

The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage

By
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INTRODUCTION

In the final year of George W. Bush's presidency, proponents of international criminal justice had a reason to be optimistic. The impending change in U.S. administration appeared to signal the end of a then long-standing tension between the United States and the International Criminal Court (hereinafter "ICC" or "Court").¹ After a decade of dormancy, the prospect of the United States joining the ICC appeared to have been surprisingly resurrected, representing a shift in U.S. policy of potentially remarkable magnitude. The possibility of U.S. membership, virtually unthinkable during George W. Bush's two-term presidency, became viable when the 2008 presidential nominations were secured, as each of the leading candidates had publicly expressed their desire to see the United States become a part of the institution.²

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1. Created pursuant to the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

2. Then-Senator and future Republican presidential candidate John McCain was quoted as saying, "I want us in the ICC," although he tempered his comments by expressing dissatisfaction with the Court's safeguards. Press Release, Citizens for Global Solutions, Citizens for Global Solutions Applauds Senator McCain's Support of the ICC (Jan. 28, 2005), *available at* http://archive1.globalsolutions.org/press_room/press_releases/press_releases05/icc_mccain.html. As a Senatorial candidate, Democrat Barack Obama answered "Yes" to the question "Should the United States ratify the Rome Statute of the International Criminal Court?" Citizens for Global Solutions, 2008 Presidential Candidate Questionnaire, Response from Barack Obama,

Now, just over two years into the Obama presidency, the world has witnessed renewed and significant U.S. engagement with the Court. In the wake of senior members of the Obama administration both praising the ICC and lamenting the fact that the United States is not a part of the Court, the United States was represented at the annual meeting of the ICC's Assembly of States Parties—for the first time ever—in late 2009. In mid 2010, a strong U.S. contingency was then sent to Kampala, Uganda to attend the ICC Review Conference as observers.³ Perhaps most remarkably, in February 2011, the United States not only voted in favor of a United Nations Security Council resolution referring the conflict in Libya to the Court,⁴ it actually lobbied other states on the Council to support the referral.⁵

This progress, considered alongside the thus-far non-threatening work of the Court, provides a timely opportunity to consider the future of the U.S. relationship with the ICC. Amidst handshakes and promises of continued cooperation with the ICC, is there a reason to think that the relationship between the United States and the Court will become something more? This article addresses that question.

It does so by first critiquing the shifts in the U.S. approach to the ICC, from the Clinton administration to the Obama administration, in view of the Court's framework and work to date. It then analyzes the recent amendments made to the ICC Statute regarding the controversial crime of aggression. Concluding that in this respect the U.S. delegation's Kampala mission was a qualified success, this article then considers the effect of that outcome on the U.S. perception of the Court. As its final area of inquiry, this article examines the early work of the International Criminal Court in an effort to determine whether the ICC is in fact fulfilling its mission to act as a "court of last resort."⁶

Establishing that the Court is not currently poised to fulfill the role of a "court of last resort," this article posits that there is no present incentive for the United States to ratify the Statute of the Court. Put simply, the ICC's existing approach to case admissibility neither provides adequate evidence that the Court is on a path that assures its anti-impunity goal nor comports with the United

<http://www.globalsolutions.org/08orbust/pcq/obama> (last visited Mar. 22, 2011).

3. The long-awaited meeting presented the first opportunity for the States Parties to amend the Rome Statute, a process in which the U.S. delegation participated actively and arguably with some success. *See infra* section III.

4. S.C. Res. 1970, U.N. SCOR, UN Doc. S/RES/1970 (Feb. 26, 2011). A Security Council referral is one of three ways in which the ICC's jurisdiction can be triggered. *See infra* note 22 and accompanying text. This marked the first time that the United States voted in favor of such a referral.

5. The United States was one of the four states that circulated the resolution referring the situation in Libya to the Court. Edward Wyatt, *Security Council Calls for War Crimes Inquiry in Libya*, N.Y. TIMES, Feb. 26, 2011. "The U.K., France, Germany and U.S. spent eight hours overcoming opposition in the council by several countries to the ICC referral." Joe Lauria, *U.N. Imposes Sanctions on Gadhafi*, WALL ST. J., Feb. 27, 2011.

6. *See infra* section IV B.

States' clear preference to see justice performed at the national level.⁷ Accordingly, this article concludes with some thoughts regarding the changes that will need to be made in order to make U.S. accession a reasonable possibility. It advocates for the Court's prosecutor to facilitate the ICC's anti-impunity mission by focusing solely on situations where justice would not be served other than with the intervention of the ICC. It also recognizes that, difficult though they may be to effectuate, amendments to the ICC Statute by the Assembly of States Parties may be necessary in order to decisively establish that it is national jurisdictions that bear the primary responsibility for prosecuting the egregious crimes that fall within the Court's subject matter jurisdiction.

I. BACKGROUND

A. U.S. Participation in the Drafting Process of the Court's Statute

Despite the relatively short existence of the International Criminal Court, the United States has managed to develop a notably extensive—and somewhat checkered—history with the institution. In the early 1990s, the possibility of U.S. support for a permanent international criminal justice institution seemed unlikely, as the United States then harbored “a residual mistrust of international tribunals.”⁸ However, when confronted by “egregious violations of international law [that might] go unpunished because of a lack of an effective national forum

7. “Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of an international court.” Ambassador David J. Scheffer, War Crimes Tribunals: The Record and the Prospects, Address at the Conference Convocation for the Washington College of Law Conference, in 13 AM. U. INT'L L. REV. 1389, 1396 (1998). Stephen J. Rapp, current Ambassador at Large for War Crime Issues, further noted:

Certainly, the U.S. Government places the greatest importance on assisting countries where the rule of law has been shattered. . . . At the same time, the United States recognizes that there are certain times when justice will be found only when the international community unites in ensuring it, and we have been steadfast in our encouragement for action when the situation demands it.

Speech to Assembly of States Parties, Stephen J. Rapp, Ambassador at Large for War Crimes Issues, United States of America, Nov. 19, 2009, [hereinafter Rapp Speech], available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf. The U.S. preference to see justice performed at the national level is not peculiar to the ICC. See e.g. Goran Sluiter, *Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case*, 8 J. INT'L CRIM. JUST. 365, 367 (2010) (noting a parallel view with respect to Article VI of the Genocide Convention).

8. Michael P. Scharf, *Getting Serious About the International Criminal Court*, 6 PACE INT'L L. REV. 103, 105 (1994). Scharf partially attributes this wariness to the finding of jurisdiction and justiciability by the International Court of Justice in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1984 I.C.J. 392. *Id.* at 105 n.5 (internal citations omitted).

for prosecution,⁹ such as high profile attacks on U.S. peacekeepers by Somali warlords,¹⁰ the U.S. position gave way to an understandable and sharp change in policy.¹¹ In this respect, President Clinton ultimately set the stage for active U.S. participation in the creation of a permanent international criminal court, expressing support for an institution that could serve to fill an unsettling impunity gap and potentially deter atrocity crimes.¹²

The United States went on to play a noteworthy role in the early development of the ICC¹³ and, as the idea of establishing the Court gained momentum,¹⁴ in the creation of its draft statute.¹⁵ Congressional backing for the future court was also strong at that time. In fact, a 1997 joint resolution of Congress called upon the President “to continue to support and fully participate in negotiations at the United Nations [and] to conclude an international agreement to establish an international criminal court.”¹⁶ Complete participation followed, as the United States continued to be an influential party in the drafting of the ICC Statute, later named the Rome Statute, which was ultimately adopted in 1998.¹⁷ Even though the United States voted against the final draft of the

9. Scharf, *supra* note 8, at 109 (quoting Press Release, United States Mission to the United Nations, Statement by the Honorable Conrad K. Harper, United States Special Advisor to the United Nations General Assembly in the Sixth Committee, U.S.U.N. Press Release #171-(93) (1993)).

10. “If U.N. peacekeepers catch Gen. Mohamed Farrah Aidid, the Somali warlord whose munition dumps are periodically blown up by U.S. air forces, no one is quite sure what to do with him. The goal is to arrest him. There is, however, no international law to accuse him of violating, and no court in which to try him.” Don Noel, *Dodd’s Court Would Move the World Closer to the Rule of Law*, HARTFORD COURANT, July 12, 1993, at C11; *see also* Editorial, *A Court for International Outlaws*, N.Y. TIMES, July 6, 1993, at A16 (observing that Somalia’s lack of a functioning government creates an impunity gap for warlords committing crimes against peacekeepers on Somali territory).

11. Scharf, *supra* note 8, at 109 (describing the shift as “a major U.S. policy and strategy reversal on the issue of an ICC”).

12. “[The creation of a permanent court would] send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions.” John F. Harris, *Clinton Pushes for U.N. War Crimes Tribunal*, WASH. POST, Oct. 16, 1995, at A4. (quoting Clinton).

13. “From 1995 to 1998, the United Nations General Assembly convened two committees to produce what was called a “consolidated text” of the Draft Statute for the Establishment of an International Criminal Court (ICC).” M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 443 (1999) (internal citations omitted).

14. *See e.g.* G.A. Res. 51/207, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (Dec. 17, 1996) (reaffirming the mandate of the Preparatory Committee on the Establishment of an International Criminal Court and calling for a 1998 conference of plenipotentiaries “with a view to finalizing and adopting a convention on the establishment of an international criminal court”).

15. Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of the International Criminal Court*, 91 AM. J. INT’L L. 177, 178 (1997) (noting that the US took “the most active role” on many of the major issues addressed in 1996).

16. 103 H.R.J. Res. 89, 105th Cong. (1997).

17. *See, e.g.*, Bartram S. Brown, *The Statute of the ICC: Past, Present and Future in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND*

Statute,¹⁸ it maintained a prominent position in the later work of the Preparatory Commission,¹⁹ helping to develop both the Elements of Crimes and the Rules of Procedure and Evidence designed to direct the work of the Court.²⁰

B. *The Rome Statute*

The Rome Statute grants the Court subject matter jurisdiction over war crimes, crimes against humanity, genocide, and the crime of aggression.²¹ In order for the Court to exercise jurisdiction over one or more of these crimes, an investigation must be “triggered.” The Court’s prosecutor must either receive a referral of a situation by a State Party or by the Security Council, or must make an independent determination to initiate an investigation.²² Investigations initiated on the prosecutor’s own motion (*proprio motu*) require authorization from the Court’s Pre-Trial Chamber,²³ a judicial filter designed to add an element of accountability to the prosecutor’s investigatory choices. Except in the

INTERNATIONAL LAW 61, 109 (Sarah B. Sewell & Carl Kaysen, eds., 2000) (attributing to Theodor Meron, a U.S. citizen-advisor at the Rome Conference, the observation that the statute’s due process protections and mens rea requirements “reflected a strong American influence” and that much of the Court’s substantive law caused him to conclude that “American fingerprints are all over [the] document”); *see also* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 73 (2001-02) (maintaining that “the United States achieved many of its negotiating objectives at the Rome Conference”); William A. Schabas, *United States Hostility to the International Criminal Court: It’s All About the Security Council*, 15 EUR. J. INT’L L. 701, 709 (2004) [hereinafter Schabas, *Security Council*] (crediting the United States with having positively contributed to the drafting of the Rome Statute as to both its substantive and procedural law).

18. “There were a few very fundamental issues which either have to be accommodated within the treaty text or they present very severe difficulties for the United States government. . . . [A]ccommodations were not achieved in the negotiations, and therefore we were not in a position to support the text as it came out of Rome.” *On the Record Briefing at Foreign Press Center*, Federal Document Clearing House, Jul. 31, 1998, available at 1998 WL 431804 (statement of David Scheffer, then Ambassador-At-Large Designate For War Crimes Issues) [hereinafter Scheffer statement]. The issues that precluded U.S. approval are considered in greater detail *infra* section II A.

19. As a signatory to the Final Act in Rome, a document that acknowledges the events of the Rome Conference and was signed by nations that participated in its negotiations, the U.S. earned the right to be a part of the Commission. Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, Congressional Research Service Report, Report RL 30020, at 23 (updated Jan. 6, 1999), available at <http://fortunaty.net/org/wikileaks/CRS/wikileaks-crs-reports/RL30020.pdf>.

20. Scheffer, *supra* note 17, at 74.

21. Rome Statute, *supra* note 1, art. 5(1). At present, the Court can only exercise jurisdiction over war crimes, crimes against humanity, and genocide; the Court will not be able to exercise jurisdiction over the crime of aggression until at least Jan. 1, 2017. Resolution RC/Res.4, Annex I, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, art. 15 *bis* (2) and (3); 15 *ter* (2) and (3) [hereinafter Amendments to the Rome Statute]. The definition of the crime of aggression and its jurisdictional reach is discussed at length, *infra* section III.

22. Rome Statute, *supra* note 1, art. 13 (a)-(c).

23. *Id.* art. 15(3) and (4).

case of a Security Council referral, the Court's exercise of jurisdiction is limited by the requirement of either personal or territorial jurisdiction. As such, the Court has the authority to hear cases involving nationals of states that are parties to the Statute, as well as those involving crimes allegedly committed on the territories of states that are parties to the Statute.²⁴ It is this latter aspect that makes it possible for nationals of states that are not a party to the Rome Statute to be prosecuted before the ICC. However, any state, regardless of its membership status, may preclude the Court from exercising jurisdiction over a case by conducting a genuine, domestic investigation into the matter and, if necessary, a prosecution.²⁵ To this end, at the behest of the United States,²⁶ the Statute's preamble stresses "the duty of every state to exercise its jurisdiction over those responsible for international crimes."²⁷

II.

THE U.S. AND THE ICC: A TALE OF THREE ADMINISTRATIONS

A. *The Signing of the Rome Statute and Clinton's Concerns*

The United States became a signatory to the treaty at the close of 2000 under then-President Clinton. While President Clinton's accompanying statement reiterated U.S. commitment to international accountability and the prosecution of those alleged to have violated the crimes within the Court's subject matter jurisdiction, it also concluded that the Rome Statute contained "significant flaws."²⁸ Specifically, President Clinton cited the Court's claim of jurisdiction over nationals of non-party states, concern regarding "unfounded charges" being brought against U.S. officials, and the resultant prospect of "politicized prosecutions."²⁹

The first noted flaw was frequently cited by the United States from an early stage,³⁰ despite there being arguably little basis for the criticism. With the exception of matters referred by the Security Council, the ICC is only able to hear a case involving a U.S. national (i.e. a national of a non-party state) if the

24. *Id.* art. 12(2).

25. *Id.* art. 17 (1) (a), (b) and (c).

26. Jeffrey L. Bleich, *Complementarity*, 25 DENV. J. INT'L L. & POL'Y 281, 285 (1996-1997).

27. Rome Statute, *supra* note 1, preamb. ¶ 6, art. 1 (stressing that the ICC is complementary to domestic justice systems).

28. Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), available at http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html.

29. *Id.*; see also Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999); William K. Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*, 64 L. & CONTEMP. PROBS. 119 (2001); Schabas, *Security Council*, *supra* note 17, at 709-712 (2004).

30. See Scheffer statement, *supra* note 18; see also David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

alleged crime takes place on the territory of a state party.³¹ In the same way, a national of the United States would be subject to the jurisdiction of a second state if accused of having committed a crime on its territory.³² As a result, this argument against signing the Statute has a primarily visceral appeal,³³ suggesting that the shift in the U.S. position—from Court proponent to critic—was more likely attributable to an unstated motive.³⁴

In this respect, commentators have noted that U.S. opposition to the ICC surfaced at a time when early plans for the Court, which featured a prominent role for the United Nations Security Council (“Security Council” or “UNSC”), gave way to a different vision in which the Security Council was comparatively sidelined.³⁵ Rather than employ an approach that essentially dictated prior UNSC approval of every ICC investigation and prosecution,³⁶ the draft statute was ultimately revised in such a way that the UNSC has more limited abilities. As amended, the UNSC shares with States Parties and the ICC prosecutor the power to trigger the Court’s jurisdiction with respect to a situation³⁷ and also has the authority to defer for a period of twelve months an ICC investigation or prosecution by way of a Chapter VII Resolution.³⁸

There is no doubt that this transformation significantly altered the playing field for the United States. *Ex ante*, UNSC approval would have meant that no ICC investigation could proceed without at least the tacit approval of each permanent Security Council member,³⁹ of which the United States is one.⁴⁰ This approach would have given the United States indirect control over the ICC docket, thereby assuring that no American would be prosecuted at the Court without U.S. consent. To attain the same outcome with an *ex post* deferral, however, the United States would have to successfully lobby the support of the

31. Rome Statute, *supra* note 1, art. 12(2)(a).

32. “The principle that the courts of the place where the crime is committed may exercise jurisdiction has achieved universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300 (3d ed. 1979).

33. For a different perspective, see Ruth Wedgwood, *The Irresolution of Rome*, 64 *LAW & CONTEMP. PROBS.* 193, 199 (2001) (arguing that, at least in cases “where the charged conduct consists of the faithful execution of official policy, the state remains a real party in interest”).

34. Schabas, *Security Council*, *supra* note 17, at 712-17.

35. *Id.* at 717.

36. While this method was not affirmatively prescribed, the original draft language had the effect that an ICC prosecution would not be possible unless the Security Council decided to make it so. Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(B) and 16 in THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS* 143, 149-50 (Roy S. Lee, ed., 1999).

37. Rome Statute, *supra* note 1, art. 13.

38. *Id.* art. 16. See also Schabas, *Security Council*, *supra* note 17, at 717.

39. U.N. Charter art. 27, para. 3. (requiring “an affirmative vote of nine members *including the concurring votes of the permanent members*” in order for the Security Council to render a decision on non-procedural matters).

40. *Id.* art. 23, para. 1.

four remaining permanent members in order to secure a resolution to that effect.⁴¹ In this respect, as Professor William Schabas rightly notes, the eleventh hour U.S. opposition to the Court was “all about the Security Council.”⁴² At the same time, however, the loss of *ex ante*, UNSC control and the U.S. concern about being the target of politicized prosecutions at the ICC can be viewed as two sides of the same coin.⁴³

This loss of power must also be considered in light of the more or less concurrent decision to instill the Court’s prosecutor with independent, or, in the words of the Statute, “*proprio motu*,” investigatory powers,⁴⁴ in contrast to U.S. efforts to tightly constrain the prosecutor’s authority.⁴⁵ Although a judicial filter was added to address concerns about inappropriate *proprio motu*

41. See, e.g., Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASK. L. REV. 275, 291 (2000). This alteration caused one American to speculate that what was really driving the so-called “middle powers” at Rome was the prospect of “increasing their relative influence by inhibiting and controlling militarily powerful nations.” Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 101 (2003); see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 26 (3rd ed., 2007) (acknowledging that “the Rome Statute was an attempt by many states to effect indirectly what could not be done directly, namely, reform of the United Nations and amendment of [its] Charter”).

42. Schabas, *Security Council*, *supra* note 17.

43. It bears mentioning that *ex ante*, UNSC control was also lacking with respect to the exercise of jurisdiction by the predecessors to the ICC, the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), whose statutes likewise enabled them to exercise jurisdiction over U.S. nationals on the basis of territorial jurisdiction. See, e.g., U.N. Secretary General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, at 36 (May 3, 1993). Admittedly, the fact that both of these institutions have enjoyed broad U.S. support makes the U.S. argument with respect to the ICC appear disingenuous. Schabas, *Security Council*, *supra* note 17, at 710. Yet it is not clear that this aspect of the Tribunals’ jurisdiction was considered at the time of drafting. David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1010, 1023 (2008). In fact, after the ICTY Prosecutor’s NATO investigation made it apparent that U.S. nationals were potentially vulnerable to prosecution at the Tribunals, the statute drafted for the Special Court for Sierra Leone (SCSL), which in other respects closely followed that of the ICTY and ICTR, effectively precluded a similar type of investigation at the SCSL. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion*, 3 J. INT’L CRIM. JUST. 162, 184 (2005). Moreover, from 2003 onwards, the hands of the ICTY and ICTR prosecutors have been similarly tied. Completion strategies imposed by the UNSC have directed the two tribunals to ensure that they only confirm indictments of “the most senior leaders suspected of being the most responsible for crimes within the[ir respective] jurisdiction[s].” *Id.* at 185.

44. Rome Statute, *supra* note 1, art. 15 (1). The decision to expand the triggering of ICC investigations to include the independent prosecutor’s decision to investigate emerged at the last Preparatory Committee meeting before Rome. Jelena Pejic, *The International Criminal Court Statute: An Appraisal of the Rome Package*, 34 INT’L LAW. 65, 77 (2000).

45. Pentagon Letter to Military Attaches, Urgent Request for Engagement with Counterparts on the International Criminal Court, Mar. 31, 1998, in Congressional Research Service Report, *supra* note 19 at 31 (informing foreign military attaches that it was the U.S. goal to “preclude the creation of a so-called *proprio motu* (independent) prosecutor with unbridled discretion to start investigations”).

investigations,⁴⁶ U.S. concerns remained and were perhaps intensified by the prediction that investigations initiated by the prosecutor would be the primary mechanism by which matters would come before the Court.⁴⁷ The combination of these factors gave rise to concerns about a worst case scenario in which “a politically motivated prosecutor might attempt to convict the United States in the court of public opinion of a violation of international law, by charging one of its military or civilian officials with war crimes, crimes against humanity, or genocide, using the accused as a proxy for the United States.”⁴⁸

B. The Bush Administration

1. Bush's First Term: Unsigning and Antipathy

Notwithstanding U.S. concerns about the ICC, President Clinton concluded that signatory status would best position the United States “to influence the evolution of the Court.”⁴⁹ The effect of Clinton’s signature to the Rome Statute, however, was relatively short-lived. Rather than utilize this signatory role as Clinton had intended,⁵⁰ the Bush administration (in)famously “unsigned” the Rome Statute approximately a year and a half later,⁵¹ indicative of—and further

46. Rome Statute, *supra* note 1, art. 15 (4). A *proprio motu* investigation cannot be initiated without judicial authorization.

47. “The principal argument was that the proposed court would be unlikely to have much work if it relied upon States Parties and the Security Council to trigger its jurisdiction.” SCHABAS, *supra* note 41, at 160; *see also id.* at 143 (noting that referrals made by a state party were considered unlikely, given the historical reluctance of states to lodge complaints against one another).

48. Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT’L L. 124, 129 (2001); *see also* Giovanni Conso, *Are There Hopes of Reconciliation? The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*, 3 J. INT’L CRIM. JUST. 314 (2005); Congressional Research Service Report, *supra* note 19, at 13 (expressing the concern of some U.S. officials that states with “anti-American sentiments” might attempt to use the Court to thwart “responsible U.S. military actions on their territory” or to “subvert U.S. diplomatic efforts”); Goldsmith, *supra* note 41, at 96-97 (positing that the two plausible explanations for U.S. concerns about the Court are the remote possibility of the prosecution of U.S. troops and the sully of the U.S. international reputation by engaging in an investigation).

49. Statement by the President, *supra* note 28.

50. “I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.” *Id.*

51. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to UN Secretary General Kofi Annan (May 6, 2002), http://www.lb9.uscourts.gov/webcites/08documents/Abagninin_bolton.pdf. The move was likely precipitated by the 60th ratification of the Statute, made less than one month prior, which ensured that the ICC would become operational in July 2002. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT’L L. 683, 687 (2003); *see also* Edward T. Swain, *Unsigning*, 55 STANFORD L. REV. 2061 (2003) (defending the decision to “unsign”). Sudan has since followed the U.S. lead in this regard, “unsigning” the Statute in August 2008. *See* Letter from Deng Alor Koul, Minister for Foreign Affairs for the Republic of Sudan (Sept. 8, 2008), http://untreaty.un.org/English/CNs/2008/601_700/612E.pdf. A staunch opponent of the

engendering—the intensity of U.S. dislike for the International Criminal Court. This move was arguably predictable, given that President Bush chose John Bolton as Undersecretary for Arms Control and International Security.⁵² Prior to assuming the role, Bolton had publicly espoused his thoughts on the Court, calling its Statute “pernicious and debilitating.”⁵³

In the early years of George W. Bush’s presidency, Bolton, “the architect of the government’s campaign against the Court,”⁵⁴ successfully turned existing U.S. unease with the ICC to flat-out antagonism by seizing upon the fear of politicized prosecutions and amplifying the importance of distinctions between U.S. and ICC practices.⁵⁵ In addition, Bolton questioned the worth of the institution, predicting that it would be incapable of contributing to deterrence.⁵⁶ Bolton further argued that the ICC Statute inappropriately altered the balance of authority for the maintenance of international peace and security from the Security Council to the ICC, leaving U.S. civilian and military leaders “potentially at risk” and subject to “an unaccountable prosecutor” and “unchecked judicial power.”⁵⁷

The Bush administration also aimed to isolate and undermine the Court.⁵⁸

Court in the face of the Security Council referral of the situation in Darfur, Sudan no doubt wished to liberate itself from its signatorial obligation not to defeat the object and purpose of the Rome Statute. Vienna Convention on the Law of Treaties, art. 18(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

52. Bolton’s sway over Bush was “greater than his title would ordinarily imply because [Bolton] was perceived to have helped Bush win the 2000 presidential election.” John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals*, 18 EUR. J. INT’L L. 277, 293 (2007).

53. John R. Bolton, *Reject and Oppose the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES 37, 37 (Alton Frye, ed., 1999) [hereinafter Bolton, *Reject and Oppose*].

54. Anne K. Handel, *The Counterproductive Bush Administration Policy toward the International Criminal Court*, 2 SEATTLE J. FOR SOC. JUST. 345, 364 (2004).

55. At the time, debate on the Court was “define[d] by the Administration . . . and counter-arguments [were] not being heard.” Washington Working Group for the ICC, *Fact Sheet: US Public Opinion and the ICC*, at 4, October 2003, available at http://www.amicc.org/docs/WICC_USpublicOp.pdf (last visited Mar. 31, 2011).

56. “Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke.” John R. Bolton, Under Sec’y for Arms Control and Int’l Sec., Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/dos/dos111402westmnt.html>.

57. *Id.* (noting further that the attempted marginalization of the Security Council is a “fundamental new problem created by the ICC that will have a tangible and highly detrimental impact on the conduct of U.S. foreign policy”).

58. For example, the National Security Strategy announced during George W. Bush’s first term in office provided that: “We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept.” John R. Bolton, Under Sec’y for Arms Control and Int’l Sec., Remarks to the Am. Enter. Inst.: American Justice and the International

Attempts to weaken the ICC's effect included creating so-called "Article 98 agreements,"⁵⁹ bilateral immunity agreements that preclude the consenting state from surrendering "current or former U.S. government officials, military and other personnel" to the Court.⁶⁰ Moreover, in a strong legislative parallel to the hostility advanced by the executive branch, Congress adopted the American Service-Members' Protection Act (ASPA).⁶¹ Subject to certain delineated exceptions, the Act prohibits American cooperation with the Court,⁶² authorizes the use of "all means necessary" to secure the release of Americans held by or for the ICC,⁶³ and prohibits military assistance to certain ICC States Parties who refuse to enter into Article 98 agreements.⁶⁴

2. Bush's Second Term: A Warming Towards the Court

George W. Bush's second term in office, however, began with decidedly less antagonism toward the Court. Most notably, the United States decided to abstain from voting on the Security Council referral of the situation in Darfur to

Criminal Court (Nov. 3, 2003), available at http://stage.amicc.org/docs/Bolton11_3_03.pdf (declaring that the ICC has unacceptable consequences for national sovereignty and describing the bilateral agreements designed to ensure that other states do not hand over American citizens to the ICC).

59. Article 98 of the Rome Statute provides that the Court may not proceed with a request for surrender "which would require the requested state to act inconsistently with its obligations under international agreements[.]" Rome Statute, *supra* note 1, art. 98(2).

60. These agreements were negotiated by the United States with more than 100 countries. The term "other personnel" includes non-U.S. nationals and therefore includes foreign sub-contractors working for the United States. Coalition for the International Criminal Court (CICC), *Status of US Bilateral Immunity Agreements (BIAs)* (2006), available at http://www.iccnw.org/documents/CICCFB_BIAstatus_current.pdf (last visited Mar. 31, 2011) (containing a comprehensive list of the states that signed or ratified such agreements as of 2006).

61. 22 U.S.C. § 7421 et seq. (2002).

62. This is tempered by the "Dodd Amendment," found in Sect. 2015 of the law, which provides that "[n]othing 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."

63. *Id.* at § 2008. This aspect of the Act earned the ASPA the nickname "The Hague Invasion Act." See, e.g., *'Hague Invasion Act' Becomes Law*, HUMAN RIGHTS WATCH (Aug. 3, 2002), <http://www.hrw.org/en/news/2002/08/03/us-hague-invasion-act-becomes-law>.

64. § 2007 prohibits U.S. military assistance to States Parties to the Rome Statute, but provides for exceptions when deemed by the President to be in the U.S. national interest, when the State Party has signed an Article 98 agreement with the United States and with respect to NATO and non-NATO major allies. That the Act for the most part remains good law lies at odds with the U.S.'s present engagement with the ICC. See *infra* section II(C); see also *Eight Initiatives the Obama Administration Should Take on International Justice*, HUMAN RIGHTS WATCH (Mar. 2, 2009), <http://www.hrw.org/en/news/2009/03/02/eight-initiatives-obama-administration-should-take-international-justice> ("urg[ing] the Obama administration to signal its opposition to all remaining provisions of ASPA. This will . . . remove a potential stumbling block for the US to assist the court in individual investigations").

the International Criminal Court.⁶⁵ In the wake of the strong anti-ICC campaign, the decision to abstain was unexpected and, perhaps naturally, was perceived to signal a major change in the U.S.'s relationship with the Court. While there was certainly support for this perspective,⁶⁶ there were likewise indications that the abstention was hardly the beginning of a truly new era.⁶⁷ First, at the insistence of the United States, the UNSC Resolution referring the Darfur situation to the Court included controversial paragraphs designed to shield U.S. nationals from prosecution and to preclude the use of UN moneys to finance the relevant investigations and prosecutions.⁶⁸ The United States also successfully lobbied for the inclusion of a preambular reference to Article 98 agreements, an effort seemingly designed to legitimize the U.S. practice of securing them.⁶⁹ In

65. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc SC/8351 (Mar. 31, 2005).

66. *See, e.g.*, Press Briefing on Sudan, Robert Zoellick, Deputy Sec'y of State (May 27, 2005) (asserting that the Security Council referral "send[s] a signal about accountability" and that it's a useful deterrence [sic] against others").

67. The abstention was accompanied by vows of continuing opposition to the institution. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor, U.N. Press Release SC/8351 (Mar. 31, 2005) (noting that "[a]lthough [the United States] delegation had abstained on the Council referral to the Court, it had not dropped, and indeed continued to maintain, its long-standing and firm objections and concerns regarding the Court.") Moreover, the abstention was secured only after alternative American efforts had failed. *US Fiddles over ICC While Darfur Burns*, HUMAN RIGHTS WATCH (Jan. 31, 2005), <http://www.hrw.org/en/news/2005/01/31/us-fiddles-over-icc-while-darfur-burns> (noting that the US had attempted to garner support for the creation of a hybrid tribunal in Africa in lieu of a referral because, per then-U.S. ambassador-at-large for war crimes, Pierre-Richard Prosper, "We don't want to be a party to legitimizing the ICC.") Further, the Resolution ensured that jurisdiction over U.S. nationals was effectively precluded by any non-U.S. court and U.S. Article 98 agreements were acknowledged. S.C. Res. 1593, *supra* note 65, ¶ 6 and preamb.

68. S.C. Res. 1593, *supra* note 65, ¶¶ 6, 7; *see also* SCHABAS, *supra* note 41, at 155-9; Jennifer K. Elsea, *U.S. Policy Regarding the International Criminal Court*, Cong. Research Service Report, Report RL 31495, 25-26 (2006) (updated) (noting that the US abstention might be seen as an endorsement of the type of court the United States wanted rather than a softening towards the Court proper). It bears mentioning here that virtually identical provisions to ¶¶ 6 & 7 of S.C. Res. 1593 can be found in the recent Security Council resolution referring the situation in Libya. S.C. Res. 1970, *supra* note 4, ¶¶ 6, 8. This suggests that the U.S. decision to lobby for and affirmatively support this most recent referral may not be as dramatic a turnaround as it otherwise might seem.

69. "The Security Council... *Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute..." S.C. Res. 1593, *supra* note 65, preamb. In this respect, consider the comments made by Brazil's UNSC representative:

The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue.

U.N. SCOR, 60th Sess., 5158 mtg. at 11, U.N. Doc. S/PV.5158 (Mar. 31, 2005); *see also* The Remarks of the Danish UNSC Representative. *Id.* at 6 (maintaining that the reference to Article 98 agreements is "purely factual" and that the resolution evidences a "genuine and valid compromise"). By contrast, S.C. Res. 1970 contains no reference to Article 98 agreements.

addition, the U.S. abstention was followed by actions taken on behalf of the administration that were decidedly anti-ICC, such as Bolton's request that all references to the ICC be deleted from the outcome document of the 2005 World Summit⁷⁰ and the continued pursuit of Article 98 agreements throughout Bush's second term.⁷¹

Moreover, while President Bush's final year in office included noteworthy support for the prosecutions arising from the situation in Darfur,⁷² his presidency also ended with the conspicuous absence of U.S. participation in the then-ongoing process of establishing a definition of the crime of aggression,⁷³ despite the unquestionable importance of this issue to U.S. interests.⁷⁴ Perhaps the U.S. avoided participation because it might have been viewed as an endorsement of the ICC proper, as opposed to the evidently "pragmatic exploitation"⁷⁵ of the institution with regard to the situation in Darfur.⁷⁶ A sufficiently comprehensive assessment of Bush's second term leads to the conclusion that the administration's shift on the ICC had more to do with opportunism and a growing awareness that the Court was not likely to go by the wayside than it was indicative of a genuine sea change. Indeed, older, more hostile views⁷⁷ toward the Court appear to have had a lingering effect, with U.S. engagement with the Court exercised only infrequently and when all else

70. See, e.g., Paul H. Brietzke, *Playing Poker at the U.N.*, 27 PENN ST. INT'L L. REV. 317, 342 (2007).

71. For example, an Article 98 agreement was secured from Montenegro in 2007, less than one year after the state came into being. See Letter from U.S. Embassy at Podgorica to Ministry of Foreign Affairs of the Republic of Montenegro (Apr. 17, 2007), available at <http://www.ll.georgetown.edu/guides/documents/Montenegro07-102.pdf>.

72. A seminal example lies in the U.S. decision to abstain on UNSC Res. 1828 because of its notation that the Security Council "intend[ed] to consider" the request from the African Union that it defer the ICC case against Sudanese President Al Bashir. S.C. Res. 1828, ¶ 9, U.N. Doc. S/RES/1828 (Jul. 31, 2008). For a discussion on this issue, see Annalisa Ciampi, *The Proceedings Against President Omar Al Bashir and the Prospects of their Suspension Under Article 16 ICC Statute*, 6 J. INT'L CRIM. JUST. 885, 887 (2008). For a comprehensive list of acts and statements that evidence the Bush Administration's support for the Darfur-related prosecutions, see The American Non-governmental Organizations Coalition for the International Criminal Court, *Chronology of U.S. Opposition to the International Criminal Court: From "Signature Suspension" to Immunity Agreements to Darfur*, 3-8 (updated Feb. 12, 2010) available at <http://www.amicc.org/docs/US%20Chronology.pdf>.

73. On this issue, see *infra* section III.

74. See, e.g., Patricia M. Wald, *Is the United States' Opposition to the ICC Intractable?* 2 J. INT'L CRIM. JUST. 19, 24 (2004).

75. Cerone, *supra* note 52, at 304.

76. "By the time the U.S. came under severe pressure to drop its proposal for an ad hoc 'Sudan Tribunal' to handle what it termed the 'genocide' in Darfur, it was clear that the U.S. hostility towards the ICC was not achieving its purpose. Far from undermining the ICC, the Bolton-inspired policies appeared to enhance its credibility." Jose Alvarez, *The Evolving U.S.-ICC Relationship*, 24 ASIL Newsletter 1 (2008), <http://www.asil.org/newsletter/president/pres080320.html>.

77. Many of the stronger anti-ICC advocates had by this time left the Administration or lost their influential roles. Cerone, *supra* note 52, at 304.

failed.⁷⁸

C. *A New Era under Obama*

Viewed in this way, Obama advisor Harold Koh was not wrong to note that under the Obama administration the default on the U.S. relationship with the Court has been “reset from hostility to positive engagement.”⁷⁹ Compared to the so-called warming at the close of the Bush era, it is clear that the United States has come a long way in improving its relationship with the Court. The Obama administration announced in its first year that it would review the U.S. policy on the ICC.⁸⁰ At the same time, officials in the Obama administration publicly praised the Court’s potential and expressed interest in supporting its investigations.⁸¹

This paved the way for speculation that the new regime would reaffirm former President Clinton’s commitment to the Rome Statute,⁸² an idea that was later bolstered when Secretary of State Clinton conveyed disappointment over the U.S.’s status as an ICC outsider.⁸³ The United States then participated for

78. Indeed, the individual who served as U.S. Ambassador at Large for War Crimes at the close of the Bush presidency in 2008 remarked that his office sought first to support the relevant domestic system, then to explore hybrid tribunal options and [f]inally, when other options are not available, we consider international courts, including the ICC.” Clint Williamson, *U.S. Efforts to Combat Genocide and War Crimes*, 16 TUL. J. INT’L & COMP. L. 321, 327 (2008). Williamson makes the same argument in a separate writing, highlighting the creation of such hybrid courts as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. Clint Williamson, *When the Fighting Stops*, 38 SETON HALL L. REV. 1253, 1262-63 (2008).

79. Harold Hongju Koh, Legal Advisor, U.S. Dep’t. of State, Special Briefing: U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/s/wci/us_releases/remarks/143178.htm [hereinafter *U.S. Engagement*]; see also Salvatore Zappala, Editorial, 8 J. INT’L CRIM. JUST. 327, 327 (2010) (noting that “a new mood in the United States, exemplified by the Obama administration’s policy of so-called ‘positive engagement’ . . . promises to herald in our view a new era for the ICC”).

80. Press Release, U.S. Department of State, Daily Press Briefing (Feb. 12, 2009) (noting also that the administration supported the work of the Court in relation to the situation in Darfur). These representations comport with then-candidate Obama’s campaign position which signaled the coming of a new era with regard to the Court. See Citizens for Global Solutions, 2008 Presidential Candidate Questionnaire, Response from Barack Obama, available at: <http://www.globalsolutions.org/08orbust/pcq/obama> (promising cooperation with regard to the situation in Sudan as well a thorough review to determine whether the US should join the ICC).

81. See LEE FEINSTEIN & TOD LINDBERG, MEANS TO AN END: U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT 48 (2009) (containing statements made by Secretary of State Hillary Rodham Clinton and U.S. Permanent Representative to the UN, Susan Rice).

82. Nicholas Kralev, *US Warms to Global Court*, WASH. TIMES, Apr. 30, 2009, available at <http://www.washingtontimes.com/news/2009/apr/30/us-warms-to-global-panel/?page=1> (positing that, while it is likely that the US will affirm its earlier signature, “it may be years before the United States joins [the] institution”).

83. “This is a great regret that we are not a signatory [to the Rome Statute of the International Criminal Court]. 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.” Ewen MacAskill, *Clinton: It is a ‘Great Regret’*

the first time as an observer at the Eighth Annual Meeting of the ICC's Assembly of States Parties (ASP),⁸⁴ "the clearest sign [at that time that] Washington [was] engaging with the Court."⁸⁵ In the wake of that meeting, the United States began to take additional steps towards forging a relationship with the ICC, likely hoping to repair its international reputation along the way,⁸⁶ by offering to assist with the institution's investigations and prosecutions.

The United States has since announced that it stands ready to protect the witnesses required to testify against top Kenyan officials at the Court.⁸⁷ The Obama administration has also proactively sought out meetings with the ICC prosecutor and other ICC officials in order to determine how the United States can best help the institution.⁸⁸ Increased engagement was further demonstrated by a significant U.S. showing at the ICC Review Conference in Kampala in mid-2010,⁸⁹ President Obama's reprimand of an ICC State Party for its failure to cooperate with the Court⁹⁰ and, most recently, in the U.S. decision to vote in

the US is Not in International Criminal Court. Hillary Clinton, the Secretary of State, Signals Shift by the US in Favour of the International Criminal Court, THE GUARDIAN, Aug. 6, 2009, available at <http://www.guardian.co.uk/world/2009/aug/06/us-international-criminal-court>; see also *Washington Hints It Might Favor Joining International Court*, RADIO FREE EUROPE, Aug. 7, 2009 (observing that "that the Obama administration already is cooperating with the court in a clear break with Washington's previous policy of ignoring it").

84. Rapp Speech, *supra* note 7. The Assembly of States Parties provides management oversight and is the legislative arm of the Court. It is required to meet annually and may also hold special sessions. Rome Statute, *supra* note 1, art. 112.

85. Aaron Gray-Block, *U.S. Makes Debut Attendance at Hague War Crimes Court*, REUTERS, Nov. 19, 2009.

86. See, e.g., Elsea, *supra* note 68, at 29 (noting that cooperating with the ICC "would enhance the reputation of the United States as a promoter of human rights and the rule of law"). This is seemingly part of a larger campaign aimed at strengthening U.S. international diplomacy as part of a strategy for global leadership. U.S. Secretary of State Hillary Rodham Clinton, Remarks on United States Foreign Policy (Sept. 8, 2010), <http://www.state.gov/secretary/rm/2010/09/146917.htm>.

87. This offer came before the related ICC investigation was even officially underway. Alan Boswell, *U.S. to Help Protect Kenyan Violence Witnesses*, VOA NEWS, Feb. 11, 2010, <http://www.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html>.

88. Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Regarding Stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010), <http://usun.state.gov/briefing/statements/2010/138999.htm>. The need for this assistance is strong. "We have our shopping list ready of requests for assistance . . . from the American government." Statement of Beatrice Le Fraper Du Hellen, Special Advisor to the Prosecutor at the ICC, *Seeking Global Justice*, CNN's Amanpour (Transcript), Mar. 24, 2010, <http://archives.cnn.com/TRANSCRIPTS/1003/24/ampr.01.html>. Unsurprisingly, at the top of the list is a request for U.S. operational support to facilitate the execution of the arrest warrants that have been issued by the ICC. *Id.*

89. The U.S. delegation in attendance at the Review Conference included representatives from the National Security Council, Uniformed Services, and the State, Justice, and Defense Departments. *U.S. Engagement*, *supra* note 79. This showing is a far cry from the "few mid-level career lawyers[] tasked to engage minimally in the discussions on the crime of aggression" under President Bush in 2001. Scheffer, *Staying the Course*, *supra* note 17, at 62.

90. *Obama "Disappointed" Kenya Hosted Sudan's Bashir*, AGENCE FRANCE PRESSE, Aug.

favor of referring the situation in Libya to the ICC.⁹¹

1. *The Influence of Ideology*

At first blush, the disparity between the Bush and Obama approaches toward the Court might appear to have a straightforward explanation. Bush was an anti-internationalist who surrounded himself, primarily, with anti-internationalists.⁹² Obama, on the other hand, is clearly invested in remedying America's international reputation, vowing to do what is right "because there is no force in the world more powerful than the example of America," and rejecting unilateralism as a non-starter.⁹³ President Obama has appointed individuals who stand ready to support his agenda accordingly⁹⁴ and who proudly distinguish this administration from the last "with respect to its approach and attitude toward international law."⁹⁵

It would be a mistake, however, to put the change in U.S. tenor toward the Court down to ideology alone.⁹⁶ One must also bear in mind that the Obama administration came into power with two advantages over the Bush administration: the benefit of hindsight and the absence of any negative history with the Court. Owing to the former, the Obama administration is in a better position to assess existing U.S. reservations about the Court in light of the ICC's ongoing work than its predecessor was.

27, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5gBZwsGDmXZU-zu4szjFinzqkKVWg>.

91. See *supra* notes 4 and 5 and accompanying text.

92. See, e.g., Cerone, *supra* note 52, at 304; see also Philippe Sands, *Lawless World: The Cultures of International Law*, 41 TEX. INT'L L.J. 387, 392 (2006).

93. "[W]e are showing the world that a new era of engagement has begun. For we know that America cannot meet the threats of this century alone, but the world cannot meet them without America." Barack Obama, President, U.S., Address to Joint Session of Congress (Feb. 24, 2009), http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress (concluding that "in our hands lies the ability to shape our world for good or for ill").

94. See, e.g., Harold Hongju Koh, *The U.S. Constitution and International Law*, 98 AM. J. INT'L L. 43 (2004); Harold Hongju Koh, *American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); see also: Transcript, *Obama's National Security Team Announcement*, N.Y. Times, Dec. 1, 2008, <http://www.nytimes.com/2008/12/01/us/politics/01text-obama.html> (including then President-elect Obama's comment that the members of the team he assembled "share [his] pragmatism about the use of power and [his] sense of purpose about America's role as a leader in the world" and relevant remarks from Hillary Clinton, such as "America cannot solve . . . crises without the world, and the world cannot solve them without America.").

95. Harold Hongju Koh, Legal Advisor, U.S. Department of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

96. This conclusion comports with the findings of a recent assessment of U.S. attitudes towards International Criminal Courts and Tribunals. U.S. support generally turns on such issues as Security Council control, a preference for domestic prosecutions and a commitment to accountability; the "ideological leanings of those in power" may have an impact, but one that tends to be "moderated over time." Cerone, *supra* note 52, at 314.

2. ICC Investigations and Sovereignty Concerns

Significantly, a survey of the early work of the ICC does not bear out the concern that the United States—or indeed any state—is apt to be unfairly targeted by the Court. In fact, at the start of the Obama administration, the only situation under consideration at the ICC that was fraught with Court-state tension was that of Darfur, brought within the jurisdiction of the Court by the earlier mentioned Security Council referral.⁹⁷ Remarkably, the “dangerous” *proprio motu* investigatory powers of the ICC prosecutor were never used prior to Obama taking office. They have since been used only one time with, at least initially, apparent state support⁹⁸ in the situation in the Republic of Kenya.⁹⁹

Interestingly, the remainder of the ICC’s investigations and cases has come before the Court in a way that had not been previously anticipated: the triggering

97. See S.C. Res. 1593, *supra* note 65 and accompanying text. Although subject to still unfolding developments, it may well be that the most recent Security Council referral will similarly engender hostility from the territorial state. Whether Libya will ultimately oppose ICC investigations and prosecutions appears to depend upon the identity of its future government, a matter of some uncertainty as the article goes to press. Alan Greenblatt, *Leaders of the Libyan Opposition Emerge*, NPR, Mar. 14, 2011. The ICC investigation presently focuses on Muammar al Gadaffi and his inner circle. Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya (Mar. 3, 2011), available at http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf. The ongoing conflict in Libya appears to have prevented any official response to the referral, but it seems fair to surmise that the consequent ICC investigation will be opposed by the Gadaffi regime if it remains in power.

98. “Kenya itself mooted the possibility of ICC investigations for the violence, although it was ultimately taken up by the Prosecutor on his own accord after delays on the part of Kenyan authorities to take appropriate action against those suspected of the violence.” Max du Plessis, *The African Union, the International Criminal Court and al-Bashir’s Visit to Kenya*, INST. FOR SEC. STUDIES (Sept. 15, 2010), http://www.issafrica.org/iss_today.php?ID=1025. Both political sides in Kenya later expressed willingness to cooperate with the ICC. *Prosecutor Seeks Ok on Kenya Inquiry*, HUMAN RIGHTS WATCH (Nov. 26, 2009), <http://www.hrw.org/en/news/2009/11/26/icc-prosecutor-seeks-ok-kenya-inquiry>. The official position of the Kenyan government has recently changed, however, with its filing of the first ever state challenge to the admissibility of an ICC case. Situation in the Republic of Kenya, Case Nos. ICC-01/09-01/11 and ICC 01/09-02/11, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>.

99. In the wake of post-election violence in Kenya, a Commission of Inquiry was formed. As a result of its investigation, a list of alleged perpetrators of crimes against humanity was ultimately handed over to the ICC prosecutor. Antonina Okuta, *National Legislation for the Prosecution of International Crimes in Kenya*, 7 J. INT’L CRIM. JUST. 1063, 1064-65 (2009). After the government’s failure to establish a domestic criminal tribunal to prosecute the relevant crimes, presumably owing to internal division, the ICC Prosecutor requested that the Pre-trial Chamber authorize his investigation into the matter. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>. An outright self-referral of the situation was not feasible as it “would have been a de facto admission that Kenya is unable to prosecute the perpetrators, and that would have put [it] under the umbrella of failed states.” Nick Wadhams, *After Kenyan Stalling, the ICC Will Investigate Post-Election Riots*, TIME, Nov. 6, 2009, available at <http://www.time.com/time/world/article/0,8599,1935921,00.html> (quoting Hassan Omar Hassan, head of the Kenyan National Commission on Human Rights).

of ICC jurisdiction by way of “voluntary referrals,”¹⁰⁰ in which member states have asked the prosecutor to investigate situations involving rebel bands within their borders.¹⁰¹ The first such referral came from Uganda in late 2003.¹⁰² Uganda’s decision to refer a situation that took place on its own territory appears to have opened the door to the second voluntary referral, rendered by the Democratic Republic of Congo (DRC) some months later, in relation to killings in its Ituri region.¹⁰³ The following year, the Central African Republic followed suit.¹⁰⁴ At this point, it is logical to consider why half of the investigations undertaken at the ICC have been initiated through an unanticipated channel.

a. The Practice of the Prosecutor

Shortly after assuming office in 2003, Luis Moreno-Ocampo, the ICC’s first prosecutor, noted the challenges he would face in putting together a case as an “outsider” to a conflict, recognizing that investigations would not be easy to conduct and that state support would be an imperative factor to achieving success.¹⁰⁵ In making this prediction, Moreno-Ocampo no doubt considered the hardships encountered by his counterparts at the two predecessors to the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁰⁶ and the

100. “[T]here had never been even the slightest suggestion in the drafting history of the [Rome] Statute that a State might refer a case ‘against itself. . . .’” William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L. F. 5,7 (2008) [hereinafter Schabas, *Complementarity*].

101. SCHABAS, *supra* note 41, at 36. See also Claus Kress, *Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy*, 2 J. INT’L CRIM. JUST. 944 (2004).

102. Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L L. 403, 403 (2005).

103. Prior to the referral, the situation had captured the interest of the Prosecutor. “In September 2003 the Prosecutor informed the States Parties that he was ready to request authorization from the Pre-Trial Chamber to use his own powers to start an investigation [into the situation in the DRC], but that a referral and active support from the DRC would assist his work.” Press Release, ICC, Office of the Prosecutor of the International Criminal Court Opens First Investigation, ICC Doc. ICC-OTP-20040623-59 (June 23, 2004); see also SCHABAS, *supra* note 41, at 42; Akhavan, *supra* note 102, at 405-406.

104. Press Release, ICC, Prosecutor Receives Referral Concerning Central African Republic, ICC Doc. ICC-OTP-20050107-86 (Jan. 7, 2005), available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Central+African+Republic.htm>. More than two years passed before the Prosecutor opened an investigation. Press Release, ICC, Prosecutor Opens Investigation in the Central African Republic, ICC Doc. ICC-OTP-20070522-220 (May 22, 2007), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB>. The delay between referral and investigation was the result of the Prosecutor’s decision to monitor the development of referring country’s justice system. SCHABAS, *supra* note 41, at 52.

105. International Criminal Court, *Paper On Some Policy Issues Before the Office of the Prosecutor* 2 (Sept. 2003) [hereinafter Moreno-Ocampo, 2003 Paper], http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

106. Established under the Statute of the International Tribunal for the Prosecution of Persons

International Criminal Tribunal for Rwanda (ICTR).¹⁰⁷ Like Moreno-Ocampo, ICTY and ICTR prosecutors have had to rely on the cooperation of states and state-like entities in order to perform their investigative and prosecutorial functions. In practice, this has frequently meant an uphill battle, in which prosecutors have struggled in their efforts to investigate crimes in hostile environments, effectuate the arrest of indicted persons, and obtain evidence from obstructive states.¹⁰⁸

As a result, an annex to a 2003 paper penned by Moreno-Ocampo anticipated the possibility of either minimizing or circumventing these difficulties. After introducing the novel concept of a voluntary referral, a referral by a state of a situation on its territory, Moreno-Ocampo shared the view that, in such cases,

the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.¹⁰⁹

Moreno-Ocampo later revisited this issue in 2006, by which time his vision was becoming a self-fulfilling prophecy. The Court's docket in its entirety then consisted of three so-called "self-referrals," arising from situations in Uganda and the Democratic Republic of Congo, with a like referral by the Central African Republic awaiting prosecutorial authorization, and one lone Security Council referral regarding the situation in Darfur. Moreno-Ocampo's three years as prosecutor confirmed the numerous impediments he anticipated, causing him to cite as "exceptional logistical difficulties" safety issues, on-going violence, language barriers and inaccessibility to certain territories.¹¹⁰ At the same time, he opined that "[t]he method of initiating investigations by voluntary referral has increased the likelihood of important cooperation and on-the-ground

Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, annex (1993).

107. Established under the Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).

108. See generally Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403 (2004); see also James A. Goldston, *More Candour about Criteria*, 8 J. INT'L CRIM. JUST. 383, 396 (2010) (noting that "the reality is that the ICC Prosecutor is substantially more dependent on state cooperation than his ICTY and ICTR counterparts").

109. International Criminal Court, Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications 5 (2004), http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf.

110. The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 – June 2006) 7-8, (Sept. 12, 2006), http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf.

support.”¹¹¹

The prosecutorial benefit to proceeding in this manner is apparent when compared with Moreno-Ocampo's work in relation to Darfur, the one matter in which the prosecutor was then definitively, and not by his own choosing, operating at odds with the territorial state. At the same time that the prosecutor enjoyed the advantages inherent to the “voluntary referrals” made by Uganda, the DRC, and the Central African Republic,¹¹² he was initially unable to get his Sudan investigation off of the ground. This seems to have been attributable to a lack of state cooperation and to Moreno-Ocampo's inability to successfully move forward without it.¹¹³ Drawing in particular on the experience of the ICTY, what lies ahead with respect to the Darfur referral is no doubt a Herculean task, requiring “patience and cunning . . . as well as innovative tactics and strategy.”¹¹⁴ As such, a comparison with the Darfur situation perhaps best illustrates the attraction of proceeding with the tacit promise of state cooperation that comes by way of self-referral.

In addition to reaping these noted investigatory rewards, there is arguably a significant supplementary impetus for the prosecutor's decision to court voluntary referrals. In light of the U.S.'s long-standing opposition to the prosecutor's independent powers, it may well have seemed shrewd to avoid utilizing them.¹¹⁵ Considered alongside the prosecutor's determination to avoid publicly shaming states by privately rejecting inappropriate referrals,¹¹⁶ avoiding the *proprio motu* option appears likely to have been part of a larger design to quell concerns about his independent authority.¹¹⁷

111. *Id.* at 7.

112. *See infra* section II (C) (2).

113. Even strong supporters of the Court remarked upon the Prosecutor's failure to take the steps necessary to secure the Security Council's assistance. *See* Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434, 439 (2006) (noting, in addition, Moreno-Ocampo's missed opportunity in dramatizing the conflict so as to garner attention and support). Some three years after the Security Council referral, the Executive Director of Human Rights Watch lamented Moreno-Ocampo's failure to employ creative ways of acquiring information, noting that, instead, the Prosecutor “banked on the idea that if he [was] sufficiently nice to Khartoum, he [could] perhaps trick the government into cooperating--get it to turn over a key piece of evidence--but that has not worked.” Comments of Kenneth Roth, *The International Criminal Court Five Years on: Progress or Stagnation?* 6 J. INT'L CRIM. JUST. 763, 768 (2008).

114. David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1290 (2009).

115. “[T]he prosecutor has demonstrated a clear sense of focus on the perceived legitimacy of his investigations.” Tod Lindberg, *A Way Forward with the International Criminal Court*, POL'Y REV., Feb. 1, 2010, <http://www.hoover.org/publications/policy-review/article/5369>. *See also* Conso, *supra* note 48, at 322; SCHABAS, *supra* note 41, at 165.

116. Lindberg, *supra* note 115.

117. *See* Paola Gaeta, *Is the Practice of “Self-Referrals” a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 950 (2004):

It is possible that the Prosecutor's [solicitation of a voluntary referral by the DRC] is aimed at reassuring opponents of the Court who fear that he may wield his investigative powers too boldly: the Prosecutor could have started the

In this respect, one cannot likely overstate the effect that the prosecutor's chosen docket to date has had upon the Obama administration's perception of the Court. As was rightly predicted, "[s]election of early cases by the Prosecutor and Pretrial Chamber [has proved to] be a critical test."¹¹⁸ According to U.S. Ambassador Rapp, "We've had a concern in the past that the ICC could . . . undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes. Thus far, the Court has been appropriately focused."¹¹⁹

Of course, the Bush administration also had the opportunity to appreciate the "appropriate focus" of the Court; by mid-way through Bush's second term in office, the ICC's docket consisted solely of voluntary referrals and the situation in Darfur.¹²⁰ The Bush administration's comfort level with the Court should therefore have been bolstered by the fact that the ICC had then yet to assert jurisdiction over the objection of any state aside from Sudan, as well as the fact that every matter before the ICC "dovetail[ed] with US foreign policy interests."¹²¹ This situation likely made the Bush administration's ultimately less hostile approach toward the Court possible. However, at that point it seems the relationship was too far gone for the administration to engage extensively with the ICC.¹²² To do more than selectively utilize ICC activity to its own advantage would have required not only an implicit admission that its vibrant anti-ICC campaign was unsuccessful and off the mark, but also tacit recognition of the Court's staying power and potential.

investigation in the DRC on his own initiative, but he pushed for, and gained, a self-referral. Thus, the Court has made its first steps in the guise of an institution that can assist states to obtain justice in the face of mass atrocities committed within their boundaries, rather than as an interfering international watchdog against which states have to defend themselves.

See also MOHAMED EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* 235 (2008).

118. Wald, *supra* note 74, at 22. In fact, Wald notes that it might be particularly useful for the prosecutor to employ a strategy of targeting cases that do not involve US national or residents but in which "the United States has a clear interest in seeing the perpetrators brought to justice." *Id.* at 23.

119. *U.S. Engagement*, *supra* note 79, Comments of Rapp. Rapp later re-emphasized the importance of case selection by noting its importance to acquiring any type of U.S. support: "at least in the situations that have been opened so far, we're prepared to do what we can to assist those prosecutions . . ." *Id.*

120. *See infra* section II (C) (2).

121. Cerone, *supra* note 52, at 304. On the situation in Uganda, *see, e.g.*, Statement by the President on the Signing of the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 (May 24, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-signing-lords-resistance-army-disarmament-and-northern-uganda-r>.

122. Cerone, for example, speculates that the anti-ICC rhetoric espoused in the latter part of the Bush administration may have been a "smokescreen" designed to veil its change in position. Cerone, *supra* note 52, at 305 n.168.

3. Additional Reasons

The Obama administration also enjoys an enhanced ability to observe the Court in action over that of its predecessor.¹²³ Indeed, it was not until the end of the Bush presidency that certain U.S. concerns, such as those regarding the ICC's ability to ensure a fair trial,¹²⁴ had even the prospect of being genuinely abated.¹²⁵ In June 2008, despite widespread criticism regarding the ICC's ability to get up and running,¹²⁶ Trial Chamber I made the remarkable decision to stay the Lubanga case because of due process concerns.¹²⁷ Placing the integrity of the proceedings ahead of the pressure to show results, the decision halted the case just a few days shy of its highly anticipated commencement as the Court's first trial. The upside of this delay is the positive perception it created; namely, that the ICC judiciary stands ready to ensure a fair trial at any cost,¹²⁸ a state of

123. The ICC's first trial did not officially start until 2009. Press Release, ICC, Opening of the First Trial of the Court on Monday 26 January 2009: For the First time in the History of International law the Victims will Fully Participate in the Proceedings, ICC Doc. ICC-OTP-20090123-PR388 (Jan. 23, 2009).

124. See, e.g., Patricia M. Wald, *International Criminal Courts: A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 345 (noting that U.S. opponents occasionally allege that the due process protections embodied in the Rome Statute are inadequate in comparison to those employed by the United States). Despite this, "[s]cholars and commentators have long recognized that fundamental due process rights are protected by the Rome Statute." Scheffer & Cox, *supra* note 43, at 1048.

125. "In terms of procedure, every lawyer knows how difficult, if not dangerous, it is to speak about law without practice." Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 603 (2003).

126. "Like all too many international bodies, the ICC moves at a molasses pace . . . ICC prosecution efforts to date have been criticized for taking too much time to accomplish very little." Adam Hochschild, *The Trial of Thomas Lubanga*, THE ATLANTIC, Dec. 2009; see also Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, Council on Foreign Relations Special Report 55 (Apr. 2010), http://www.cfr.org/publication/21934/from_rome_to_kampala.html; Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409 (2008) (concluding that the record-breaking length of the Lubanga pre-trial phase makes the oft considered glacial pace of ICTY prosecutions appear efficient by comparison).

127. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008 (June 13, 2008).

128. ICC proponents predicted that the initial stay in the Lubanga proceedings would help to dissipate US concerns about the fairness of Court procedures. Dennis Doyle, *ICC Halts Lubanga Trial*, USA FOR THE INTERNATIONAL CRIMINAL COURT (June 18, 2008), <http://usaforicc.wordpress.com/2008/06/18/icc-halts-lubanga-trial/>; see also Rachel Katzman, *The Non-Disclosure of Potentially Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial*, 8 NW J. INT'L HUM. RTS. 77, 78 (2009) (averring that "[t]he stay of proceedings was a strong assertion by the Chamber that the rights of the accused are paramount"). The Trial Chamber has continued to evidence this commitment. It later stayed the Lubanga proceedings yet again owing to fair trial concerns. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay the Proceedings Pending Further Consultations with the VWU, ¶ 2 (July 8, 2010). The stay remained

affairs that certainly makes U.S. support of the ICC both more likely and more tenable.¹²⁹

What's more, contrary to John Bolton's predictions, since mid-2008, evidence has surfaced that indicates that the work of the ICC is actually having a deterrent effect.¹³⁰ Ever since Thomas Lubanga has been on trial in The Hague for "enlisting and conscripting children under the age of fifteen years . . . and using them to actively participate in hostilities"¹³¹ in the Democratic Republic of Congo, "few child soldiers have been seen [in that country]."¹³² In fact, the Special Representative of the Secretary-General on Children and Armed Conflict recently testified that the ICC's willingness to prosecute individuals who utilize child soldiers has had an appreciable effect throughout the world, causing "many armed groups" to approach U.N. entities in order "to negotiate action plans for the release of children."¹³³

4. Summary

It is therefore against this backdrop that the present U.S. approach to the Court emerged. In the wake of carefully selected investigations whose pursuit

in place for some three months, until the source of the problem was resolved. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay the Proceedings Pending Further Consultations with the VWU" (Oct. 8, 2010).

129. "The American government might . . . become more supportive of the Court if political observers witnessed growing sensitivity to the rights and interests of the accused. The more the ICC becomes like a real criminal court, operating under the rule of law, the more American politicians are likely to shelve their fears of politicized prosecution." George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 561 (2005); see also Wald, *supra* note 74, at 23.

130. HUMAN RIGHTS WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS* 64, 68-69 (July 11, 2008), <http://www.hrw.org/en/reports/2008/07/10/courting-history-0>; see also Thadeus Mabasi, *ICC Arrest Warrants No Impediment to Peace*, NEW VISION, Aug. 27, 2008, <http://www.newvision.co.ug/D/8/459/646751>.

131. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Public Redacted Version with Annex I, Decision on the Confirmation of Charges 156-157 (Jan. 29, 2007).

132. Hochschild, *supra* note 126 (concluding that "if the various rebel groups still fighting have [child soldiers], they are at least being kept well out of sight when journalists, ICC investigators, or UN observers are about"). A key aspect to the deterrent effect lies simply in the fact that the charges have educated the public, informing it that the use of child soldiers is in fact a crime. Human Rights Watch, *supra* note 130, at 69; see also *id.* at 127 (noting that "many people in Ituri did not view the use of child soldiers as being illegal or a particularly serious crime").

133. Testimony of Radhika Coomaraswamy, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 Transcript of Jan. 7, 2010, at 16. Cf. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777, 807 (2006) (arguing that, because international prosecutions are less certain and threaten less punishment than their domestic counterparts, they are not likely to contribute to deterrence). There is, however, a downside to the external effect of the Court's work; it appears that some children are now hidden or abandoned rather than demobilized owing to the fear of prosecution. Human Rights Watch, *supra* note 130, at 69-70.

did not affront the relevant states, indications of Court sensitivity to ensuring due process, and signs of a deterrent effect on the ground, there could likely be no better time for the United States to re-engage with the ICC. Moreover, there was a compelling, additional impetus for the Obama administration to be proactive about the Court. As the first ever opportunity to amend the Court's statute¹³⁴ loomed, so did a possible resolution of the crime of aggression, the only crime within the ICC's subject matter jurisdiction for which an agreed upon definition proved elusive in Rome.¹³⁵ Renewed U.S. involvement with the Court, in particular its participation in the 2010 Kampala Review Conference, could therefore contribute to the discussions on the ever important issue of aggression and might possibly affect whether and how the Court would be able to deal with the crime.

III.

THE CRIME OF AGGRESSION

For more than a decade prior to the Review Conference, the United States had been uneasy about the ICC's ability to exercise jurisdiction over the crime of aggression. At the Rome Conference in 1998, the crime of aggression was one of the key factors creating doubts for the U.S. delegation and policy-makers over the emerging ICC statute. Once defined, the adopted language had the potential to "redefine or modify the concept and conduct of warfare."¹³⁶ An agreed upon definition might therefore alter the manner in which the United States could comfortably employ its global military power.¹³⁷ In addition, if the Court's ability to exercise jurisdiction over alleged violations mirrored that of its power in relation to the other crimes that make up the ICC's subject matter jurisdiction,¹³⁸ it would effectively dilute the Security Council's existing monopoly over determining acts of aggression.¹³⁹ As a result, the vulnerability

134. Rome Statute, *supra* note 1, art. 121 (1) (dictating that no amendment to the Statute can be made until the Statute had been in force for seven years).

135. Rome Statute, *supra* note 1, art. 5(2); *see, e.g.*, Herman von Hebel and Darryl Robinson, *Crimes within the Jurisdiction of the Court*, 79, 85 in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS* (Roy S. Lee, ed., 1999) (describing the politicized conflicts among states that prevented agreement as to a definition); Noah Weisbord, *Prosecuting Aggression*, 49 *HARV. INT'L L.J.* 161, 170-71 (2008).

136. Congressional Research Service Report, *supra* note 19, at 16 n.61.

137. Indeed, even the prospect of the crime played a role in the United Kingdom's consideration of participation in the 2003 U.S.-led invasion of Iraq. Weisbord, *supra* note 135, at 170-71.

138. *See supra* note 37 and accompanying text.

139. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter, art. 39; *see, e.g.*, Mark S. Stein, *The Security Council, the International Criminal Court and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?* 16 *IND. INT'L & COMP. L. REV.* 1, 31 (2005) (arguing that the proper interpretation of

of U.S. political and military leaders to prosecution would be widened,¹⁴⁰ as would the possibility of initiating an investigation that might tarnish the reputation of the United States.¹⁴¹

Given these issues, it is of little surprise that the agenda of the American delegations present at the ASP meeting in November 2009, where the States Parties decided the potential amendments later to be considered in Kampala,¹⁴² and the subsequent Review Conference in June 2010 were clearly connected to the unresolved issues regarding the crime of aggression.¹⁴³

this provision is that “no body other than the Security Council may determine aggression for the Security Council. . . .”)

140. In some respects, this was not a negligible concern. Indeed, prior to the creation of a generally agreed upon definition of the crime, there was no shortage of individuals who voiced the opinion that the 2003 U.S.-led invasion of Iraq was an act of aggression. *See, e.g.*, SCHABAS, *supra* note 41, at 218 (noting that the crime “is well recognized in customary international law”); Ronald C. Kramer & Raymond Michaelowski, *War Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq*, 45 BRIT. J. CRIMINOLOGY 446, 446 (2005). Prominent U.K. legal figures have since testified in hearings held in relation to the country’s Iraq Inquiry that Operation Iraqi Freedom amounted to the crime of aggression and was known to be so at the time of the invasion. *See, e.g.*, Richard Norton-Taylor, *Blair’s Case for Iraq Invasion Was Self-Serving, Lawyers Tell Chilcot Inquiry*, THE GUARDIAN, Oct. 1, 2010, at 20. *But see U.S. Engagement*, *supra* note 79, (Comments of Koh maintaining that “Of course, [the United States does] not commit aggression. . . .”).

141. “[E]ven if no U.S. official ends up in The Hague, the ICC can affect the United States by merely investigating alleged crimes and engaging in official public criticism and judgment of U.S. military actions.” Goldsmith, *supra* note 41, at 97.

142. Resolution ICC-ASP/8/Res.6, Review Conference, Annexes II and III, ASP 8th Plenary Mtg., ICC Doc. ICC-ASP/8/20 (Nov. 26, 2009) [hereinafter ICC Resolution on the Review Conference]. The only other amendment proposal, addressing the supplementation of the list of prohibited weapons cited in the existing definition of war crimes, was far less controversial and drew considerably less attention. *Id.* The possible deletion of Article 124, which allows a new State Party to deny the Court’s jurisdiction for up to seven years in regards to war crimes, was also up for consideration in Kampala. Its review was statutorily dictated. Rome Statute, *supra* note 1, art. 124. Despite NGO opposition to the provision, it remains in place. Chandra Lekha Sriram, *ICC Hypocrisy Over War Crimes: Amnesty Has Called Article 124 of the Rome Statute a ‘Licence to Kill’, But Despite Support for its Deletion the Big Powers Won Out*, THE GUARDIAN, June 22, 2010, available at <http://www.guardian.co.uk/commentisfree/2010/jun/22/icc-hypocrisy-article-124-war-crimes>.

143. Rapp Speech, *supra* note 7 (remarking that, while the U.S. primarily intended to “listen and learn” at the November ASP meeting, the ambassador “would be remiss not to share” the U.S. concerns regarding the crime of aggression, including the U.S. position that “jurisdiction should [only] follow a Security Council determination that aggression has occurred”); *see also* Mike Corder, *Not a Member, US Envoy Attends International Court*, SEATTLE TIMES, Nov. 19, 2009, available at http://seattletimes.nwsourc.com/html/nationworld/2010306874_apeuinternationalcourtus.html (attributing the US presence at the November ASP meeting to the fact that “Washington wants a role in drafting a definition of the crime of aggression for inclusion in the court’s statute[]”). While American players were less forthcoming about the connection between their presence in Kampala and the crime of aggression, the U.S.’s strong interest in affecting the aggression discussion in Kampala was hardly a secret. *See* Afua Hirsch, *New Face at the International Criminal Court*, THE GUARDIAN, May 30, 2010, at 12. The U.S. participation in Kampala provides further evidence of the delegation’s aggression-oriented focus. *See also* William A. Schabas, *Kampala Diary 4/6/10*, THE ICC REV. CONF.: KAMPALA 2010 (June 5, 2010, 10:28 PM), <http://iccreviewconference.blogspot.com/2010/06/kampala-diary-4610.html> (describing US Legal Advisor Harold Koh’s speech in Kampala as including “a very extensive list of arguments in

A. The Definition

The primary U.S. objective for the Review Conference was to avoid agreement on a definition of aggression.¹⁴⁴ Failing that, its aim was to alter the definition that had been finessed—without U.S. input—in the years leading up to Kampala.¹⁴⁵ Had the United States prevailed in its chief objective, the above noted concerns would have been delayed, if not averted. It also would have postponed the need to confront some additional issues inherent in the nature of the crime.

As the crime of aggression by its very nature implicates the related state,¹⁴⁶ it is particularly susceptible to use as a tool by which political battles might be waged through the forum of the ICC, an oft-noted U.S. concern.¹⁴⁷ Moreover, as the following discussion establishes, this aspect of the crime might be seen as one that renders it incompatible with the relevant state's ability to avail itself of the principle of complementarity.

Leaving concerns about a rogue prosecutor and a runaway judiciary aside,¹⁴⁸ the Court's principle of complementarity makes it feasible for any state, regardless of its membership status, to preclude the ICC from exercising jurisdiction over its nationals. In this respect, the principle of complementarity dictates that a genuine domestic investigation and a subsequent prosecution, if necessary, will serve to bar the matter from ever becoming a part of the Court's docket.¹⁴⁹ Consider, however, that a state's ability to institute internal prosecutions must realistically turn in part on the fact that the alleged crimes can be portrayed as aberrant acts of an individual or set of individuals—even if the person(s) charged enjoyed a leadership position—from which the prosecuting state can distance itself. Not so the crime of aggression, which wholly implicates the relevant state.¹⁵⁰ In such cases, the state would essentially have to put itself

favour of deferring any discussion of aggression," such as a "lack of consensus," "the need for clarity in the definition," and "many other difficulties").

144. Conversation with Jennifer Trahan, Chair, American Branch, International Law Association, ICC Committee; Assistant Professor of Global Affairs, N.Y.U. (April 11, 2011).

145. *See id.*; *see also* Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49, 73 (2011).

146. Consider, for example, the definition of aggression adopted by the UN General Assembly in 1974, which provides in pertinent part: "Aggression is the use of armed force *by a state* . . ." UN G.A. Res. 3314 (XXIX), 2319th plenary mtg., Dec. 14, 1974. The General Assembly definition was ultimately incorporated into the definition adopted in Kampala. Amendments to the Rome Statute, *supra* note 21, art. 8 *bis* (2).

147. Congressional Research Service Report, *supra* note 19, at 13 (expressing the concern of some U.S. officials that states with "anti-American sentiments," might attempt to use the Court to thwart "responsible U.S. military actions on their territory" or to "subvert U.S. diplomatic efforts").

148. *See, e.g.*, Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 66 (2001).

149. Rome Statute, *supra* note 1, art. 17 (1)(a), (b).

150. "[T]he crime of aggression [] remains most profoundly a 'crime of state.'" SCHABAS,

on trial in order to preclude an ICC investigation or prosecution, an unlikely possibility even when there has been a subsequent change in power.¹⁵¹

The state condemnation facet is evident in the definition of aggression that was ultimately adopted in Kampala, which provides in relevant part:

- (1) For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, *by a person in a position effectively to exercise control over or to direct the political or military action of a State*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
- (2) For the purpose of paragraph 1, “act of aggression” means the use of armed force *by a State* against the Sovereignty, territorial integrity or political independence of another State. . . .¹⁵²

The American delegation was clearly dissatisfied with this definition.¹⁵³ Despite U.S. success in shaping the manner in which the Court’s newest crime will be interpreted and applied through the creation of “understandings,”¹⁵⁴ the ICC definition of the crime of aggression has been described by the chief U.S. Legal Advisor as “flawed” and has been criticized by the present Ambassador-at-Large for War Crimes for being too vague.¹⁵⁵ In this respect, the general sentiment expressed by the American delegation seems rather the fulfillment of former Ambassador David Scheffer’s prediction in the early days of the Bush administration.¹⁵⁶ The rest of the world, through a Special Working Group on

supra note 41, at 139.

151. While there might be a political impetus post-regime change to implicate the prior administration in an internal aggression prosecution, this action may create problems for the newly empowered administration, such as providing a basis for a subsequent action in which reparations may be sought. “It is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act.” Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. No. 116, ¶ 259 (Dec. 2006), <http://www.icj-cij.org/docket/files/116/10455.pdf> (finding that Uganda caused injury to the DRC and requiring Uganda to make reparations). Moreover, in order for the United States to institute such proceedings, the crime of aggression would have to be incorporated into U.S. law, an unlikely possibility for the foreseeable future. Padmanabhan, *supra* note 126, at 17.

152. Amendments to the Rome Statute, *supra* note 21, art. 8 *bis* (1) and 8 *bis* (2) (emphasis added).

153. *U.S. Engagement*, *supra* note 79, Comments of Koh and Rapp.

154. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res.4, Annex III. The concept of adopting understandings at Kampala that would ultimately serve to facilitate the application of the aggression amendments was introduced by the United States. *U.S. Engagement*, *supra* note 79, Comments of Rapp. Seven such understandings were ultimately adopted, with understandings four through seven employing verbatim or near verbatim language to that which was included in the initial U.S. proposal. U.S. Understandings, First Proposal (Jun. 6, 2010) (on file with author). Only time will tell the true effect of these provisions which, unlike the Elements of Crimes, are not provided for in the Rome Statute. At a bare minimum, should the ICC judges need to discern the drafters’ intent when applying the aggression amendments, the understandings will prove of significant assistance.

155. *U.S. Engagement*, *supra* note 79, Comments of Koh and Rapp.

156. Ambassador David J. Scheffer, *A Negotiator’s Perspective on the International Criminal*

the Crime of Aggression (SWGCA),¹⁵⁷ had spent nearly a decade working on a suitable definition for the crime without U.S. input.¹⁵⁸ Years of work on the part of the SWGCA caused certain aspects of the aggression definition to become entrenched over time and, because of the U.S. absence in this process, the result for the Obama administration was that “some things ended up in [the drafting] process that . . . probably wouldn’t have been there if [the United States had] been involved.”¹⁵⁹

B. The Court’s Ability to Exercise Its Jurisdiction over the Crime

Yet whether these perceived definitional shortcomings create a fundamental problem for the United States remains to be seen. The pivotal issue is, of course, the Court’s ability to exercise jurisdiction over the crime of aggression in the first place.¹⁶⁰ In this regard, it is first worth noting that it will be a number of years before the crime can be investigated or prosecuted at the ICC.¹⁶¹ Of greater import to the United States, however, is the fact that the Kampala amendments make the possibility of one of its nationals being prosecuted for aggression at the ICC beyond unlikely.¹⁶² This is true despite the

Court, 167 MIL. L. REV. 1, 14 (2001) (predicting that “the rest of the world will not be impressed” with Bush’s policy of very limited engagement with the Court and that it “will soldier on drafting documents of central importance to the operation of the Court”).

157. The SWGCA was established by the ASP after the Rome Statute came into effect in July 2002. Troy Lavers, *(Pre)Determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom?*, 71 ALB. L. REV. 299, 302 (2008).

158. “[A]fter ‘unsigned’ the Rome Statute on May 6, 2002, the United States did not participate in the discussions of the SWGCA.” Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT’L L. 71, 112 (2010).

159. *U.S. Engagement*, *supra* note 79, Comments of Rapp (concluding that, in Kampala, the U.S. delegation “had to play catch-up with that.”).

160. Fittingly, “the conditions for the exercise of jurisdiction by the Court, as was well appreciated long before we all came to Kampala, proved to be the far more politically controversial and diplomatically vexed issue to resolve.” Robbie Manson, *Smoothing Out the Rough Edges on the Kampala Compromise*, INST. L. ACCOUNTABILITY & PEACE, at 1 (June 18, 2010), <http://blogs.ubc.ca/ligi/files/2010/06/Post-Kampala-Articlemans.pdf>.

161. The recent amendments delay the start of the Court’s jurisdiction over the crime until at least Jan. 1, 2017. They also require that an additional vote then be taken, and that thirty states have ratified the aggression amendments for a period of one year, before the crime can be activated. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (2) and (3); art. 15 *ter* (2) and (3). No one appears to doubt that these statutory hurdles will be overcome. *See e.g.* David Scheffer, *Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court*, ASIL BLOG- INT’L CRIM. CT. REV. CONF. (June 13, 2010), <http://iccreview.asil.org/> (remarking that he “would be surprised if, by January 1, 2017, the 30-State Party requirement will not have been met”).

162. U.S. Legal Advisor Harold Koh’s conclusion was, at least initially, slightly more conservative. Koh surmised that “the chances are extremely remote that a prosecution [of the crime of aggression] will, at some point in the distant future, affect [the U.S.] negatively.” *U.S. Engagement*, *supra* note 79, Comments of Koh. One day later, however, Koh declared that the Kampala amendments “ensure total protection for U.S. armed forces and other nationals going forward.” Harold Hongju Koh, Legal Advisor, U.S. Department of State, The U.S. and the

fact that the United States again did not achieve its primary objective pertaining to the exercise of jurisdiction over the crime. Joined by the four other permanent members of the Security Council,¹⁶³ the United States sought to condition the Court's ability to exercise jurisdiction over alleged acts of aggression on a Security Council referral.¹⁶⁴

Instead, the role of the Security Council vis-à-vis the ICC's exercise of its aggression jurisdiction is far more limited. As with other crimes in the Court's subject matter jurisdiction, the Security Council may refer relevant situations to the ICC;¹⁶⁵ it may also call a halt to an aggression investigation or prosecution for one year¹⁶⁶ subject to renewal. For all state-referred or self-initiated investigations, the prosecutor is required to notify the Secretary-General about the situation.¹⁶⁷ If the Security Council then makes (or has made) a determination that the relevant act of aggression occurred, the prosecutor has the green light to immediately proceed with the investigation.¹⁶⁸ If, however, the Security Council fails to render a determination that an act of aggression has occurred within six months of the date of notice, the prosecutor may proceed with his investigation, provided that he receives requisite judicial approval.¹⁶⁹

This template is, in one sense, a far cry from the long-standing U.S. objective. Had the ASP opted to make a Security Council resolution a prerequisite to the ICC's exercise of its aggression jurisdiction, the United States, along with the remaining four permanent members of the Security Council, would have been able to exercise marked control over the Court's aggression docket.¹⁷⁰ That arrangement would likely have provided an

International Criminal Court: Report From the Kampala Review Conference 5 (June 16, 2010), available at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

163. Conversation with Jennifer Trahan, *supra* note 144. See also Trahan, *supra* note 145, at 69; Padmanabhan, *supra* note 126, at 14 (noting that both the United Kingdom and France have maintained that the Security Council should have the last word regarding ICC aggression prosecutions); Koh, *supra* note 162, at 16.

164. Article 39 of the United Nations Charter dictates that the Security Council shall determine the existence of any act of aggression. The impact of the provision is subject to interpretation. The long-standing U.S. position is that aggression determinations are the exclusive bailiwick of the Security Council. See, e.g., Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court (July 17, 1998) L/ROM/22. This view appears to have been shared by its fellow permanent member of the Security Council, the United Kingdom. See SCHABAS, *supra* note 41, at 136. However, article 39 does not expressly prohibit other bodies from determining that an act of aggression has occurred. *Id.* at 137.

165. Amendments to the Rome Statute, *supra* note 21, art. 15 *ter*. The Court, however, would then make an independent determination as to whether an act of aggression occurred. *Id.* art. 15 *ter* (4).

166. Rome Statute, *supra* note 1, art. 16.

167. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (6) (requiring that the Prosecutor first find that there is a reasonable basis to proceed with the investigation).

168. *Id.* art. 15 *bis* (7).

169. *Id.* art. 15 *bis* (8) (dictating that the Pre-Trial Division, rather than just a Pre-Trial Chamber, must authorize the commencement of the investigation).

170. This point was made in the Court's early life, highlighting the shortcomings of a court that

intangible benefit to the United States. The ability to exert power over the Court's docket—even if only indirectly and in part—would have meant regaining a piece of what was lost in Rome, and may well have helped mitigate some of the existing domestic concerns about the Court. Its most practical benefit, however, would have been the assurance that neither nationals of the United States nor those of its allies would ever appear before the ICC on aggression charges.

This latter aspect was, predictably, a fundamental issue for the Obama administration. Prior to Kampala, the administration made clear that the Court's assertion of aggression jurisdiction over nationals of non-party states without prior Security Council approval remained a concern.¹⁷¹ Notably, however, this worry is equally averted pursuant to the recent aggression amendments, as these also place the United States in a position to shield its citizens from ICC aggression prosecutions. Unlike the remaining crimes within the Court's subject matter jurisdiction, a national of a non-member state can only come before the Court on an aggression charge through a Security Council referral.¹⁷² In light of the United States' ability to veto such referrals, U.S. vulnerability—and, arguably, that of its non-member state ally, Israel—is virtually non-existent.¹⁷³ Consequently, for so long as the United States remains a non-party to the Rome Statute, it is effectively guaranteed that its citizens will be shielded from such prosecutions. Moreover, should the current ICC-U.S. courtship advance to the point of the United States ratifying the Rome Statute, the United States could then choose to opt out of the Court's jurisdiction over crimes of aggression,¹⁷⁴ keeping intact the assurance that no U.S. national can be prosecuted for aggression at the ICC.¹⁷⁵

would need Security Council approval in order to prosecute any of the crimes in its jurisdiction. Mysak, *supra* note 41, at 280. “[S]ome would argue that the degree of US support for a tribunal directly corresponds to its degree of control over the mechanism.” Cerone, *supra* note 51, at 314.

171. State Department Press Release, Ian Kelly, Daily Press Briefing (Nov. 16, 2009), available at <http://www.state.gov/r/pa/prs/dpb/2009/nov/131982.htm>; see also Padmanabhan, *supra* note 126, at 4 (noting with concern that “ICC jurisdiction over aggression also poses unique risks to the United States as a global superpower. It places U.S. and allied leaders at risk of prosecution for what they view as necessary and legitimate security actions”); *id.* at 17.

172. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (4) and (5) (providing also that the ICC may not prosecute a national from a different state for an alleged act of aggression on the territory of a State that is not a party to the Rome Statute).

173. Indeed, Koh tellingly assumes the impossibility of a Security Council referral by concluding that, pursuant to the new articles, “No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party.” *U.S. Engagement*, *supra* note 79, Comments of Koh.

174. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (4).

175. Koh's remarks appear to assume that the United States would opt out, should it ultimately ratify. Making specific note of the provision, he concludes “we now ensure total protection for our Armed Forces and other U.S. nationals going forward.” *U.S. Engagement*, *supra* note 79, Comments of Koh. Should this situation come to pass, the United States could well attribute its decision to opt-out on the basis of the “flawed” ICC definition that was created without U.S. input. There are, of course, potential downsides to availing of an opt-out provision, such as being “named and shamed” by interested non-governmental organizations and being subject to political fallout. Shana Tabak,

IV.

POST-KAMPALA: WHITHER NOW THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT?

As a result, despite its failure to achieve its definitional and jurisdictional objectives with respect to the crime of aggression, it is not surprising that the American delegation has since been able to paint its work in Kampala as a qualified success.¹⁷⁶ These results form an important indicator of the United States' future with the Court. As Judge Wald rightly predicted, had the aggression amendments resulted in an added threat to the United States, the likelihood for ultimate ratification would have been quite bleak.¹⁷⁷ With this risk now averted and the United States on a settled path of cooperative engagement with the ICC, it seems both timely and appropriate to ask, "What next?"

A. The Possibility of U.S. Accession

In considering the future of the U.S.-ICC relationship post-Kampala, it is worthwhile to review some timely remarks made by U.S. Ambassador Rapp. While conceding that ICC membership was not under discussion for the United States "at this time," Rapp went on to note that U.S. ratification of international treaties has historically been a lengthy process.¹⁷⁸ Making the possibility of the United States joining the Court seem more likely than in any of his prior comments on the subject, the ambassador ultimately opined that, "over time, there's a possibility that we may gain confidence in this institution and that would enable us to move forward."¹⁷⁹ This would only happen, however, after the United States has the opportunity to evaluate whether the Court "develop[s] responsibly," which Rapp indicated would be assessed by whether the Court

Article 124, War Crimes, and the Development of the Rome Statute, 40 GEO. J. INT'L L. 1069, 1095 (2009). It seems unlikely, however, that these potential consequences would affect a U.S. decision to opt-out. The United States seemed impervious to such concerns in Rome, where it advocated extensively, albeit unsuccessfully, for the inclusion of a 10 year opt-out provision for crimes against humanity and war crimes. Scheffer, *supra* note 30, at 19. In parallel, Ambassador Rapp attributes the inclusion of the opt-out provision to U.S. participation in Kampala. *U.S. Engagement*, *supra* note 79, Comments of Rapp (remarking that "provisions have gone into the statute that can't be changed . . . which will protect the nationals of non-party states like ourselves, or states that opt out . . . I don't think that would have occurred were it not for us sort of raising the issues in this conference.").

176. For a contrary view, labeling the outcome in Kampala as a failure, see Brett D. Schaefer, *The U.S. Loses on Aggression in Kampala*, NAT'L REV. ONLINE, June 14, 2010, <http://www.nationalreview.com/corner/231855/u-s-loses-aggression-kampala-brett-d-schaefer> (asserting that the United States "failed in its main objectives" regarding the crime of aggression and that its successful efforts in qualifying the Court's exercise of jurisdiction over the crime represent a "less than ideal[] achievement").

177. Wald, *supra* note 74, at 24.

178. *U.S. Engagement*, *supra* note 79, Comments of Rapp.

179. *Id.*

exhibits an established focus on “crimes that involve truly massive intentional attacks on civilians.”¹⁸⁰

The logic in this regard is relatively straightforward when one considers U.S. concerns about the potential for politicized prosecutions at the ICC. Discussions on this issue tend to turn almost exclusively on the possibility of U.S. nationals appearing before the Court as a result of unintentional killings sustained in the context of an otherwise legitimate military undertaking (i.e., collateral damage).¹⁸¹ Accordingly, an ICC with a vested and exclusive focus on the prosecution of acts that involve grave harm intentionally inflicted on civilians strikes at the very heart of this basis for U.S. opposition.¹⁸²

Indeed, perhaps some American critics have already begun to question this basis for opposing ICC membership, as virtually every situation before the Court to date involves civilian victims who are alleged to have suffered grave, intended harm at the hands of those accused.¹⁸³ However, it would be a mistake

180. *Id.* (Noting that, in this regard, the United States would be evaluating “the decisions made by its prosecutor on where to open investigations and [the decisions rendered] by [the Court’s] chambers . . . that have to decide whether, sometimes, to authorize those investigations or to issue arrest warrants.”).

181. “Our concern was that a prosecutor who was not under any kind of accountability, who’s elected for nine years, who doesn’t answer to any kind of national system, could say, ‘Well, over here, we’ve got someone who murdered 200,000 people. Over here, we have maybe some soldiers that came in to protect some of those people, and some folks died in collateral damage. We’ll go ahead and prosecute both.’” George Lerner, *Ambassador: U.S. Moving to Support International Court*, CNN, Mar. 24, 2010, http://articles.cnn.com/2010-03-24/us/us.global.justice_1_icc-central-african-republic-war-crimes?_s=PM:US (quoting Ambassador Rapp). Rapp went on to note that this concern, to some extent, remains. *Id.*; see also Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing the International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT’L L.J. 1, 5 (2001-2002) (noting that U.S. opposition to the ICC is based upon the Court’s potential to exercise jurisdiction over U.S. nationals for the “inadvertent, unintended loss of civilian life”).

182. See, e.g., Richard John Galvin, *The ICC Prosecutor, Collateral Damage and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT’L & COMP. L. REV. 1, 98 (2005) (averring that “the ICC Prosecutor would be justified to adopt a policy of generally not pursuing collateral damage cases because such a policy could help to slowly build a comfort level with the ICC in the U.S.”). Of course, the Statute’s threshold requirement for war crimes, its requisite mens rea of intent and knowledge, and its gravity requirement equally undermine the collateral damage argument. Rome Statute, *supra* note 1, arts. 8 (1), 30, and 17 (1)(d), respectively. Thus far, however, these provisions have not proved sufficient to thwart U.S. concerns.

183. See, e.g., Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony issued on 8 July 2005 and amended on 27 September 2005, ¶ 5 (July 8, 2005) (alleging that the accused, along with fellow LRA members, “engaged in a cycle of violence and established a pattern of ‘brutalization of civilians’”); Warrant of Arrest for Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, ¶ 12 (May 23, 2008) (implicating the accused in acts of rape, torture, pillaging and outrages on human dignity); Situation on Darfur, Sudan, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (April 27, 2007) (concluding that there are reasonable grounds to believe that the accused contributed to the commission of crimes against humanity). *But see* Situation in the Republic of Kenya in the Case of Francis Kirimi Muthaura, Uhuri Muigai Kenyatta & Muhammad Hussein, Case No. ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuri Muigai Kenyatta & Muhammad Hussein, ¶ 37 (Mar. 8, 2011) (confirming, as this article goes to press, the Court’s first charges based upon a theory of

to assume that this type of focus alone, even if it becomes part of the fabric of the ICC, will prove sufficient to prompt U.S. ratification. Ambassador Rapp certainly does not make this prediction,¹⁸⁴ and with good reason. If concerns regarding the potential for politicized prosecutions are at the core of U.S. opposition to the Court, eliminating this risk simply removes one (admittedly sizeable) hurdle to ratification; it does not incentivize it.¹⁸⁵

Rather, as there is little to no inducement for the United States to join an institution that seems incapable of fulfilling its mandate, the potential for future U.S. membership is likely to turn upon whether the Court's operations evidence its potential for success. As such, once the ICC has had adequate time to develop, the relevant question will be whether the Court appears to be making strides towards becoming the institution it was intended to be. Specifically, this will involve an analysis of whether the work of the ICC demonstrates that it is truly a court of last resort¹⁸⁶ whose actions both legitimately fill the impunity gap¹⁸⁷ and create an adequate impetus for states to assume the primary responsibility for prosecuting international crimes.¹⁸⁸

B. *A Court of Last Resort? The Complementarity Connection*

It is frequently maintained that the ICC is a "court of last resort,"¹⁸⁹ a description that implies that the Court acts only when there is no feasible

indirect co-perpetration).

184. After acknowledging the pivotal importance of the Court's focus and noting that increased confidence may over time make it possible for the United States to "move forward," Rapp candidly asks "who knows what the future may hold?" *U.S. Engagement, supra* note 79, Comments of Rapp.

185. Rather, it has likely provided the impetus for the recent U.S. overtures of assistance. *See supra* note 87 and accompanying text. Indeed, at the press conference during which Ambassador Rapp noted that the ICC investigations have thus far been "appropriately focused," he also acknowledged that U.S. assistance presently serves U.S. interests. *U.S. Engagement, supra* note 79, Comments of Rapp.

186. "Americans embrace the core vision of the ICC—a fair and effective court of last resort for victims of monstrous crimes." Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 432 (2004).

187. In this respect, the bar cannot be set too high, so as to demand that the ICC's actions alone eliminate impunity. Such expectations are simply unreasonable. *See, e.g.*, Knut Dormann & Robin Geiß, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7 J. INT'L CRIM. JUST. 703, 717 (2009). Instead, the appropriate inquiry is whether the Court is investigating situations and prosecuting cases that would otherwise be inadequately addressed.

188. Rome Statute, *supra* note 1, preamb. ¶ 6.

189. *See, e.g.*, James L. Taubee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 129 (2000) (noting that "the ICC is designed to be truly a court of last resort"); Eric Bales, *Torturing the Rome Statute: The Attempt to Bring Guantanamo's Detainees within the Jurisdiction of the International Criminal Court*, 16 TULSA J. INT'L & COMP. L. 173, 188 (2009); Ronli Sifris, *Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L COMP. L. 88, 107 (2008).

alternative forum for investigation and prosecution.¹⁹⁰ This suggestion both reinforces the Court's role in "put[ting] an end to impunity,"¹⁹¹ while concurrently mitigating sovereignty concerns regarding the Court's exercise of its jurisdiction. It is therefore no surprise that ICC actors have embraced the designation.¹⁹² Indeed the Court's website,¹⁹³ prosecutor,¹⁹⁴ and first President¹⁹⁵ all refer to the ICC as a court of last resort. At the same time, it is commonplace for those operating outside the institution to describe the Court in the same fashion, including such high profile figures as former UN Secretary-General Kofi Annan,¹⁹⁶ present UN Secretary-General Ban Ki-moon,¹⁹⁷ former ICTY Prosecutor Richard Goldstone,¹⁹⁸ and numerous academics and journalists.¹⁹⁹

When the term "court of last resort" is used in relation to the ICC, it is almost always linked with the Court's principle of complementarity, which precludes the ICC from proceeding with an investigation or prosecution when

190. Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice and the International Criminal Court*, 50 VA. J. INT'L L. 107, 122 (2009) (internal citation omitted).

191. Rome Statute, *supra* note 1, preamb. ¶ 5; *see also id.* art. 20(3)(a)-(b).

192. It has also been suggested that the Court has "embraced its place as a court of last resort." *Recent Publications*, 35 YALE J. INT'L L. 533, 546 (2010) (reviewing LEE FEINSTEIN & TOD LINDBERG, *MEANS TO AN END: THE U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT* (2009)).

193. "The ICC is a court of last resort." ICC at a Glance, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/> (last visited Mar. 31, 2011).

194. "[T]he Court intervenes as a last resort . . ." Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24-25, 2007), available at http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F005461711149/143825/LMO_nuremberg_20070625_English.pdf [hereinafter Moreno-Ocampo, Nuremberg Address]; *see also* Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005).

195. "This is a fundamental point that has to be understood about the ICC. The ICC is a court of last resort." Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT'L L. REV. 539, 543 (2007); *see also* Philippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 501, 505 (2007) [hereinafter Kirsch, Applying].

196. *Analysis: Mixed Report Card for ICC*, INTEGRATED REGIONAL INFO. NETWORKS (June 10, 2010), <http://www.irinnews.org/report.aspx?ReportId=89423>.

197. Ban Ki-moon, *Ushering in a New Age of Accountability*, WASH. POST, May 29, 2010, at A19.

198. Justice Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Criminal Justice*, THE INT'L CRIM. CT. MONITOR, June 2002, at 3, available at http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html.

199. *See, e.g.*, Charles H.B. Garraway, *Military Excesses? Is There a Right Way of Dealing?*, 2 J. INT'L CRIM. JUST. 981, 982 (2002); Lauren Fielder Redman, *United States Implementation of the International Criminal Court: Toward the Federalism of Free Nations*, 17 J. TRANSNAT'L L. & POL'Y 35, 40 (2007); Estanislao Oziewicz, *Court Seeks to Try Suspects for Atrocities in Darfur; International Tribunal Faces Obstacles in Prosecuting Politician, Militia Leader*, GLOBE & MAIL (CA), Feb. 28, 2007, at A15.

the matter is being dealt with properly on the national level.²⁰⁰ For example, former ICC President Philippe Kirsch explains the ICC's role as a court of last resort:

[That role] is reflected in the principle of complementarity A case is not admissible if it is being or has been investigated or prosecuted by a state with jurisdiction. The ICC will act only if a state is unwilling or unable to genuinely carry out an investigation or prosecution.²⁰¹

Let us assume for now that Kirsch's conclusion is true, that is to say that under the complementarity principle the Court will act only if a state with jurisdiction is either unwilling or unable to initiate national proceedings. If this is so, the principle does indeed reflect that the ICC is a court of last resort and, as a consequence, that the cases it hears will automatically fill an impunity gap. Significantly, Kirsch's conclusion, and the consequences that come with it, appears to align with the understanding of the complementarity principle held by multiple States Parties with respect to this absolutely fundamental aspect of the Court.

For example, when opening the debate in the Dáil (the principal chamber of the Irish Parliament) on the constitutional amendment required for the country to ratify the Rome Statute, Ireland's then-Minister for Foreign Affairs explained: "The Court will be complementary to national legal systems. . . . Only where the State Party in question is unwilling or unable genuinely to investigate the crimes alleged or to prosecute the accused person may the Court exercise its jurisdiction."²⁰² The Minister of State of the United Kingdom (while acting on behalf of the European Union and the European Commission)²⁰³ and an advisor to the New Zealand Ministry of Foreign Affairs and Trade²⁰⁴ have espoused similar perceptions of the complementarity principle. Parallel interpretations appear on the websites of the Permanent Mission of Germany to the United

200. See *supra* note 149 and accompanying text; Rome Statute, *supra* note 1, art. 17(1)(a)-(b).

201. Kirsch, *Applying*, *supra* note 195, at 505.

202. International Criminal Court: Statement to the Dáil by the Minister for Foreign Affairs, Mr. Brian Cowen T.D., on the 23rd Amendment to the Constitution Bill, Apr. 11, 2001, *available at* <http://www.dfa.ie/uploads/documents/Legal%20Division%20Documents/international%20criminal%20court.pdf>; *see also* Remarks by Mr. Brian Cowen T.D., Minister for Foreign Affairs on the Launch of the Government Campaign for the 23rd Amendment to the Constitution Enabling the Ratification of the Rome Statute of the International Criminal Court, May, 24 2001, *available at* <http://www.dfa.ie/uploads/documents/Legal%20Division%20Documents/remarks%20by%20cowen.pdf> (noting that "[t]he Court will be complementary to national legal systems, and will operate only where a State Party is unable or unwilling to investigate alleged crimes").

203. "The court will be complementary to national processes in the sense that it will act where national systems are unable or unwilling genuinely to investigate a crime, or to bring a prosecution if the results of the investigation warrant one." Press Release, Diplomatic Conference Begins Four Days of General Statements on the Establishment of International Criminal Court, UN Press Release L/ROM/7, Jun. 15, 1998 (quoting Tony Lloyd).

204. "Generally, a case is inadmissible if a state with jurisdiction wishes to investigate or prosecute. It becomes admissible if the state is 'unwilling or unable genuinely to carry out the investigation or prosecution.'" Juliet Hay, *Implementing the ICC Statute in New Zealand*, 2 J. INT'L CRIM. JUST. 191, 192 n.10 (2004).

Nations in New York²⁰⁵ and Foreign Affairs and International Trade Canada.²⁰⁶

The principle of complementarity has been correspondingly interpreted and abbreviated by the International Commission of Inquiry on Darfur²⁰⁷ and in numerous academic works. For example, scholars have noted that: “under [the complementary] regime, the ICC cannot proceed unless the local authorities ‘cannot or will not’ initiate a prosecution;”²⁰⁸ “[the complementarity] principle provides that the court can accept cases only where national authorities are unwilling or unable to handle them;”²⁰⁹ “[t]he ICC can only intervene if a state with jurisdiction is ‘unwilling or unable genuinely to carry out the investigation or prosecution;”²¹⁰ “[t]he ICC is only able to exercise jurisdiction over persons accused of crimes when States are unwilling or genuinely unable to carry out investigations or prosecutions;”²¹¹ and so on.²¹²

205. The diplomatic website highlights what it deems “the most important principles for the work of the ICC” and places at the top of this list that “the Court can only prosecute if states are unwilling or unable genuinely to pursue a specific serious criminal offence (principle of complementarity, Article 17).” *The International Criminal Court*, FED. FOREIGN OFF., http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/ISIGH/Hintergrund_node.html (last updated May 27, 2010).

206. “[The ICC] is also ‘complementary’ to national jurisdictions, which means it will only proceed with a case when a state is unable or unwilling genuinely to prosecute transgressors on its own.” Significant Elements of the Rome Statute, FOREIGN AFFAIRS AND INT’L TRADE CANADA (Mar. 13, 2010), <http://www.international.gc.ca/court-cour/significant-elements-significatifs.aspx?lang=eng#com>.

207. “[T]he principle of complementarity on which the ICC is based [provides that] the Court only steps in when the competent national courts prove to be unable or unwilling genuinely to try persons accused of serious international crimes.” International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, U.N. Doc. S/2005/60, ¶ 606 (Jan. 25, 2005).

208. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 38-39 (2006).

209. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT’L L. 1, 6 (2005).

210. Garraway, *supra* note 199, at 981.

211. Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM J. INT’L L.J. 767, 787 (2002).

212. Amongst far too many examples to exhaustively include here, *see, e.g.*, Hon. David Hunt, AO, *High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges*, 2 J. INT’L CRIM. JUST. 56, 63 (2004); Wedgwood, *supra* note 33, at 202; Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 136 (2007); Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1080-81 (2008); Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. FOR SOC. JUST. 345, 348-49 (2004); Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT’L L. 197, nn.18-19 (2010); M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT’L L. 269, 287 (2010); Kathleen Maloney-Dunn, *Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects and Fundamental Human Rights at the ICC*, 8

1. *The Prosecutor's Avowed Interpretation*

For the purposes of the discussion that follows, however, the most significant comments about complementarity have come from the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo. Recognizing that the Rome Statute reflects the diligent efforts of its drafters, Moreno-Ocampo remarked upon the Court's system of complementarity in his comments about the work of the ICC in 2007: "[c]areful decisions were made [by the drafters in Rome] . . . a system of complementarity was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act."²¹³ This conclusion more forcefully echoes an observation made by Moreno-Ocampo shortly after his appointment, when he noted that "[t]he ICC is not intended to replace national courts, but to operate when national structures or courts are unwilling or unable to conduct investigations and prosecutions."²¹⁴

In light of Moreno-Ocampo's espoused interpretation of complementarity, it seems fair to anticipate that this understanding of the principle would be reflected in his practice of soliciting voluntary referrals.²¹⁵ In such cases, the very act of making a voluntary or self-referral may reasonably be considered evidence of the relevant state's willingness to have the situation investigated and relevant actors prosecuted.²¹⁶ Accordingly, one would then expect that the prosecutor would limit his solicitation of self-referrals to states that are in fact unable to conduct the relevant investigations and prosecutions. Yet, this has not consistently been the case.

2. *The Voluntary Referral Rendered by Uganda*

In fact, the first voluntary referral received by the ICC prosecutor was rendered by Uganda, a state arguably able to conduct its own investigations and prosecutions, albeit unable to effectuate the arrests of the relevant accused.²¹⁷

SANTA CLARA J. INT'L L. 69, 81 n.54 (2010); Jennifer Trahan, *Reflections on the Difficulties of Enforcing International Justice*, 30 U. PA. J. INT'L L. 1187, 1203 n.64 (2009). Predictably, this interpretation of complementarity is also reflected in the media. See, e.g., Jonathan Fanton, *Supporting the Court of Last Resort*, SAN DIEGO UNION TRIB., Apr. 21, 2008 (asserting that the ICC, "[t]he so-called 'court of last resort' is not meant to replace national courts but to have jurisdiction only when nations are unable or unwilling to act.").

213. Moreno-Ocampo, Nuremberg Address, *supra* note 194.

214. Moreno-Ocampo, 2003 Paper, *supra* note 105, at 4.

215. See Schabas, *Complementarity*, *supra* note 100 and accompanying text.

216. *Id.* at 17.

217. While a state's inability to "obtain the accused" is relevant to a determination of inability under Article 17, the accused must be elusive "due to a total or substantial collapse or unavailability of [the] national justice system." Rome Statute, *supra* note 1, art. 17(3). Moreover, because the ICC must rely on the cooperation of states to effect its arrest warrants, there is "some doubt as to whether the ICC would be in a better position to help capture the alleged perpetrators." EL ZEIDY, *supra* note 117, at 234 (noting in addition that the application of Article 17(3) would be dependent upon a showing that Uganda initiated relevant domestic proceedings "yet failed genuinely to carry them

According to Professor Schabas:

It has never been suggested that the Ugandan courts are unable to conduct prosecutions. Indeed, Uganda's courts are among the best in sub-Saharan Africa. Nothing in the Court's discussion of the five arrest warrants [issued in relation to the Ugandan referral] suggests that the matter has arisen. Rather, the prosecutor and the Government of Uganda have simply decided it would be more convenient to hold trials in The Hague before the International Criminal Court.²¹⁸

These circumstances prompt the question of how the prosecutor can so proceed if the principle of complementarity requires that a state either be unable or unwilling to investigate or prosecute before the ICC can exercise its jurisdiction. Until this point, we have assumed that this is what the principle in fact dictates, focusing in particular on the prosecutor's avowed interpretation of complementarity. Yet, at the same time that Moreno-Ocampo noted that the Court "is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct investigations and prosecutions," he also noted that, under the Statute, "[t]here is no impediment to admissibility of a case before the Court where no State has initiated any investigation. . . . In such cases there will be no question of 'unwillingness' or 'inability' under [the Statute]."²¹⁹

In so stating, the prosecutor endorsed the position advanced by a group of experts who had advised him on the "legal, policy and management challenges" he was likely to face "as a consequence of the complementarity regime."²²⁰ The resultant informal expert paper counseled the prosecutor that "the most straightforward scenario [with respect to admissibility] is where no State has initiated an investigation (the inaction scenario)."²²¹ In fact, the report noted that "[t]here may be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction in order to facilitate admissibility before the ICC."²²²

a. Interpreting the Rome Statute's Complementarity Provisions

To best understand this notion of "inaction admissibility," one must consult the relevant provisions in the Rome Statute. Article 17 provides in pertinent part that a case is inadmissible where:

1. (a) *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*

out").

218. Schabas, *Complementarity*, *supra* note 100, at 23.

219. Moreno-Ocampo, 2003 Paper, *supra* note 105, at 5.

220. Office of the Prosecutor Informal Expert Paper, *The Principle of Complementarity in Practice*, INTERNATIONAL CRIMINAL COURT, at 2 (2003), <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>.

221. *Id.* at 7.

222. *Id.* at 19.

(b) *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. . .*

According to Darryl Robinson, coordinator of the expert group consulted on behalf of the prosecutor, the conclusion that Article 17 precludes the Court from acting unless a state with jurisdiction is either unwilling or unable to investigate or prosecute represents a failure to recognize the above emphasized language in the provision.²²³ Rejecting this construction as one that does not give equal weight to all terms in Article 17, Robinson explains that the provision in fact requires an initial determination of “whether a state is investigating or prosecuting a case (or has done so).”²²⁴ Only if the answer to this preliminary question is “yes” does one then assess the relevant state’s ability or willingness to investigate or prosecute.²²⁵

b. Applying the Rome Statute’s Complementarity Provisions

When one applies this understanding of Article 17 to the ICC Uganda cases, the inquiry begins and ends with the first step of the articulated test. Because Uganda has neither investigated nor prosecuted the events it referred to the Court,²²⁶ there is no complementarity question. Article 17 does not apply and the ICC cases are simply admissible. Accordingly, Uganda’s willingness to see the prosecutions take place, as presumably evidenced by the referral it made, and its apparent ability to conduct these prosecutions domestically are in point

223. Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67, 71 (2010).

224. *Id.* at 68.

225. *Id.*

226. *See, e.g.*, Situation in Uganda, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, ¶ 37 (Sept. 27, 2005) (noting that in its 2004 “Letter on Jurisdiction” the Ugandan government pronounced that it “has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible” for the crimes within the referred situation). This situation is, of course, subject to change. Uganda has since established a war crimes court as a special division of the Uganda High Court. *See, e.g.*, *Uganda sets up war crimes court*, BBC NEWS, May 26, 2008, <http://news.bbc.co.uk/2/hi/africa/7420461.stm>. This nascent court is perceived by some as part of a Ugandan plan to thwart ICC prosecutions because the pending ICC cases have impeded peace negotiations. *Id.* This development arguably adds credence to the conclusion that the Ugandan self-referral was rendered for illegitimate reasons. *See, e.g.*, Schabas, *Complementarity*, *supra* note 100, at 19-22 (noting that Ugandan President Museveni initially made the self-referral in order to secure the leverage necessary to bring the country’s rebel forces to the negotiating table). Indeed, more recent events make clear that the Ugandan president is hardly committed to the goals of international criminal justice. *Qaddafi Offered Refuge in Uganda*, CBS NEWS, Mar. 30, 2011, <http://www.cbsnews.com/stories/2011/03/30/501364/main20048721.shtml>. Despite this, it is difficult to take issue with the sentiment expressed by the head of the new war crimes division of the Uganda High Court who noted: “It is the duty of [ICC] member states to put in place mechanisms to try people who have committed atrocities The ICC has a responsibility to support us.” Bill Oketch, *Uganda Set for First War Crimes Trial*, INSTITUTE FOR WAR & PEACE REPORTING, Jul. 14, 2010, <http://iwpr.net/report-news/uganda-set-first-war-crimes-trial>.

of fact immaterial. This disconnect between state inability/unwillingness and the question of complementarity, of course, seems counterintuitive in light of the preceding discussion. It also stands particularly at odds with the prosecutor's public acknowledgement that the principle of complementarity "was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act."²²⁷

Applying Robinson's conclusions, however, the Prosecutor's description of the principle represents nothing more than the "slogan version of complementarity [that] exercises a powerful grip on popular imagination,"²²⁸ a deduction that equates to a strong, albeit inadvertent, indictment of Moreno-Ocampo.²²⁹ The notion that the Court not act unless a state with jurisdiction is unwilling or unable to do so is not simply convenient political rhetoric; it was a fundamental consideration that drove the complementarity discussion at the Rome Conference and is also absolutely central to the ICC's ability to function as a court of last resort. Therefore, because inaction admissibility renders the relevant state's willingness and ability to prosecute of no consequence, it then ought to be the prosecutor's responsibility to ensure that his use of "admissibility by inaction" comports with the Court's intended role as an institution of last resort. This means going forward with inaction matters when (1) a state's decision not to act is "inconsistent with an intent to bring the person(s) concerned to justice"²³⁰ or (2) is the result of some other barrier, such as when the state is comprised of "[g]roups bitterly divided by conflict [that] oppose prosecutions at each others' hands."²³¹ Above all, faithfulness to the intent behind the complementarity principle and the notion that the ICC is meant to function as a court of last resort requires that the prosecutor refrain from investigating or prosecuting matters whenever a state with jurisdiction is both supportive of and able to conduct the relevant investigations and prosecutions.

3. *The Voluntary Referral Rendered by the Democratic Republic of Congo*

Evidence that the prosecutor is not presently committed to ensuring that the ICC functions as a court of last resort is not limited to the Uganda situation, but can also be seen in some of the cases born of the second voluntary referral, that of the Democratic Republic of Congo (DRC). When the DRC first referred the situation on its territory to the ICC in 2006, the country asserted that it was not

227. Moreno-Ocampo, Nuremberg address, *supra* note 194.

228. Robinson, *supra* note 223, at 68. Ironically, Robinson elsewhere acknowledges that "ensur[ing] that serious international crimes do not go unpunished" is "the very *raison d'être* of the ICC." Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 484 (2003).

229. Robinson's article, while replete with examples of so-called "slogan complementarity," omits any references to statements made by the ICC prosecutor.

230. Rome Statute, *supra* note 1, art. 17(2)(a)-(c).

231. Moreno-Ocampo, 2003 Paper, *supra* note 105, at 5.

then in a position to conduct the necessary investigations without the Court's assistance.²³² Some two years later, however, ICC Pre-Trial Chamber I observed that the country's justice system had "undergone certain changes," such that "the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of [the Rome] Statute does not wholly correspond to the reality any longer."²³³ This is arguably reflected in the fact that several of the ICC accused who are presently being tried in The Hague were being held in the DRC on domestic charges (that included crimes which fall within the jurisdiction of the Court) at the time that ICC arrest warrants were issued against them.

a. Complementarity and the Case of Thomas Lubanga Dyilo

With respect to the first accused to be tried at the ICC, Thomas Lubanga Dyilo, then-existing domestic charges caused the Pre-trial Chamber that considered the prosecutor's application for his warrant of arrest to engage in a complementarity/admissibility assessment. In accord with Robinson's interpretation set out above, the Pre-trial Chamber noted that "the first requirement for a case arising from the investigation of a situation to be declared inadmissible is that at least one State with jurisdiction over the case is investigating, prosecuting or trying that case, or has done so."²³⁴ In this respect, the Chamber held it "is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."²³⁵ Accordingly, as Lubanga was detained in the DRC with respect to charges that included genocide and crimes against humanity,²³⁶ and his ICC case rather involved allegations of enlisting and conscripting child soldiers, the DRC proceedings did not encompass the conduct that formed the basis of the prosecutor's application for a warrant of arrest.²³⁷ In effect, the DRC had been "inactive" with respect to the conduct that formed the basis of the ICC charges,²³⁸ barring the need for the Pre-trial Chamber to address the state's

232. The referral letter is quoted in *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-129, Decision on the Appellant's Application for an Extension of the Time Limit for the Filing of the Document in Support of the Appeal and Order Pursuant to Regulation 28 of the Regulations of the Court (May 30, 2006). It provided in relevant part: "En raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus [crimes internationaux] ni d'engager les poursuites nécessaires sans la participation de la Cour pénale internationale." *Id.* ¶ 3, n. 4.

233. *Situation in Democratic Republic of the Congo*, Case No. ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, ¶ 37 (Feb. 10, 2006).

234. *Id.* ¶ 30.

235. *Id.* ¶ 31.

236. *Id.* ¶ 33.

237. *Id.* ¶¶ 38-39.

238. *Id.* ¶ 41.

ability or willingness genuinely to carry out an investigation or prosecution.

In one respect, it is difficult to find fault with this narrow interpretation of the relevant statutory provision. Article 17 clearly states that “a case is inadmissible where the case is being investigated by a state which has jurisdiction over it,”²³⁹ and there is little doubt that the disparate charges against Lubanga address different types of conduct. At the same time, the application of the “same conduct” test, which has been utilized repeatedly since the Lubanga arrest warrant decision,²⁴⁰ is one that seems not to comport with the object and purpose of the Rome Statute,²⁴¹ setting too high a bar and showing inadequate deference to national proceedings. As applied, good faith domestic prosecutions of international crimes are insufficient to preclude an ICC prosecution unless the national charges are calibrated to address precisely the same conduct that is the focus of the ICC charges. This aspect of Court practice alone is likely to be used to argue against U.S. accession²⁴² despite the “appropriate focus” of the ICC’s proceedings.²⁴³

Viewed more broadly, the test is one that lies at odds with the notion of the ICC acting as a court of last resort. If the International Criminal Court, with its finite resources, is meant to make any headway with respect to its anti-impunity mission, it should only be acting with respect to perpetrators who would otherwise not be held accountable for their international crimes.²⁴⁴ At the same time, it is arguably incumbent upon the Court to encourage domestic proceedings, rather than to subvert or circumvent them, as national prosecutions are an indispensable aspect of the ICC anti-impunity objective.²⁴⁵ In effect,

239. Rome Statute, *supra* note 1, art. 17(1)(a).

240. *See, e.g.*, Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-04, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest against Germain Katanga, ¶ 20 (July 6, 2007); Prosecutor v. Katanga & Chui, Case No. ICC-01/04-02/07-3, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest Against Mathieu Ngudjolo Chui, ¶ 21 (July 6, 2007); Prosecutor v. Harun & Kushayb, Case No. ICC-01/04-02/07-3, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 21 (Apr. 27, 2007).

241. VCLT, *supra* note 51, art. 31(1).

242. “[C]omplementarity or deference to national justice systems[] like so much else connected with the ICC [] is simply an assertion, utterly unproven and untested.” John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 41 VA. J. INT’L L. 186, 200 (2000).

243. *See supra* note 119 and accompanying text.

244. Schabas likewise argues against the “mechanistic comparison of charges” asserting that the real assessment should be one that assesses the relative gravity of the domestic charges with respect to those of the ICC. SCHABAS, *supra* note 41, at 182. This, of course, would have resulted in a different outcome for Lubanga. For some compelling arguments against the same conduct test, see, for example, Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga Pursuant to Article 19(2)(a) of the Statute, ¶¶ 39-43 (Mar. 11, 2009).

245. “There has never been any doubt that the ultimate aim of eliminating impunity for international crimes cannot be achieved by a single international institution, however effective it may turn out to be. From the outset, the ICC has been created to act as a catalyst for domestic

rather than functioning to facilitate “the two overarching purposes in the Rome Statute: to . . . end impunity . . . and to encourage national investigations and prosecutions of [atrocious] crimes before resorting, if necessary, to the ICC,”²⁴⁶ the same conduct test actually serves to impede their attainment. This is an obvious cause for concern that is further compounded by a recent Appeals Chamber decision on complementarity rendered in the case of Germain Katanga.²⁴⁷

b. Complementarity and the Case of Germain Katanga

Like Lubanga, Germain Katanga was detained in the DRC on national charges of genocide and crimes against humanity²⁴⁸ at the time that the ICC arrest warrant was issued against him.²⁴⁹ These domestic charges formed the basis of Katanga’s admissibility challenge in which he asserted that the principle of complementarity precluded the ICC from hearing the case against him. After Katanga was transferred to The Hague, however, the DRC closed its national proceedings with respect to him,²⁵⁰ a fact that proved of some consequence to the subsequent Appeals Chamber determination of admissibility. According to the Appeals Chamber, the admissibility of a case must be determined “on the basis of the facts as they exist at the time of the admissibility challenge.”²⁵¹ As such, the Appeals Chamber found that the DRC’s termination of its proceedings against Katanga rendered the state inactive with respect to the accused at the time of his complementarity challenge.²⁵² This fact—coupled with what might be described as an unnatural interpretation of Article 17(1)(b)²⁵³—resulted in

prosecutions . . .” Dormann & Geiß, *supra* note 187, at 717.

246. David J. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, 3 J. INT’L CRIM. JUST. 333, 335 (2005).

247. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 73 (Sept. 25, 2009) [hereinafter Katanga Appeal Decision].

248. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19 (2)(a) of the Statute, ¶ 11 (Mar. 11, 2009).

249. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest for Germain Katanga (July 2, 2007).

250. The DRC case file was forwarded to the ICC Registrar; this included a letter from the DRC’s General Auditor of the High Military Court which provided in pertinent part that the DRC proceedings had been closed “in order to facilitate the joinder of the proceedings at the level of the ICC.” Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case, ¶ 11.

251. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal, ¶ 80.

252. *Id.*

253. As noted above, Article 17(1)(b) requires the Court to declare a case inadmissible when a state has investigated the case “and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state not to prosecute.”

the Appeals Chamber's conclusion that there was no bar to the ICC proceedings and, accordingly, that the DRC's willingness and ability to prosecute the accused were irrelevant considerations.

In other words, pursuant to the Katanga Appeals Chamber decision, the prosecutor is not only well placed to prosecute cases that realistically can be addressed on the national level, but he is also in a position to initiate investigations and cases despite the existence of relevant, on-going national proceedings in a state with jurisdiction. Indeed, the only limitation placed upon the prosecutor's ability to pursue such matters is the requirement that the state abandon its prosecutorial efforts prior to an admissibility challenge at the ICC. Given the expense associated with the prosecution of international crimes and the state willingness evidenced to date to cede jurisdiction to the ICC, the potential for this is something that cannot easily be dismissed. The bottom line is that the Appeals Chamber decision facilitates a practice that runs directly counter to that which was intended for the Court²⁵⁴ and that is wholly inconsistent with the ICC's anti-impunity mission and its potential to function as a court of last resort.

4. *Summary*

In sum, the Court's interpretation of the Rome Statute's complementarity provisions does not limit the ICC's exercise of jurisdiction to situations in which a state with jurisdiction is unable or unwilling to prosecute. Rather, an entire range of cases falls outside any complementarity analysis pursuant to inaction admissibility. As such, the only stopgap to potentially unnecessary ICC investigations and prosecutions is the prosecutorial decision not to pursue such matters. In effect, then, the principle of complementarity alone cannot ensure that the ICC functions as a court of last resort. Rather, the Court can only attain this status when the principle is applied in conjunction with an appropriate prosecutorial policy.

To date, however, the prosecutor has not implemented this type of process but rather has, at times, pursued a seemingly opposite course of action, arguably undermining the Court's anti-impunity goal in the process. Moreover, the case law born of the prosecutor's policy sets the stage for this problem to be exacerbated and, possibly, institutionalized. In effect, the Court's jurisprudence facilitates the commencement of ICC prosecutions despite the existence of

According to the Appeals Chamber, however, this sub-article does not apply to Katanga's case, "because the DRC did not make any decision not to prosecute [Katanga]." It rather decided "that he should be prosecuted, albeit before the International Criminal Court." *Id.* ¶ 82. In the opinion of this author, this analysis is not one that comports with the sub-article's ordinary meaning. Rather, the Appeals Chambers unconvincingly interprets the phrase "the State has decided not to prosecute" to mean "the State has decided that the person should not be prosecuted."

254. *See, e.g.*, Press Release, Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions, U.N. Press Release L/2773 (Apr. 2, 1996).

genuine, national proceedings, provided that the latter either fail to adequately conform to the charges subsequently brought by the Court's prosecutor or are subsequently terminated in favor of the ICC prosecution.

Quite simply, the result is that the ICC is not poised to fulfill its role as a court of last resort. In the absence of this status, its prosecutions may—but will not necessarily—contribute to the Court's anti-impunity mission. In this respect, despite claims to the contrary,²⁵⁵ the actions of the prosecutor and the ICC's consequent jurisprudence wholly fail to emphasize the integral role that domestic proceedings must play with respect to ensuring widespread accountability for the commission of international crimes. When coupled with the long-standing preference of the United States for national proceedings,²⁵⁶ these facts mean that, at least for the time being, there is no convincing impetus for the United States to move forward in its relationship with the International Criminal Court.

CONCLUSION

The United States has come a long way in its relationship with the International Criminal Court. The notion that the United States should isolate and ignore the Court²⁵⁷ has dramatically fallen to the wayside for reasons both pragmatic and ideological. Mending rifts with the ICC aligns both with the Obama administration's mission to repair the international reputation of the United States and Obama's "personal[] commit[ment] to a new chapter in American engagement."²⁵⁸ It is likewise a practical endeavor. The ICC does not appear to be going out of business any time soon. It currently operates with the

255. "A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes." Moreno-Ocampo, 2003 Paper, *supra* note 105, at 5. On the concept of positive complementarity, for example, William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L.F. 59 (2007).

256. See *supra* note 108 and accompanying text. For evidence of this with respect to each of the three relevant administrations, see Bleich, *supra* note 26, at 286 n.18 (detailing the Clinton position in the lead up to the Rome Conference); *supra* note 52 and accompanying text (with respect to the Bush Administration); and *U.S. Engagement*, *supra* note 79, Comments of Rapp (concluding, as a representative of the Obama Administration, that national prosecutions are the "best approach").

257. The concept was first introduced by John Bolton on the heels of the Rome Conference. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations*, United States Senate, 105th Cong., 2d Sess. 28-32 (July 23, 1998) (Statement of Hon John Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute).

258. Mark Tran, *Barack Obama Defends America's Global Image*, THE GUARDIAN, Apr. 7, 2009, available at <http://www.guardian.co.uk/world/2009/apr/07/obama-defends-us-image> (quoting Obama and also asserting that Obama is "[s]eeking to repair the damage to America's international reputation by his predecessor, George Bush").

commitment of 114 states²⁵⁹ and a docket spawned in part by UN Security Council referrals.

The present policy of engagement also appears a sensible course of action in light of some key facts about the early work of the ICC. Initial concerns regarding the Court's ability to ensure fair trials and discourage international crimes have not been borne out. Predictions that the ICC would maliciously interfere with state sovereignty and engage in a practice of politicized prosecutions have not come to pass. Rather, the nascent practice of the Court provides evidence that it is committed to protecting due process rights, even when doing so will undoubtedly contribute to criticism about the ICC's ability to perform efficiently and effectively. In addition, the international response to the Court's first prosecution suggests that the ICC's operation has already begun to have a deterrent effect. Moreover, the Court's prosecutor has not pursued cases of questionable magnitude, but instead has consistently focused on decidedly grave acts intentionally committed against civilians. Of comparable significance, with the prosecutor has made an effort to proceed with the cooperation of states with jurisdiction.

Longstanding U.S. concerns with respect to the Court's ability to exercise its jurisdiction over alleged acts of aggression have been even more decisively put to rest. While the United States did not walk away from the 2010 Review Conference in Kampala with its most desired outcome, the end result of the Uganda meeting is something it can easily live with. The United States received a virtual assurance that no U.S. national, or national of a non-State Party ally, will ever be prosecuted at the ICC for the crime of aggression. Thus, the U.S. delegation is right to view the outcome of the Review Conference as a qualified success. Indeed, the fact that there is no real prospect for the Court to consider an allegation of U.S. aggression may well help to pave the way towards U.S. accession to the Rome Statute.

Nevertheless, U.S. membership is unlikely to materialize any time soon. The United States was initially drawn to back the creation of the International Criminal Court because it identified the need for a forum in which to try perpetrators of international crimes when there is no effective national forum for prosecution.²⁶⁰ Accordingly, it recognizes the Court in its role as an institution "where justice will be delivered if it can't be delivered at the national or regional level."²⁶¹ This suitably aligns with the notion that the ICC is meant to function as a court of last resort, a designation that implies that the work of the Court will, by necessity, contribute to its anti-impunity goal.

It is now clear, however, that the Rome Statute alone does not dictate this

259. *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited April 7, 2011) (listing 114 members).

260. See *supra* note 8 and accompanying text.

261. *U.S. Engagement*, *supra* note 79, Comments of Rapp.

outcome. Contrary to the belief held by numerous member states,²⁶² and as the 2009 Katanga Appeals Chamber decision makes clear, the application of the Statute's complementarity provision does not dictate that the ICC can intervene only when a state with jurisdiction is unwilling or genuinely unable to investigate or prosecute. Rather, these limitations do not come into effect unless and until a state with jurisdiction has initiated relevant national proceedings.

In cases of state inaction, the prosecutor is given a blank check to proceed as he wishes, free to go forward even in instances where a state with jurisdiction is able to institute national proceedings and is desirous of prosecution. While it is indisputable that the ICC should be able to act when states with jurisdiction blatantly refuse to do so, the absence of any limitations on inaction admissibility means that the Court may address—and perhaps is presently addressing—matters that could and, therefore, should, be prosecuted at the national level. This runs counter to the notion that the ICC is a court of last resort and means that ICC investigations and prosecutions may not actually contribute to the anti-impunity mission that fostered the Court's creation.

The prosecutor's decision to initiate an investigation at the behest of a state that is seemingly able to do so itself and to pursue cases despite the existence of national proceedings suggests that he is not committed in any real sense to the notion that the ICC is meant to operate as a court of last resort. This is a troubling conclusion in light of the fact that the prosecutor's discretion, coupled with the Statute's complementarity provisions, could ensure that the Court operates in this fashion. The matter is further complicated by the fact that the prosecutor's policy has engendered regrettable jurisprudence that is likely to discourage U.S. ratification.

This is not to suggest that all is lost, however, nor is it meant to imply that the United States will disregard the prospect of eventual accession. The pursuit of questionable investigations and cases may be an additional aspect of the ICC's "teething problems,"²⁶³ the result of impulsive decisions designed to produce quick and demonstrable results.²⁶⁴ In this respect it might be argued that the prosecutor's 2009 request for authorization to initiate an investigation into the situation in the Republic of Kenya, in which the territorial state proved unable to initiate national proceedings,²⁶⁵ may be seen to indicate a change in

262. See *supra* notes 202-206 and accompanying text.

263. Including self-referrals on his list of possible "teething problems" for the ICC, Cassese notes that the practice "might lead to states using the Court as a means of exposing dangerous rebels internationally, so as to dispose of them through the judicial process of the ICC." Cassese, *supra* note 113, at 436.

264. SCHABAS, *supra* note 41, at 183-84 (noting that the Prosecutor and the Pre-trial Chamber that crafted the "same conduct" test in Lubanga may have acted impetuously owing to their desire to "have a real defendant before the Court").

265. While Kenya is not "unable" to investigate or prosecute in the terms of Article 17(3), its internal division essentially precluded national proceedings. See *supra* note 99.

policy. If this can be established,²⁶⁶ it would indeed represent an important first step in demonstrating the Court's ability to perform as it was intended.

Under the Statute as presently drafted and interpreted, the most immediate fix would be for the prosecutor to exercise his discretion in a manner that ensures that the ICC functions as a court of last resort. In this respect, the prosecutor could initiate and make public a clear policy under which his office will only initiate *proprio motu* investigations when there is a substantial and verifiable impediment to national proceedings. The prosecutor could likewise put states on notice that self-referrals will be managed in the same way.²⁶⁷ While it might be unrealistic to expect the current prosecutor to take these steps, this would be a good way for his successor²⁶⁸ to openly avow her commitment to battling impunity for international crimes by facilitating the ICC's operation as a court of last resort.

For U.S. accession, however, this may prove insufficient. Avid opponents of the Court are likely to point out that the practice of investigating and prosecuting matters that are already the subject of national proceedings could well be revived when there is no legal impediment to prevent this from happening. Accordingly, the prospect of the United States joining the Court would be better enhanced if the matter were addressed by way of statutory amendment. While it is admittedly difficult for the Assembly of States Parties to effectuate such amendments,²⁶⁹ member states may ultimately decide that this particular issue calls for action. Indeed, there may be sufficient political will for this in light of the fact that complementarity, as applied, does not align with numerous member states' understanding of the principle. The most significant impetus to effectuate change might well come in time, however, if the prosecutor's future efforts cause the ICC to be "used as a 'garbage can' into which national court systems [] dump criminals that they should be punishing at

266. There has been a recent and valid call for the Kenyan situation to "mark a change in prosecutorial policy" away from the near wholesale practice of self-referrals. Andreas T. Muller & Ignaz Stegmiller, *Self-Referrals on Trial*, 8 J. INT'L CRIM. JUST. 1267, 1271 (2010). At this stage, however, it is difficult to sustain the argument that the Kenyan investigation itself represents such a change. Indeed, one might credibly argue that the Prosecutor's use of his *proprio motu* investigatory powers is simply the result of the fact that it was not feasible for Kenya to self-refer. In this respect, consider the viewpoint of Hassan Omar Hassan, *supra* note 99.

267. The fact that a state is both able to investigate and prosecute and is desirous of prosecution could be cited as substantial reasons why the investigation would not be in the interests of justice. Rome Statute, *supra* note 1, art. 53(1)(c). In the alternative, the Prosecutor could take his time in officially responding to the referral, while publicly noting his hope for the able and willing state to live up to its "duty . . . to exercise its criminal jurisdiction over those responsible for international crimes." *Id.* preamb. ¶ 6.

268. Moreno-Ocampo's term of office is due to conclude in 2012; pursuant to the Rome Statute, he is not eligible for re-election. *Id.* art. 42(4).

269. The amendment process is particularly onerous. See Rome Statute, *supra* note 1, art. 121. Indeed, former ICC President Philippe Kirsch noted the importance of drafting a strong statute as "later on it will be far easier to get governments to change their minds [about the Court] than it will to change the statute itself." Brown, *supra* note 17, at 61.

the national level.”²⁷⁰

In the end, of course, it is impossible to predict with precision what the future holds for the United States and the International Criminal Court. Most observers would likely guess that U.S. accession is not to be. Then again, most observers—with good reason—doubted the possibility of a Security Council referral, and yet two such referrals have now been made. Likewise, most observers of the vitriolic campaign against the Court at the start of the decade would probably never have predicted the present state of cooperative engagement between the United States and the ICC. Whatever the future may reveal, however, it seems certain that the United States will not ratify the Rome Statute until it appears that the ICC is truly functioning as a court of last resort whose investigations and prosecutions are in fact contributing to its anti-impunity endeavor. In order for this to happen, changes will have to be made.

270. Press Release L/2773, *supra* note 254 (quoting the representative of Japan).