICC, after ten years of its existence, there were significant criticisms of its work on many levels. Claude Jorda, *The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn From Them*, 2 J. INT'L CRIM. JUST. 572, 582 (2004); Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT'L CRIM. JUST. 558, 559-67 (2004); Stuart Ford, *The ICC Turns Ten: Evolution and Development*, JURIST (July 6, 2012), <http://jurist.org/forum/2012/06/dan-scheffer-us-icc.php>. Yet today, roughly twenty years after its creation, the ICTY has arrested or otherwise addressed all of its 161 indictees. Press Release, Office of the Prosecutor, Statement of the Office of the Prosecutor, Int'l Crim. Tribunal for the Former Yugoslavia on the Arrest of Goran Hadžić (July 20, 2011), available at <http://www.icty.org>.



This point is particularly important as the advantages of the U.S.'s "*de facto*" membership only go so far.<sup>157</sup> The real benefits of membership reside within the ICC family. Primarily, U.S. ratification would result in acquiring a vote in the ASP, the ICC's legislative and governing body.<sup>158</sup> More than just the ability to cast a single vote, the U.S. can marshal its voting power to persuade other countries more forcefully than its current observer role permits. As a voting member, it could better sway other countries on the wide range of critically important topics addressed by the ASP, such as amendments to the ICC law and procedures and the selection of the most qualified ICC judges and prosecutors.<sup>159</sup> Likewise, as a State Party, the U.S. would also have a more meaningful dialogue with the Court and other State Parties on a number of essential operational and administrative issues.<sup>160</sup> Lastly, only from within the ICC can the U.S. best address others regarding its main concerns, namely prosecution strategies.<sup>161</sup>

#### 6. *Ensure American Human Capacity and Competence in International Criminal Law*

The most overlooked problem with U.S. non-ratification of the Rome Statute, and deeply related to the section immediately above, is the institutional and symbolic restrictions it places on American judges, prosecutors, lawyers, and other staff from working at the ICC.<sup>162</sup> There are currently multiple American prosecutors, lawyers, visiting professionals, and interns at the ICC; however, the future presence of Americans at the ICC is far from a foregone conclusion.

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org/sid/10734. The Tribunal is also considered a resounding success for accountability and international criminal law. Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT'L L. 321, 324–25 (2012). In comparison, the ICC has a far larger mandate in many respects than the ICTY, which means its potential impact is also far larger. Concededly, the ICTY had the strong backing of the U.S., but with 121 committed State Parties and a growing presence on the international stage, the ICC will inevitably evolve and improve along the way.

157. Scheffer, *supra* note 150.

158. Rome Statute, *supra* note 2, art. 112 (7).

159. *Id.* arts. 36, 42, 51; Gallarotti & Preis, *supra* note 13, at 4, 17; Kip Hale, *The Price We Must Pay for International Criminal Justice*, HUFFINGTON POST (Nov. 19, 2012), [http://www.huffingtonpost.com/kip-hale/international-criminal-court-funding\\_b\\_2149834.html](http://www.huffingtonpost.com/kip-hale/international-criminal-court-funding_b_2149834.html).

160. A.B.A., *Recommendation that the United States Government Accede to the Rome Statute of the International Criminal Court*, at 1 (2001), available at [http://www.iccnw.org/documents/ABARes\\_onUSFeb01.pdf](http://www.iccnw.org/documents/ABARes_onUSFeb01.pdf).

161. Risch, *supra* note 21, at 11.

162. *See infra* note 163.

Despite a regulatory preference for applicants from State Parties,<sup>163</sup> American lawyers and other professionals are hired by the Court based upon their degrees from the well-respected American legal and graduate education system, work experience in highly sophisticated American public and private enterprises (e.g., law firms and U.S. Attorney offices) and, most importantly, unique experience working on similarly complicated international criminal cases at UN *ad hoc* and hybrid international tribunals. Due to substantial U.S. support of these other tribunals, Americans generally have more experience in the practice of international criminal law than most other nationalities.<sup>164</sup> These uniquely similar experiences have ensured American candidates a place at the ICC, because these other tribunals are unparalleled training and proving grounds for ICC work.

Yet, Americans will not long maintain this expertise at present course. First, American advanced education and law firm experiences are not limited to Americans. More acutely, the other international criminal tribunals, while operational for many years, are only temporary and set to close in the next several years.<sup>165</sup> The pool of opportunities to gain international criminal experience is narrowing for professionals of all nationalities, as a result. Inversely, ICC positions become increasingly more competitive. Ten years from now, the ICC will likely be the only international criminal tribunal in existence, and one that still prefers hiring applicants from State Parties. Without the opportunity to gain useful experience from the other international criminal tribunals, the justification to employ Americans at the ICC despite the regulatory preference will cease, and the number of Americans at the ICC will dwindle steadily.

The practical repercussions of U.S. non-State Party status will extend beyond negatively impacting the number of jobs that Americans can get at the ICC. With opportunities in international criminal law becoming fewer than for most other nationalities, the next generation of internationally experienced American judges, prosecutors, attorneys, and other

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163. ICC-ASP Res., Staff Regulations of the International Criminal Court, Annex to the Resolution (4), ICC-ASP/2/Res.2 (Sept. 12, 2003), [http://www.icc-cpi.int/NR/rdonlyres/3119BD70-DFB6-4B8C-BC17-3019CC1D0E21/140182/Staff\\_Regulations\\_120704EN.pdf](http://www.icc-cpi.int/NR/rdonlyres/3119BD70-DFB6-4B8C-BC17-3019CC1D0E21/140182/Staff_Regulations_120704EN.pdf).

164. *See, e.g.*, Press Release, Int'l Crim. Ct., ICC Prosecutor Fatou Bensouda appoints Patricia Sellers, Leila Sadat and Diane Marie Amann as Special Advisers (Dec. 12, 2012), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr861.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr861.aspx) (all three special advisers are American); Press Release, Harvard Univ. Law School, Whiting to Join International Criminal Court (July 13, 2010), [http://www.law.harvard.edu/news/2010/07/13\\_whiting.icc.html](http://www.law.harvard.edu/news/2010/07/13_whiting.icc.html).

165. Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 *LOY. U. CHI. INT'L L. REV.* 13, 13–14 (2010).

professionals will be far fewer in number and lower in competence. Furthermore, it is these professionals with experience in the practice of international criminal law that become competent, informed advisors to the U.S. government on international criminal justice and related matters. Stephen Rapp, the current U.S. Ambassador at large for Global Criminal Justice who has extensive working experience at the ICTR and SCSL, is a perfect example.<sup>166</sup> Ten to twenty years from now the U.S. government will not have such informed advisors as Ambassador Rapp at its disposal.

The most costly ramification is that the U.S. government will simply have no human connection to the ICC. The lack of Americans at the ICC will make the Court appear progressively more and more foreign and distant to the U.S. government, and also give it limited, if any, means to gain insight into the ICC. For the U.S. to avoid this “brain drain” in international criminal law, it must work towards greater engagement with, and ultimately membership in, the ICC.

#### *B. Reasons for the ICC to Improve Relations with the U.S.*

##### *1. Gain Robust and Unique U.S. Support*

Thus far, the previously discussed benefits of a more open and supportive relationship between the U.S. and the ICC has centered on added value to the U.S. The ICC, however, has much to gain from such improvements to the relationship as well, including possible future U.S. ratification. As discussed, the ICC is no different than any other international institution in that it is the sum of its parts. Said differently, it is generally as good as the quality of the support it receives from States. This reality does not mean the ICC is fully at the whim of States or fails to contribute to its own perpetuation or future. Nonetheless, it remains true that the ICC depends on States, especially given that it requires States to carry out its core criminal enforcement functions.<sup>167</sup>

Accordingly, the ICC has a vested interest in building up the U.S.-ICC relationship, and in the long term, the ratification of one of, if not, the world’s most dynamically powerful countries. The U.S. government and its people offer a comprehensive array of diplomatic, financial, political, human, and logistical resources that, if fully dedicated to the ICC and its

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166. *Biography: Stephen J. Rapp*, U.S. DEPT. OF STATE, <http://www.state.gov/r/pa/ei/biog/129455.htm> (last visited Feb. 11, 2013).

167. Rene Blattmann & Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT’L CRIM. JUST. 722, 723 (2008).

processes, would significantly increase the Court's overall effectiveness and efficiency in carrying out its lofty mandate.<sup>168</sup> The real world benefits to the ICC would be numerous: U.S. financial contributions would be an immense boost to the ICC's underfunded budget;<sup>169</sup> American diplomatic pressure and political support of the ICC would contribute prominently to the systematic increase in cooperation and support to the Court from countries around the world;<sup>170</sup> and U.S. logistical, intelligence, military, and human resources that would be assigned to assist ICC investigations, prosecutions, and adjudications would immediately raise the quality and outcomes of such ICC activities.<sup>171</sup>

Of course, aside from direct financial support, the ICC can receive several types of support from the U.S. given its *ad hoc*, "case-by-case" arrangement with the Court.<sup>172</sup> For instance, the U.S. has helped, *inter alia*, in investigative, witness protection, and fugitive apprehension matters.<sup>173</sup> Despite this fact, the relationship still remains *ad hoc* and case-by-case, subject to fundamental change at any moment. Moreover, it means that the U.S.—unlike its relationship with the UN *ad hoc* and internationalized tribunals—is not deeply invested in the success of the ICC or its activities. While it is not the sole burden of the ICC to persuade the U.S. to improve their relationship and potentially ratify the Rome Statute, it is imperative that the U.S. understands that its sustained non-State Party status is neither in its interest—as stated above—nor in the interest of the international criminal justice movement. While the U.S. efforts to institute a culture of accountability in and outside of the ICC are laudable,<sup>174</sup> a fragmented system of international criminal justice benefits no one. The ICC and its core doctrine of complementarity comprise the

168. Gallarotti & Preis, *supra* note 13, at 1, 29 n.65; Am. Soc'y of Int'l Law, Transcript, Release of the ASIL Task Force on the ICC Report [hereinafter ASIL Report Transcript], <http://www.asil.org/files/ASILTskForce032709Transcript.pdf> (last visited Aug. 19, 2013) (discussing the report's conclusions, which includes statements from Patricia Wald, former ICTY judge, and David Tolbert, former ICTY senior official, about the importance of the U.S.'s unique resources to the ICTY's effectiveness and efficiency that the ICC could greatly use).

169. Rebecca Hamilton, *Member Countries Fight over International Court's Budget*, REUTERS (Dec. 11, 2011), [http://newsandinsight.thomsonreuters.com/Legal/News/2011/12\\_-\\_December/Member\\_countries\\_fight\\_over\\_international\\_court\\_s\\_budget/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Member_countries_fight_over_international_court_s_budget/).

170. ASIL Report Transcript, *supra* note 168.

171. *Id.*

172. Ambassador Stephen J. Rapp, Statement by the United States of America to the Assembly of States Parties of the International Criminal Court (Nov. 15, 2012) (transcript available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-USA-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-USA-ENG.pdf)); Harold Hongju Koh, Keynote Justice Address at the Vera Institution of Justice, The Paley Center (Nov. 8, 2012) (transcript available at <http://www.vera.org/files/harold-koh-justice-address-2012.pdf>).

173. *See supra* note 172.

174. *See id.*

consensus system in place, and the sooner the U.S. is convinced that it should be a formal and/or proactive member of that system, the sooner it will benefit the ICC and international community.<sup>175</sup>

#### V. BREAKING THE CIRCLE

Having discussed the benefits that each would derive from greater cooperation and a more sustained relationship, we now turn to practical changes that can be implemented to bring about perceptible change to the U.S.-ICC circular conundrum. Stalemates are, by definition, notoriously hard to resolve with this cyclical issue being no different: the U.S. will not invest its resources in full until the ICC gets better, which the ICC cannot do easily without the help of States like the U.S. Typically, such impasses are fixed by a radical, overnight change that reconfigures the equation, forcing the actors to reassess.<sup>176</sup> However, the U.S.-ICC conundrum is unlikely to see such a radical shift.<sup>177</sup> The U.S. will not become an unabashed ICC advocate, let alone a State Party, with all things staying the same. Likewise, the ICC will not *quickly* become a vastly improved institution with all things staying the same. Without a doubt, the ICC has more than sufficient backing to develop and cultivate greater international support, yet that day would certainly come far more rapidly with the full support and investment of a country like the U.S.

Instead, it is preferable to chart a course that elevates U.S.-ICC relations to new heights and does so sooner rather than later. One such possible course requires both the U.S. and ICC to take “*incremental leaps of faiths*” towards each other and towards the betterment of the relationship. These incremental leaps are steps that are meaningful and demonstrate real change, but are politically achievable and acceptable in a still delicate relationship. These signs of good faith will both allow for real change in the relationship, yet also test the proverbial waters politically to explore further progress, the latter being especially relevant for the U.S.

The timing is right for such incremental changes. President Obama, who improved relations with the ICC in his first term, was elected to a

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175. SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 95, 115–16.

176. For example, the Reagan Administration ratified the Genocide Convention 40 years after the U.S. signed the convention, only after a public relations disaster committed by his administration. SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 161–63 (Harper Perennial ed., 2003).

177. Fairlie, *supra* note 133, at 558–60; John Washburn & Matthew Heaphy, *US Participation in ICC Review Conference Indicates New Supportive Policy*, JURIST (Jan. 30, 2010), <http://jurist.org/hotline/2010/01/us-participation-in-icc-review.php>; see ASIL US-ICC Task Force, *supra* note 115, at 41.

second term, and his administration can use the next two years to build up enough momentum to accomplish progress. The ICC has continued to establish itself on the international stage with cases that the U.S. supports. Additionally, the ICC has a new Prosecutor, Fatou Bensouda, who has the ability to soothe uneasy minds in Washington D.C. and overly cautious ones in The Hague.<sup>178</sup>

#### A. *Recommendations to the U.S.*

##### 1. *Remove the Bolton Letter*

Currently, the Bolton letter serves as the footnote to the U.S.'s signature on the Rome Statute, and reads as follows:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.<sup>179</sup>

Read in conjunction with Article 18 of the Vienna Convention on the Law of Treaties that obligates States that have signed a treaty to "refrain from acts which would defeat the object and purpose" of that treaty,<sup>180</sup> the Bolton letter effectively states that the U.S. need not refrain from defeating the object and purpose of the Rome Statute, which is to end impunity for genocide, crimes against humanity, and war crimes.<sup>181</sup> The U.S.'s words and actions are contrary to this legal nuance. For that reason alone, the letter deserves to be withdrawn or otherwise nullified.<sup>182</sup>

For the U.S., however, removing the Bolton letter carries political risks. The executive decision to remove the letter would befall the

178. Rick Gladstone, *A Lifelong Passion Is Now Put to Practice in The Hague*, N.Y. TIMES, Jan. 18, 2013, at A7; Mark Kersten, *The ICC Got an African Prosecutor: Does it Matter?*, JUSTICE IN CONFLICT (Jan. 5, 2012), <http://justiceinconflict.org/2012/01/05/the-iccs-got-an-african-prosecutor-does-it-matter/>.

179. The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (copy of the Rome Statute with footnotes); Bolton Letter, *supra* note 57.

180. Vienna Conventions on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

181. Rome Statute, *supra* note 2, pmbl.

182. Bolton Letter, *supra* note 57.

common, yet weak refrain against President Obama that he acts without consulting others.<sup>183</sup> It also increases the risk of inflaming those within the U.S. that are vehemently opposed to anything “international” and find such multilateral efforts to be an assault on U.S. sovereignty.<sup>184</sup> Conversely, cautious proponents of the ICC in the U.S. may advise that the U.S. can avoid these political concerns altogether, because there is no legal need to pull the letter.<sup>185</sup> If and when the U.S. decides to be a State Party, it could submit its letter of accession to the Rome Statute with the U.N. and simultaneously include its repudiation of the Bolton letter.

This advice, however, overlooks two considerations. First, it presupposes that the U.S. joining the ICC will come in one fell swoop as opposed to a slow build up, an especially tenuous assumption when U.S. history of joining treaties militates towards the latter.<sup>186</sup> Second, withdrawing the Bolton letter presents a political opportunity for President Obama to frame the debate. On this point, the ICC’s international justice mission enjoys conceptual support from both sides of the political aisle in the U.S.<sup>187</sup> It is only a vocal minority of reflexive anti-internationalists and its ability to raise the concerns of others—particularly the U.S. military brass—through misinformation that is behind the perceived undercurrent of anti-ICC sentiment in the U.S.<sup>188</sup> President Obama has the advantage of choosing a time for the letter’s removal, as well as the time to fashion a strong statement to frame the debate and neutralize opposition—a strong suit of his. Accordingly, this suggested manner of handling the Bolton letter would not only be feasible, but also has all the makings of a political win for the President.

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183. See, e.g., *Obama, GOP Trade Barbs in Health Care Fight*, CNN (July 20, 2009), <http://edition.cnn.com/2009/POLITICS/07/20/health.reform/index.html> (complaining that Obama did not “reach out” to GOP).

184. See, e.g., Brett D. Schaefer & Steven Groves, *The ICC Review Conference: A Threat to U.S. Interests*, HERITAGE FOUNDATION: BACKGROUNDER (May 28, 2010), <http://www.heritage.org/research/reports/2010/05/the-icc-review-conference-a-threat-to-us-interests>.

185. See Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS (May 2002), <http://www.asil.org/insigh87.cfm> (implying that the Bolton letter is only an expression not to ratify, but does not bind the U.S. to refrain from ratifying).

186. The U.S. has a track record of taking decades to ratify treaties that it signs. Jenny S. Martinez, *There are Two Ways at Looking at Sovereignty*, N.Y. TIMES (Dec. 6, 2012), <http://www.nytimes.com/roomfordebate/2012/12/06/have-treaties-gone-out-of-style/with-un-treaties-there-are-two-ways-to-look-at-sovereignty>.

187. For example, eighteen U.S. Senators, both Republican and Democratic, encouraged President Clinton to sign the Rome Statute. Letter from U.S. Senators to President William J. Clinton (Dec. 21, 2000), available at [http://www.amicc.org/docs/Senate12\\_00.pdf](http://www.amicc.org/docs/Senate12_00.pdf).

188. Schaefer & Groves, *supra* note 184; *More Bad Anti-ICC Arguments*, FOREIGN POLICY ASS’N (Aug. 20, 2010), <http://foreignpolicyblogs.com/2010/08/20/more-bad-anti-icc-arguments/> (demonstrating the reflexive nature of anti-ICC arguments and that this reflects the minority of Americans).

If the U.S. were to withdraw or otherwise nullify the Bolton letter, it would send a clear message to the international community that the U.S.-ICC relationship has a firmer foundation than its current *ad hoc* arrangement. Eliminating the Bolton letter to the Secretary-General of the UN would not only have symbolic significance for the U.S.-ICC relationship, but would recognize the Court in a formal manner and legally reinstate the U.S. intention to ratify.<sup>189</sup> Additionally, it would help undercut those who assail the reputation of the U.S. as a global leader on human rights and rule of law.<sup>190</sup> Lastly, as it would only require the consent of the Obama administration, re-activating the U.S. signature on the Rome Statute—while not completely devoid of politics—would be practically very achievable.<sup>191</sup>

## 2. *Develop Positive U.S. Interagency Policy on the ICC*

At present, the U.S. government does not have a policy that guides the U.S. executive branch, and its multitude of agencies, on the ICC. A government-wide policy that promotes the ICC and the relevant U.S. interests would certainly add political and diplomatic value to the U.S.-ICC relationship. The true value, however, would be from the process of the policy's creation and the subsequent benefit of the entire U.S. government making decisions from the same positive policy statement.<sup>192</sup>

The various executive branch agencies—notably the White House, State Department, Department of Justice, and Department of Defense—have taken varied positions on the ICC, sometimes at odds with each other.<sup>193</sup> Effective improvements to U.S.-ICC relations require that the U.S. government create a forum for opposing views within the government to be aired, misunderstandings corrected where they exist, and agreements forged.<sup>194</sup> The process of developing an interagency policy is that opportunity. Furthermore, with a government as large, diverse, and

189. While the U.S. could simply accede to the Rome Statute in one step, removing the Bolton letter would have the added benefit of reinstating the U.S.' intention to ratify. Aurélie Coppin, *Status of the U.S. Signature on the Rome Statute of the International Criminal Court*, AM. NON-GOV. ORGS. COAL. FOR THE INT'L CRIM. CT. (Sept. 11, 2008), [http://www.amicc.org/docs/US\\_Signature.pdf](http://www.amicc.org/docs/US_Signature.pdf).

190. Luke A. McLaurin, *Can the President "Unsign" a Treaty? A Constitutional Inquiry*, 84 WASH. U. L. REV. 1941, 1976 (2006); Risch, *supra* note 21, at 2, 12; SAIS JOHN HOPKINS US-ICC REPORT, *supra* note 7, at 104.

191. ASIL US-ICC Task Force, *supra* note 115, at 29–32 (explaining that the President can unilaterally reverse course on the "unsigned" Bolton letter).

192. *Id.* at 23–24.

193. Scheffer, *supra* note 8, at 163–98 (detailing the numerous positions taken by various agencies in the lead up and during the Rome conference in 1998).

194. *See id.*



interconnected as the U.S. government, the outcome of such an exercise allows the U.S. government to speak with one voice on the U.S.-ICC relationship and help coordinate cross-agency consistency in its activities relevant to the ICC. This unified voice will clearly identify the government's view on the positives as well as the remaining concerns with the ICC and the relationship writ large, and also ensure control over relations with the ICC that cautious minds in the U.S. would want.<sup>195</sup>

The current timing could not be better for the government to shape such an interagency policy. Specifically, the government is already undergoing a consensus bridging and policy forming exercise on a subject matter perfectly on point: the Atrocity Prevention Board. After announcing the recommendations of the National Security Advisor's review, there has been a government-wide effort to develop and institutionalize "an effective atrocity prevention and response strategy."<sup>196</sup> Creating this kind of "strategy" is a perfect opportunity for various government actors to come together to define a policy and establish how the U.S. will interact with the ICC. Lastly, and most importantly, the reputation and knowledge of the ICC is at an all-time high in the U.S. government, particularly with the recent expansion of the U.S. Rewards for Justice Program to include ICC indictees.<sup>197</sup> It is important that a U.S. inter-agency policy on the ICC be comprehensively supportive, accurate, and overall positive towards the Court. Now is the best political time to attain such a pro-ICC policy.<sup>198</sup>

### 3. *Eliminate Anti-ICC Legislation*

The effects of President George W. Bush administration's attack on the ICC, as described above, are still felt in the form of a mosaic of anti-ICC legislation. Fortunately, in the latter part of his presidency, President Bush signed into law several repeals of anti-ICC legislation.<sup>199</sup> Nonetheless, two primary pieces of anti-ICC legislation remain: ASPA and FSA. Both laws

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195. *Id.* at 23–24, 29–32.

196. Press Release, Presidential Study, *supra* note 142.

197. See Jennifer Trahan, *U.S. Cash Rewards Program to Include International Criminal Court Arrests*, OPINIO JURIS (Jan. 10, 2013), <http://opiniojuris.org/2013/01/10/u-s-cash-rewards-program-to-include-international-criminal-court-arrests/>.

198. See, e.g., Gabe Joselow, *US Official Says Kenya Election Has 'Consequences'*, VOICE OF AM. NEWS (Feb. 7, 2013), <http://www.voanews.com/content/us-official-says-kenya-elections-have-consequences/1599063.html> (inferring that there are consequences for Kenya to elect two current ICC indictees, and that "United States is not a signatory to the court, but does support what it stands for.").

199. *Anti-ICC Legislation Generally*, AM. NON-GOV. ORGS. COAL. FOR THE INT'L CRIM. CT., <http://www.amicc.org/usicc/legislation> (last visited Feb. 11, 2013).

are severe impediments to U.S.-ICC relations and are the most practically damaging, as they limit the scope of the U.S. government's ability to support the ICC even if it wants to help. These laws also handcuff U.S. diplomats and politicians in carrying out American policy, leaving them unable to incentivize other States to cooperate with the ICC in cases of U.S. interest.<sup>200</sup> In order to achieve a mutually beneficial US-ICC relationship, the relationship needs a clean slate unencumbered by legislative complications. As noted by a senior Bush administration official, the U.S. should reevaluate these laws because their purposes are no longer relevant.<sup>201</sup> Given that most anti-ICC laws have already been repealed or partly eviscerated due to internal governmental disfavor with the legislations' intended and unintended consequences, keeping any anti-ICC legislation is unjustifiable.

Even more so than nullifying the Bolton letter, eliminating these pieces of anti-ICC legislation may inflame ICC opposition in the U.S. Further, unlike the Bolton letter, the executive branch cannot simply revoke these laws. Revoking these laws will also be politically difficult, especially given that one of these laws is labeled the American Service Member Protection Act. Yet, a combination of strong leadership from the Obama administration, clear arguments on the benefits to the U.S., and timely and creative politics<sup>202</sup>—in addition to the help of civil society—will be more than sufficient to repeal such legislation. The priority should be to eliminate FSA first, as the financial prohibition is the most detrimental to U.S.-ICC relations and limiting to the scope of support options available to the U.S.<sup>203</sup> Once this particular legislative breakthrough in U.S.-ICC relations is achieved, the ASPA is more easily addressed politically. In the end, the practical impacts that eliminating these legislative hurdles will have on the ICC will be beneficial to the U.S. as well, thus justifying the effort to improve the relationship in the first place.

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200. See Rapp Interview, *supra* note 132.

201. Bellinger III, *supra* note 125.

202. For example, in addition to the tactic of inserting a repeal provision into a large omnibus piece of legislation, the Obama administration may consider inserting sunset provisions into ASPA and FSA. Such a tactic would allow for the U.S. government to monitor the ICC (e.g. allow the sunset to go through if the ICC is satisfactorily evolving) and provide political cover to conservative legislators in the short and long term.

203. The ICC has had and continues to have significant budget problems. If the U.S. were able to fund the ICC, it would alleviate major concerns that the U.S. and other States have with the Court, such as sufficient numbers of well-trained staff to discharge the increasingly enlarging ICC workload. See Press Release, Coal. for the Int'l Crim. Ct., ASP Reaches Controversial Compromise on ICC Budget (Dec. 21, 2012) [hereinafter CICC Budget Press Release], available at [http://www.iccnw.org/documents/CICC\\_PR\\_ASP10\\_\\_BUDGET\\_ADOPTION\\_FINAL\\_211211.pdf](http://www.iccnw.org/documents/CICC_PR_ASP10__BUDGET_ADOPTION_FINAL_211211.pdf).

#### 4. Increase U.S. Non-Governmental Actors Support of the ICC

All too often, the U.S.-ICC relationship is seen through the prism of the U.S. government's relationship with the ICC, with civil society encouraging progress in the U.S. government's position.<sup>204</sup> Although this specific dynamic will always need attention, it is imperative that the definition of the "U.S.-ICC relationship" is broadened to include direct assistance from non-governmental actors (i.e., civil society, donor community, corporations, individuals) on a systematic, large-scale basis. The U.S. non-governmental community is unparalleled in the world in many respects,<sup>205</sup> and it behooves this community to commit its resources to the institutional support of the ICC and the Court's ambitious mandate.

The types of assistance at the disposal of the American non-governmental actors are limitless. The American legal community is particularly well positioned to support the ICC. Provided that the Court agrees, large American law firms should offer to sponsor their highly experienced criminal lawyers for short or long-term ICC assignments to assist on, *inter alia*, a particular investigation, trial team, or judicial chamber.

To mitigate the future loss of American lawyers with international criminal experience, American law schools should institute aggressive training programs where committed students receive a thorough academic education in international criminal law. They would then be posted for several years in under-served district attorney or public defender offices around the U.S., where they will gain valuable practical legal skills. After completion, they will be excellent candidates for ICC positions and will have contributed to the U.S. criminal justice system in the process. Moreover, engaged American lawyers need to become "ICC Ambassadors," in that they educate themselves on the ICC and its regime, find *pro bono* opportunities to assist the ICC, and educate their legal and non-legal peers about the Court. Such organic efforts will raise the baseline of familiarity and comfort with the ICC in the U.S.—an important prerequisite to U.S. ratification.

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204. See Letter from the American Branch of the Int'l Law Ass'n, Recommendations for Future U.S. Policy Towards the ICC (Mar. 18, 2010), available at [http://www.iccnw.org/documents/ABILA\\_Letter\\_US\\_policy18Mar2010\\_en.pdf](http://www.iccnw.org/documents/ABILA_Letter_US_policy18Mar2010_en.pdf).

205. Zachary K. Pearce, *Building a 'Civil Society' in the Young American Republic*, HUFFINGTON POST (Mar. 27, 2012), [http://www.huffingtonpost.com/zachary-k-pearce/building-a-civil-society-\\_b\\_1383114.html](http://www.huffingtonpost.com/zachary-k-pearce/building-a-civil-society-_b_1383114.html); see FREEDOM HOUSE, REPORT, FREEDOM OF THE PRESS 2012: UNITED STATES (2012), <http://www.freedomhouse.org/report/freedom-press/2012/united-states> ("The United States has one of the world's strongest systems of legal protection for freedom of the press.").

Just as important as substantive support to the ICC from the American civil society, the American donor community—including corporations—should invest or enhance already existing investments in the ICC, particularly towards its fundamental operations. On top of the publicity benefits, this financial assistance will assist the ICC where it is most needed.<sup>206</sup>

If an impressive cross-section of American non-governmental actors showed solidarity with the ICC, the political ramifications on the U.S. government's relationship with the ICC would be potentially tectonic. A broad base of non-governmental support for the ICC would both neutralize the isolationist rhetoric in the U.S. as well as convince skeptical U.S. politicians and policy makers to reevaluate or change their position on the ICC.

## *B. Recommendations to the ICC*

### *1. Expand ICC Presence in the U.S.*

The types of incremental leaps of faith that the ICC should consider employing are neither structural nor formalistic like those the U.S. should undertake. Rather, the ICC should contemplate two broad informal efforts that will nonetheless be instrumental in improving its relationship with the U.S.: expanding its presence in the U.S.; and responsibly and appropriately expanding the American presence at the ICC.

For the first expansion, one such informal endeavor would be to foster the widespread recognition of the ICC and its formal and informal interlocutors in the U.S. With an effort to ensuring that the message is concise, clear, and accurate,<sup>207</sup> the ICC—as opposed to *just* its cases—<sup>208</sup> needs to be a part of the national American conversation. To do so, the ICC, with the help of its supporters, could embark on a multipronged campaign targeting influential and/or underexposed quarters of the U.S. Given that 70% of Americans believe the U.S. should be a State Party to

206. CICC Budget Press Release, *supra* note 203.

207. The Kony 2012 campaign shows how mass media campaigns related to the ICC must be handled with care and consideration to ensure the avoidance of exploitation or faulty messaging. Anna Holligan, *Invisible Children's Kony Campaign Gets Support of ICC Prosecutor*, BBC NEWS (Mar. 8, 2012), <http://www.bbc.co.uk/news/world-africa-17303179>.

208. *See, e.g., id.*; Peter James Spielmann, *ICC Prosecutor: War Crimes Continue in Darfur; Sudan May Face More Charges*, ASSOCIATED PRESS (Dec. 13, 2012), <http://www.newser.com/article/da3542kg0/icc-prosecutor-war-crimes-continue-in-darfur-sudan-may-face-more-charges.html>.

the ICC, this effort could pay major dividends to the U.S.-ICC relationship.<sup>209</sup>

For instance, the ICC should diligently send high-level representatives and interlocutors to national security, military, and other similar conferences in the U.S. At these conferences, the ICC would have the opportunity to show a presence and engage—as a panelist or active attendee—with influential U.S. constituencies that may have misconceptions or apprehensions of the Court. High ranking ICC representatives should take necessary steps to do appropriate interviews on national and local news outlets as well as American talk shows. Building relationships of trust with these mass media outlets would lead to continual invites for interviews, which would be a major resource for the ICC and its case work as well. These relationships may also pay dividends in expanding the reach of ICC press releases and other newsworthy events. Also, the ICC should proactively seek out a cross-section of U.S. constituencies—from faith-based groups<sup>210</sup> to retired military associations and teacher organizations<sup>211</sup>—to visit the Court, learn more about its jurisdiction and its present cases, and to stay engaged with its activities. Lastly, if responsibly executed, Hollywood’s creativity and appeal could also be utilized to further the ICC’s exposure. Appropriate documentaries and fundraisers would not only benefit the ICC, but also lead to a wider American audience discussing the U.S.-ICC relationship.

## 2. *Reasonably and Appropriately Expand the U.S. Presence in the ICC*

It is obvious that for improvements to any non-State Party’s relationship with the ICC to occur, the State and the ICC must have regular and multifaceted interactions with one another. The U.S.-ICC relationship is no different. However, the U.S.-ICC relationship has unique history that engenders both hope and sensitivities among and between the

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209. Chicago Council on Global Affairs, *Foreign Policy in the New Millennium*, at 23 (2012), available at [http://www.amicc.org/docs/2012\\_CCS\\_Report.pdf](http://www.amicc.org/docs/2012_CCS_Report.pdf); see *American Public Support for the ICC*, AM. NON-GOV. ORGS. COAL. FOR THE INT’L CRIM. CT., <http://www.amicc.org/usicc/opinion> (last visited Feb. 11, 2013).

210. Faith-based groups in the U.S. were instrumental in pushing President Bush to abstain from the UN Security Council vote on the Sudan referral to the ICC. Letter from Evalyn Bassoff *et al.* to George W. Bush, then President of the United States of America (Feb. 4, 2005), available at <http://archive.maryknollogc.org/regional/asia/darfur%20sign%20on%20letter%20for%20website.pdf>.

211. See Letter from Eugene J. Carroll, Jr. to former President of the United States of America William J. Clinton (Dec. 22, 2000), [http://www.amicc.org/docs/RetMilOff12\\_00.pdf](http://www.amicc.org/docs/RetMilOff12_00.pdf) (exhibiting that the support of retired military members can have real impact).

ICC, its State Parties, and the U.S.<sup>212</sup> Some may feel that American presence at the ICC is either already too great or unjustified. The ICC and its State Parties may have every right to react negatively to an increase in American presence at the Court, in light of the general history of international criminal tribunals<sup>213</sup> and the U.S. refusal to join the consensus of the world on a permanent international criminal court. As a result, it is a loaded statement to say that the ICC should consider increasing the U.S.'s presence at the Court.

These legitimate points aside, it remains to the benefit of the ICC and its relationship with the U.S. to find appropriate ways within the confines of its procedures and regulations to invite, permit, or otherwise involve more Americans at the ICC. Likewise, the ICC's cultural receptivity to such an expansion would be a necessity as well. To be clear, this suggestion does not mean that the presence of Americans at the ICC is insufficient to date or that the ICC itself is presently against a U.S. presence in any respect. It is merely to confirm that part and parcel of improving U.S.-ICC relations would require the appropriate expansion, or at least maintenance, of American presence at the ICC.<sup>214</sup>

Such expansion could include the continued use of the visiting professional program to appoint *pro bono* special advisors to the Office of the Prosecutor,<sup>215</sup> the expansion of this practice to other organs of the ICC,

212. See, e.g., Mark Kersten, *A Big Day for the US and the ICC: Rewards for Justice Program Extended*, JUSTICE IN CONFLICT (Jan. 8, 2013), <http://justiceinconflict.org/2013/01/08/a-big-day-for-the-us-and-the-icc-rewards-for-justice-program-extended/>. But see Mark Leon Goldberg, *U.S. Senators Threaten Retaliation for Palestine U.N. Bid*, UN DISPATCH (Nov. 30, 2012), <http://www.undispatch.com/us-senators-threaten-retaliation-against-palestinian-un-bid>.

213. Many international practitioners and commentators of civil law backgrounds believe that most of the UN *ad hoc* and hybrid tribunals (in addition to Nuremberg) were too heavily common law influenced vis-à-vis the United States. As a result, the ICC is often viewed as an improved hybrid between common and civil law in comparison to its UN tribunal brethren. See, e.g., Paul Tavernier, *The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 321 INT'L REV. RED CROSS 605 (1997), available at <http://www.icrc.org/eng/resources/documents/article/other/57jnyy.htm> ("[t]he Statute of the International Tribunal for the former Yugoslavia, which served as a model for that of the Rwanda Tribunal, was drafted by the United Nations Department of Legal Affairs and by common law experts. It is therefore greatly influenced by common law, as already applied in Nuremberg.").

214. The ICC taking such a measure would also be a favor to the U.S. and could be appropriately cast as such. As raised above, the U.S. risks losing its capacity on the practice of international criminal law as other international tribunals close and the ICC is the only tribunal left. In order to help augment that brain drain as well as help U.S.-ICC relations, this effort to expand Americans at the ICC would be a welcomed measure.

215. See, e.g., Press Release, Int'l Crim. Ct., ICC Prosecutor Fatou Bensouda Appoints Patricia Sellers, Leila Sadat and Diane Marie Amann as Special Advisers (Dec. 12, 2012), [http://www.icc-cpi.int/EN\\_Menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pages/pr861.aspx](http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pages/pr861.aspx).

and the appointment of American experts on both legal and non-legal subject matters, such as office communication practices.<sup>216</sup> Ensuring the continued practice of accepting American interns<sup>217</sup> would provide for long-term American interest in the Court and fortify lasting impressions of the ICC on future leaders in the U.S. Provided it has no actual or perceived favoritism and abides by all applicable regulations, the ICC should encourage qualified Americans to apply for open positions in all of its organs.

## VI. CONCLUSION

In terms of complexity, the U.S.-ICC circular conundrum is only overshadowed by the U.S.-ICC relationship itself. The ebbs and flows of the relationship have left a sour taste in the mouths of some and pessimism in the minds of others. As a result, the recently resurrected relationship feels slightly forced and is undoubtedly delicate.

Yet, we should not let the present dictate the future. It is very possible that one day, sooner than expected, this precarious moment in the U.S.-ICC relationship will look just as distant as ratification seems to us today.<sup>218</sup> This sentiment is neither to say that significant hurdles do not exist to achieve even intermediate progress, nor that it will not take substantial investments of advocacy, education, and engagement to see such change. Both are true.

This Article's goal, however, is to show that the gulf between the U.S. and ICC is not created by centuries of philosophical disagreement or old political wars. Rather, the divide is a matter of practicalities: the ability of a new tribunal to fulfill its mandate successfully and earn the trust of States.<sup>219</sup> Given the Article's position that it is a practical matter, bridging the divide seems less daunting and all the more humanly possible. To start building that bridge, both the U.S. and ICC need to start making small changes on their sides of the divide. The incremental leaps of faith are

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216. The receipt of such outside assistance is tied directly with the recommendations for U.S. incremental leaps of faith. See *supra* Part V.A.4, "Increase U.S. Non-Governmental Actors Support of the ICC."

217. *Internships*, INT'L CRIM. CT., <http://www2.icc-cpi.int/Menus/ICC/Recruitment/Internships+and+Visiting+professionals/Eligibility+Requirements/Internships.htm> (last visited Aug. 20, 2013) (does not include State Party eligibility requirement).

218. Fairlie, *supra* note 133, at 573; Mark Kersten, *Obama and the ICC: Four Reasons Not to Hold Your Breath*, JUSTICE IN CONFLICT (Nov. 7, 2012), <http://justiceinconflict.org/2012/11/07/obama-and-the-icc-four-reasons-not-to-hold-your-breath/>.

219. Koh & Rapp Press Statement, *supra* note 54 ("[O]ver time, there's a possibility that we may gain confidence in this institution and that would enable us to move forward.").

attainable gains. In time, these steps will lead each to positive results for both sides: the U.S. will see an improved Court and the ICC will see more steady and robust U.S. support.