THE INTERNATIONAL CRIMINAL COURT AND THE UNITED STATES: It's Not a Member. Should it Join Now?

by

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INTRODUCTION

On December 31, 2000, the last day the Rome Statute creating the International Criminal Court (ICC) was open for signature, President Clinton signed for the United States. The U.S. demanded several conditions to membership, including being allowed to use its U.N. Security Council veto to stop any ICC investigation it opposed. The ICC refused.

President Bush withdrew the U.S. signature and it remains a non-party to-date. Several reasons have been advanced by Congress and successor administrations for not joining.

On March 17, 2023, after an investigation conducted by ICC chief prosecutor Karim Khan, the ICC issued arrest warrants for Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, Commissioner for Children's Rights in the Putin administration. The charges are War Crimes, namely forced and unlawful deportation and transfer of children from areas of Ukraine occupied by Russia during wartime, across national borders to Russia.

Ukraine claims that over 14,700 children have been deported to Russia, with more than 1,000 of them from the port city of Mariupol. A U.S. backed Yale University study found in February of 2018 that Russia at that time held at least 6,000 children in at least 43 facilities as part of a large-scale systematic network.

This is the first time the ICC has charged a head of state who is also a U.N. Security Council member. The ICC does not recognize diplomatic immunity for acts of sitting heads of state.

ICC President Piotr Hofmanski made a video statement which called for the international community to enforce the arrest warrants. U.S. Attorney General Merrick Garland announced specific technical and manpower assistance to Ukraine to conduct its own prosecution of Putin.

President Biden has stated he believes Putin has clearly committed war crimes and the ICC was justified in charging him. But the United States to-date has not yet offered material assistance of any kind to the ICC and has announced no further steps to directly aid or support the ICC in its prosecution.

In light of the Putin arrest warrants, has the time now come for Congress and the Biden administration to change course? Should it overcome the opposition of the Department of Defense and members of Congress, and remove legislation which limits direct assistance to the ICC?

Should the U.S. aid the ICC in its prosecution of Putin as a war criminal? Has the time also come for the United States to take a step further and finally join 123 fellow nations to become an ICC member?

This paper will examine the history of war crimes prosecutions, U.S. participation in those prosecutions, selected ICC war crimes prosecutions, and what critics say about them. It will examine persistent arguments in favor and opposed to the U.S. joining the ICC. What are the real underlying reasons it has not joined? Are they still credible? Do they make sense today?

BRIEF HISTORY OF WAR CRIMES PROSECUTIONS

War criminals have been prosecuted since the time of the ancient Greeks and before. These were usually cases of victors punishing the vanquished, and products of revenge and retribution. Furtherance of justice and protection of human rights were not always motivating factors. For centuries national courts would usually conduct these prosecutions without adhering to any meaningful rules of law or semblance of justice

The first genuine international trial for perpetration of atrocities was likely in 1474 when Peter von Hegebach was convicted of war crimes, atrocities committed during the occupation of the town of Breisach. When the town was retaken he was beheaded.

In the 19th century various nations set out sanctions for crimes committed by their own armies in wartime. President Lincoln applied them to the Union Army. They included the death penalty for inhumane behavior, including pillage, rape of civilians, severe abuse of prisoners and other atrocities.

It wasn't until the Hague Conventions of 1899 and 1907 that laws of war were included in an international treaty. They were designed to protect civilian populations, private property, religious practice and cultural objects in belligerent countries. They declared certain conduct illegal and imposed duties on states, but no individual liability or punishment for criminal misconduct was included. (1)

At the conclusion of World War I nearly 9 million people from 32 nations died. This included the sinking of two hospital ships killing many Canadian prisoners. The Germans also refused to surrender any of its soldiers accused of war crimes. (2) The United States rejected prosecuting Kaiser Wilhelm in order to avoid infringing on German sovereignty.

The victors allowed Germany to conduct criminal prosecution of its own nationals for war crimes. Out of nearly 900 potential defendants on lists prepared by the Allies only 12 were tried, most acquitted (including those tried for the hospital ship sinking, claiming obedience of orders), and those convicted sentenced to modest jail terms or time served.

Known as the Leipzig Trials, most were show trials similar to German army disciplinary proceedings. The Treaty of Lausanne of 1923 declared Amnesty for German ally Turkey's war crimes.

The League of Nations, which the United States refused to join, prepared draft treaties between the two world wars to establish an international criminal court. One was proposed as late as 1937. They were never ratified. (3)

The League had several built-in regulations which almost insured its failure. Any member state could veto resolutions attempting to sanction its own conduct. When sanctions were proposed against Japan in 1931-32 for invading Manchuria, Japan vetoed the resolution.

After WWII at the Nuremberg Tribunal and the International Military Tribunal for the Far East high-ranking Nazi and Japanese officials were charged with war crimes, crimes against peace and crimes against humanity. The latter was referred to by prosecutors as genocide, namely crimes against the Jews.

At the Nuremberg tribunal, 19 of 22 defendants were found guilty. Thirteen were hanged. At the International Military Tribunal for the Far East all 25 defendants tried were found guilty and seven were hanged. Countless others were tried and executed by individual countries. (4)

The United Nations followed suit with the convention for the Prevention and Punishment of the Crime of Genocide in 1948. The definition of genocide was incorporated and adopted virtually unchanged by the ICC in Article 6 of the Rome Statute.

The U.N. General Assembly even established a framework for an International Criminal Court in the 1950s, but there was significant debate about punishment for crimes of aggression and no agreement could be reached. Agreement was even more difficult due to the Cold War. (5)

When the U.N. was initially established, Stalin demanded that due to its size and influence, all 15 Soviet Republics be admitted as General Assembly members. He settled on three: Soviet Russia, Belorussia and Ukraine. Soviet Russia was made a U.N. Security Council permanent member with veto power.

In the 1990s, facing ethnic conflict and slaughter in Rwanda and the former Yugoslavia, the U.N. Security Council created two ad-hoc tribunals in 1993: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda. Using Nuremberg and the Far East tribunals as a guide, a court was established.

The procedural details were difficult and exhausting since the courts were established from the ground up. The two tribunals shared regulations and used the same prosecutors. The court prosecuted the war crimes of genocide and crimes against humanity in Rwanda during internal conflicts, and in the former Yugoslavia during peacetime. (6)

Using these tribunals as a model, the International Law Commission drafted proposed statutes for a permanent international war crimes tribunal. Based upon a General Assembly resolution, the conference to establish the ICC convened in June of 1998 at the headquarters of the U.N. Food and Agriculture Organization in Rome.

Many of the International Law Commission statutes were subject to political debates and the individual agendas of the many nations attending. 160 states sent delegates and several Non-Governmental Organizations (NGOs) participated.

After exhaustive debate, the finished product was the creation of the ICC by the Rome Statute, a multi-lateral treaty approved in1998 with a two-year period for nations to ratify, up to December 31, 2000.

BASIC STRUCTURE AND FUNCTIONS OF THE ICC

The International Criminal Court (ICC), located in The Hague, Netherlands has existed for 23 years. It's composed of 123 member states, known as States Parties (see Appendix A). Almost no North African or Middle Eastern Nations are ICC States Parties except Jordan and Tunisia.

In addition to the current 123 member states, Bahrain is currently an observer. Armenia's membership is pending. The Philippines and Burundi withdrew membership. Ukraine is not a member, but conferred limited jurisdiction upon the ICC in 2014 and open-ended jurisdiction in 2015.

Countries that are not members include Russia, China, Cuba, Yemen, India, Cuba, North Korea, Iraq, Syria, Iran, Saudi Arabia and Egypt. Two additional non-member countries are Israel and the United States.

The ICC includes four organs: the Presidency, Judicial Division, Office of the Prosecutor, and the Registry. The Assembly of States Parties is separate, and manages court operations, conducts oversight and is the court's legislative body. It establishes a budget, elects judges and prosecutors, and amends laws and procedures. A Trust Fund for Victims provides assistance, support and reparations to victims of crimes prosecuted by the ICC.

Judges are in the Pre-Trial, Trial and Appellate divisions. Like the prosecutor, they serve for single 9 year terms. A three judge panel presides at the trial of persons accused by the ICC of war crimes.

The court has jurisdiction over four crimes: Genocide, Crimes Against Humanity, War Crimes, and Crimes of Aggression. The latter was formally adopted in 2018. No statute of limitations applies to these crimes.

The court has jurisdiction over individuals, including heads of states, but not states themselves. It can obtain jurisdiction in three principal ways: referral by a State Party, investigation by the ICC prosecutor on its own motion, and referral from the U.N. Security Council.

A non-member state can accept ICC jurisdiction in order to seek investigation of war crimes taking place on its terrirtory and turn over indicted defendants.

The ICC prosecutor must abide by the Principles of Complementarity. If a state is making a credible effort to investigate an individual for crimes under ICC jurisdiction in violation of its own national laws, the ICC must defer to that state.

CRIMES WITHIN ICC JURISDICTION

GENOCIDE is the specific intent to destroy, in whole or part, a national, ethnic, racial or religious entity and its members by killing, causing serious physical and, or mental injuries, imposing conditions in order to destroy the entity, including imposing measures to prevent births, and forcibly and involuntarily transferring children of one group to another group. Ethnic cleansing has been included in the above definitions.

CRIMES AGAINST HUMANITY are committed against a civilian prosecution. The Rome Statute lists 15 examples. They include murder, rape, imprisonment, forced disappearance, enslavement, sexual slavery, torture, enforced apartheid, and deportation.

WAR CRIMES are serious breaches of the Geneva Conventions and include use of child soldiers, intentionally killing civilians and, or war prisoners, intentionally attacking hospitals, schools, churches, cultural centers, historic monuments, charities and non-profit entities.

CRIMES OF AGGRESSION include use of armed force by a state against the sovereignty, integrity and, or independence of another state.

The ICC Prosecutor must conduct a preliminary examination before it can begin an investigation, to be sure it has the right to do so and sufficient evidence exists. Once it concludes its investigation it can issue an indictment and request that arrest warrants be issued. They must be approved and issued by pre-trial judges.

Trial takes place in ICC headquarters in The Hague. The basic rights of criminal defendants in most democracies apply, including innocent until proven guilty, right to counsel at no cost, and the right to confront witnesses against them. The prosecutor must turn over any evidence which tends to exonerate or aid the accused. For example, information showing that the accused was following military orders may not exonerate him or her, but can mitigate the crime charged.

The ICC has no police force and must rely upon states, members and non-members, to turn over the accused to ICC custody and trial in The Hague. If convicted the defendant has a right to appeal to the ICC judicial appellate division.

The trial judges can hand down a sentence. The death penalty is not allowed, and nobody under the age of 18 can be prosecuted. The ICC does not carry out the sentence, but relies upon States Parties and, or non-members who turned in the defendants to carry out the sentences and, if required, imprison the guilty parties.

Fines, restitution, reparations and other victim redress can be ordered and are backed by the ICC Trust Fund for Victims, which receives contributions voluntarily from member states.

ICC PROSECUTION HISTORY

Most of the successful ICC prosecutions leading to convictions were accomplished against individuals from African nations. While investigations were proposed and in some cases begun against individuals from other nations, many third-world countries and like-minded NGOs accused the ICC of prejudice in selecting defendants.

To-date, the ICC has publicly indicted 52 people. Proceedings against 22 are ongoing, 16 are at-large as fugitives, one is in the pre-trial stage and five are currently on trial. ICC judges have issued 10 convictions and four acquittals. The court has convicted five men of War Crimes and Crimes Against Humanity, all African militia leaders from the Democratic Republic of Congo, Mali and Uganda.

Until the indictments of Vladimir Putin and Maria Lvova-Belova in March of 2023, most indictments have been issued against individuals from central and southern Africa for war crimes committed in those countries.

There were exceptions. Muammar Gadhafi of Libya was indicted in June of 2011. The ICC began an investigation in 2016 and Indictments were issued in June of 2022 for Gamlet Guchmazov, Mikhaeil Mindzaev, and David Sanakoev for war crimes, including ethnic cleansing of Georgians in South Ossetia during the Russo-Georgian war in 2008. At this time they all remain fugitives.

Investigations by ICC prosecutors have been made in other countries, including Burundi, the Philippines, Venezuela, Bangladesh, Myanmar, Afghanistan, Palestine, and Ukraine.

AFRICA AND THE ICC

Africa welcomed the ICC, even though the UN International Criminal Tribunal for Rwanda (ICTR) dealt with the tragedy that nearly destroyed the country. Several other countries were experiencing atrocities, including the Democratic Republic of Congo. (7)

Africa still represents the strongest geographical group in the ICC Assembly of States Parties. Africa has provided ICC judges and the second (and first female) ICC prosecutor, Fatou Bensouda from Gambia.

Indictments were issued against sitting African heads of state, including Omar Al-Bashir in Sudan and elected Kenyan President Uhuru Kenyatta and Vice President William Ruto. They used their considerable political clout to demand truth and reconciliation commissions as more effective ways to bring warring factions to the table instead of indicting them.

Arguments were made that the ICC selectively prosecuted only some alleged war criminals out of many, and the criteria was suspect, possibly influenced by members of the UN Security Council (which can refer cases to the ICC on its own motion). Burundi, objecting to ICC investigations into a long slate of war crimes allegedly committed there, withdrew its membership in 2017.

Today the majority of African ICC member nations still back the ICC.

The sheer horror of the nature and extent of mass atrocity crimes committed in Africa and subject to ICC prosecution, ranging from forced use of child soldiers, additional child abuse, slavery, mass rape, pillage of towns and villages and destruction of ethnic groups, has invoked criticism of limited ICC ability and, or willingness to provide adequate reparations to victims.

Laurel Fletcher, UC Berkeley Law School professor and director of the International Human Rights Law Clinic, argues that victims, such as in Africa, want and need restorative justice, reparations which at least are a starting point to provide remedies for their suffering and restore a semblance of their former lives.

But the ICC, while claiming this is a goal, often concentrates on retribution by punishment of the war criminal, not victim reparations. In fact the victims are often limited participants in ICC trials and punishments handed down.

Prosecutors can use victim in-put in their investigations, but victim participation in the investigation and access to materials produced is strictly limited. (8) Their participation is on occasion limited by ICC judges to protect the accused.

The ICC and other international criminal justice tribunals often presume what victims want and deserve. As a result the ICC often concludes what an "imagined" victim might seek. It might not even resemble what actual victims really want. They see victims seeking justice and punishment.

In fact victims may really be much more interested in receiving adequate material support, compensation, more political participation, and in some cases a voice in places like truth and reconciliation commissions. They want to be heard.

At times the ICC uses the needs of their imagined victims to compel states to contribute more money to the ICC Victim Trust Fund. They badgered states (like Sudan) to provide more specific aid to victims of President Omar al-Bashir, aid the Trust Fund could not provide.

In some cases NGOs voice their opposition to the limited scope of ICC prosecutions as failing to adequately address victims. In the Thomas Lubanga Dyico (leader of the Patriotic Force for the Liberation of Congo) prosecution, Human Rights Watch wanted the voices of victims to be heard. It demanded specific allegations of sexual slavery made to punish abuse of child soldiers. Children as young as 10 were raped, infected with venereal disease and HIV, and killed by Dyico's own soldiers.

The Trial Chamber agreed, but the Appellate Chamber over-ruled it, claiming those offenses went beyond the charging documents

In the reparations phase of trials, post-guilty verdict, victims are considered parties, not just participants. In the Lubanga trial many victims submitted valid requests tailored to individual needs. The result was a collective group judgement, with only community groups receiving funds. It was up to the groups to try to address individual victim needs. That was as far as the ICC would go.

It was questionable how effective the community groups would be. Some analogized it to distributing limited supplies of bread and flour to masses in a famine. Surveys have documented that victims overwhelmingly want defendants held accountable and

punished. They have a much greater desire for economic and social welfare improvements in post-conviction reparations.

The ICC argues that its resources are limited. It must pick and choose prosecutions, and has only limited resources to allocate reparations. Better for the victim that a conviction stand, retribution be achieved, and limited reparations be made. This may be political reality in the case of Africa, where victims were already deprived and suffering on a massive scale before any war crimes were committed.

FUTURE IMPLICATIONS OF ICC VICTIM REDRESS PROBLEMS

Professor Fletcher spoke further about future victim redress problems in the War Crimes History Since 1945 Seminar held on February 27, 2023 at the Browning Federal Courthouse in San Francisco. It was co-sponsored by the San Francisco Historical Society and the 9th Judicial Circuit Historical Society.

She pointed out that the ICC is not a human rights court. Its reparations trust fund remains limited. No specific mechanisms are in place to build a solid community reparations system with active victim participation, giving them a guaranteed voice and the perception that they are really receiving tangible justice. The ICC can't order individual states to commence human rights prosecutions and aid its victims.

There is no specific ongoing international war crime victim compensation mechanism or body. The U.N. could possibly create one. It has only indirectly provided compensation in the past. Its actions are subject to complex political friction between member states and Security Council vetoes. In the case of Ukraine, with a growing list of several hundred thousand victims, and the ICC indictments of Putin and Lvova-Belova, this dilemma may take center stage in the near future.

HISTORY OF ICC PROSECUTORS' ACTIONS

From the beginning, ICC prosecutors have had to deal with the world of power politics. (9)

The first ICC head prosecutor was Luis Moreno-Ocampo, an Argentine lawyer who served from 2003-12. In the beginning he realized how careful the ICC had to be in commencing investigations following its own rules. For example, if another state, member or not, was conducting its own credible investigation, the ICC had to defer to it (the Principle of Complementarity).

The operative word is "credible", and often caused political disputes. The ICC established the Jurisdiction, Complementarity and Cooperation Division (JCCD) in 2003. It included several former foreign office officials of member states such as Canada and

the United Kingdom, political scientists and NGO officials. Its job is to screen potential investigations and how the prosecutor conducts them.

Critics felt the JCCD immersed the prosecutor in diplomacy and politics, not prosecuting. It limited the prosecutor's power to start investigation on his own motion (proprio motu). Its powers were controversial and several non-member nations like the United States and China opposed it.

JCCD helped in one of the first prosecutions to convince Congo to begin its own investigation of the violence in eastern Congo, using diplomacy and politics to avoid investigation.

Moreno-Ocampo stirred controversies. For a detailed discussion of the controversies see David Bosco's book, *Rough Justice: The International Criminal Court in a World of Power Politics*. (9) After a U.N. Security Council referral, Moreno-Ocampo prosecuted a sitting head of state of Sudan, Omar Al-Bashir for Genocide in Darfur. The Pre-Trial Chamber would not allow the Genocide charge but upheld charges for Crimes Against Humanity and War Crimes.

A former ICC prosecutor in Moreno-Ocampo's office, Andrew Cayley, wrote an article claiming that there were insufficient grounds to charge Genocide, but Moreno-Ocampo charged it for the publicity. (10)

Al-Bashir thumbed his nose at the indictment and arrest warrant and traveled widely. Moreno-Ocampo bitterly complained that the E.U. wasn't doing enough to turn him over for arrest. When Egypt considered ICC membership its then head of state demanded that Al-Bashir receive ICC immunity as a condition of Egypt's membership. It was refused and Egypt did not join.

From 2009, when the ICC arrest warrant against him was issued, to 2013 Al-Bashir visited 25 countries, including China, Malaysia, Egypt, South Sudan and Saudi Arabia, none of whom took any action against him. (11)

He served as Sudan's president from 1993-2019. Finally, in 2021, under pressure, Sudan turned him over to ICC custody. Could this happen in Russia in the future with the arrest warrant pending for Vladimir Putin?

Some African leaders adamantly opposed Moreno-Ocampo's Africa prosecutions, including Al-Bashir. Articles in international publications followed accusing him of publicity-seeking and alienating staff members.

In 2005 a member of his staff claimed that Moreno-Ocampo pressured a South African journalist to have sex with him. No charges were filed and the staff member was fired. After the firing, the staff member made a damages claim and received an award from an international tribunal.

In June of 2011 during a bloody civil war in Libya, the U.N. Security Council referred head of state Muammar Gadhafi, his second son Saif al-Islam, intelligence chief Abdullah Senussi and internal security chief Tohami Khaled to the ICC for investigation. The ICC issued arrest warrants for Crimes Against Humanity, including murder and persecution of un-armed civilians.

The case against Gadhafi ended when a Libyan mob killed him. The ICC relinquished jurisdiction and Senussi was tried in Libya, and Khaled died. ICC critics believed that the warrants were issued by Moreno-Ocampo, under political pressure by Security Council members and a select group of U.N. western nations wanting to see the Gadhafi regime eradicated. (12)

Moreno-Ocampo at times allowed political pressure to influence some of his non-Africa decisions. On occasion he exercised substantial caution and backed-off when pressed.

In January of 2009 Palestine was not yet an ICC member. The Palestinian foreign minister invoked Article 12(3) of the Rome Statute which lets non-member states request ICC jurisdiction and investigation of war crimes in their territory. He requested Moreno-Ocampo to open an investigation against Israel.

In September, 2009 the U.N. Human Rights Council issued the Goldstone report, accusing Israel of what it called criminal acts in Palestine, including deliberately attacking civilian infrastructure, abusing detainees (in some cases with torture), using them as human shields, and deliberately denying medical care to wounded civilians. The report declared that Israel had shown itself incapable of adequately investigating the above itself, and concluded the violations were within ICC jurisdiction.

Israel hit the roof. U.S. ambassador to the U.N. Susan Rice privately re-assured then Israeli president Shimon Peres that it would not let the Security Council use its power to refer Israel to the ICC.

Israel could not get the U.S. to make any public statements of support, so they met directly with Moreno-Ocampo. They argued that Palestine was not an internationally recognized state and could not make the referral. The U.S. agreed but only privately.

Moreno-Ocampo was tempted to refer the question to the ICC Assembly of States Parties, hoping for permission to proceed. Israel feared that some ICC members' anti-Jewish sentiment would doom their arguments.

After immense political pressure Moreno-Ocampo backed down, ending the investigation. Several years later, based upon U.N. declarations, the ICC recognized Palestine as a state and accepted it as a member. (13)

Moreno-Ocampo also backed down regarding demands for ICC investigation of 2,400 civilian deaths in Afghanistan in 2009 resulting from both Taliban bombing, other abuses and NATO coalition bombing and abuse of prisoners and civilians.

NATO members, including the U.S. and Germany, worried that it could stir up a hornets' nest with NGOs and nations opposing the coalition's efforts. They opposed the investigation.

The government of Afghanistan (an ICC member) did not want to upset its allies' war efforts and did not cooperate with the prosecutor's office. They managed to exert sufficient political pressure on Moreno-Ocampo to curtail the investigations. (14)

In June of 2012 Moreno-Ocampo completed his term and was replaced by Fatou Bensouda of Gambia, the first African and female to hold the position. The African Union lobbied strenuously for an African chief prosecutor. They were unhappy with U.N. Security Council referrals of Sudan and Libya for war crimes investigations, and investigations in Kenya which were begun by the prosecutor's own motion.

Bensouda was not about to back down. She prosecuted Congolese warlords Thomas Lubanga and Jean Pierre Bemba, and Uganda's Joeseph Korny, head of the Lord's Resistance Army. Some African countries were so upset that they demanded African States Parties withdraw from the ICC.

In 2016 she opened the ICC investigation into war crimes, including ethnic cleansing, in South Ossetia during the 2008 Russia-Georgian war.

In 2018 she began an investigation into extra-judicial torture and killings related to a drug war in Davao City, the Philippines, from 2011- 2016, when Rodrigo Duterte was mayor, and through 2019 when he was president. The Philippines, an ICC State party since 2011, objected, and claimed it was conducting its own investigation.

Bensouda concluded that the investigation was either insincere or ineffectual. As a result the Philippines withdrew from the ICC in March, 2019, while Duterte was still president. The investigation was suspended.

She issued arrest warrants in 2019 for Libyan leaders committing abuses in a second civil war.

Her most controversial move was resumption of the investigation into alleged war crimes by the United States and its allies in Afghanistan. In March of 2020 an ICC panel of judges authorized Bensouda to begin the investigation. It concentrated on 2003, when Afghanistan joined the ICC, through 2014.

It investigated Crimes Against Humanity and War Crimes by both the Taliban and Afghan National Security forces, with the latter accused of summary executions and torture before the 2021 Taliban takeover of the country.

It also focused upon Taliban crimes when it took control of Afghanistan, including enforced disappearance and murder of former Afghan government officials, security forces, and journalists, including several women. The Taliban was accused of attacking, beating, detention and torture of women and LGBT people demanding their rights when the Taliban seized power. The Rome Statute states that Crimes Against Humanity include persecution of any identifiable group, including on the basis of gender.

Bensouda also investigated the U.S. and its allies, including U.S. armed forces and the CIA for torture and other acts in Afghanistan and secret locations (black sites) in Poland, Romania and Lithuania. All are ICC members. The investigation provoked anger in the Trump administration.

In 2020 the then Afghan government, in response to U.S. requests, asked the court to defer to its own investigation. The ICC paused its investigation. After the Taliban assumed power, the ICC asked them to show that it was continuing a valid investigation on its own. It couldn't convince the ICC and the full investigation resumed in September, 2021 under new prosecutor Karim Ahmed Kahn.

Karim Ahmed-Kahn is the third and current ICC chief prosecutor whose term began in June, 2021 after Bensouda's term expired. He is British, born in Edinburgh, Scotland, and is a lawyer specializing in international criminal law and human rights violations.

The latter specialty is noteworthy given the complaints that ICC prosecutions fail to adequately address victim suffering and reparations. He was an U.N. Assistant Secretary General who led the U.N. investigations into ISIL abuses in Iraq from 2018-21.

One of his first moves was in December of 2021 to stop the ongoing investigation into alleged war crimes committed in what the ICC considered a Colombian civil war. The ICC decided that Colombia, an ICC State Party, was adequately carrying out its own investigation.

During his tenure investigations have gone far beyond Africa. The ICC Pre-Trial Chamber approved issuing the arrest warrants against three men for war crimes, including ethnic cleansing, in South Ossetia during the 2008 Russian-Georgia war (discussed above).

In January of 2023 an ICC judicial panel issued a long decision authorizing Ahmed-Kahn to resume the Philippines investigation. The panel listed several examples of the Philippines clearly failing to proceed with its own investigation. The ICC retained jurisdiction from the period up to March 2019, when the country withdrew from the ICC. (15)

His most noteworthy act to-date was the investigation into alleged Russian war crimes in the ongoing war in Ukraine resulting in ICC court approval for the arrest warrants discussed above.

Some diplomats and many activists commend the ICC for broadening its scope. Critics, including the U.S., argue that it has still yet to do so and remains primarily a vehicle used by major powers responding to violence in weaker states. The Russian indictments may change that perception.

THE UNITED STATES AND THE ICC; A LONG EVOLVING PROCESS

THE BUSH YEARS

On May 6th, 2002 President Bush suspended the Clinton signature, and took the position that the U.S. would no longer be involved with the ICC. (The Russian Federation also signed the Rome Statute but never ratified it. They did not suspend their signature until 2016.)

The Bush administration sought Bilateral Immunity Agreements (BIAs) excluding the citizens and military personnel of countries who signed them from ICC jurisdiction. The surrender of many people, including current or former government officials, military personnel and U.S. employees, contractors and nationals for ICC investigation and, or prosecution was prohibited The U.S. also suspended military assistance to ICC States Parties who refused to sign the agreements.

Over half the States Parties at the time refused to sign, and 53 other countries publicly refused to sign. Of the 101 governments who signed, less than 40% of those agreements were ratified by parliament or only signed as an executive agreement.

To overcome political problems with BIAs Congress passed the American Service-members Protection Act (ASPA). Some called it the "Hague invasion Act." It restricted cooperation with the ICC, and gave the President power to use all means necessary to bring about the release of any U.S. or allied personnel detained by or on behalf of the ICC.

It prohibited any federal, state and local agency, including courts, from assisting the ICC. It prohibited use of funds to extradite or consent to transferring any U.S. citizen to a country obliged to surrender persons to the ICC. It prohibited the transfer of classified national security information and law enforcement data to the ICC, and prohibited any ICC agents from conducting investigations in the U.S.

It prohibited U.S. military aid to countries who are ICC States Parties. Exceptions were made for NATO members, major non-NATO allies (Taiwan), and countries who were

honoring BIAs. The act allowed (via the Dodd amendment, proposed by Senator Christopher Dodd) the U.S. to assist in the search and capture of foreign nationals of its choosing that were wanted for prosecution by the ICC (including Osama Bin Laden and Saddam Hussein).

In 2004 Congress adopted the Nethercutt Amendment, which cut off U.S. economic support funds to all countries that ratified the Rome Statute but did not sign BIAs. This included many key allies. The President was given power to waive the economic funding restrictions, and he did so in 2006 for 14 countries previously denied aid.

Further BIA exceptions included the 2006 waiver by President Bush for military education and training funds supplied to 21 ICC States Parties even though they wouldn't approve a BIA.

In 2007 the Bush administration restored all funds denied under ASPA, except foreign military aid and financing for ICC States Parties who were not NATO members or close U.S. allies. Remaining countries who refused to sign BIAs still received no funds.

The pattern of blanket prohibitions against the ICC caused many diplomatic and political headaches. In response they were softened by confusing exceptions. A pattern was clearly developing in order to avoid alienating certain important allies.

The Bush administration and Congress did not like many fundamental ICC provisions. They opposed the power of an ICC prosecutor to commence an investigation on its own motion if the pre-trial chamber agreed.

The Bush administration feared that a prosecutor, critical of U.S. foreign policy might be pressured by anti-American ICC members, non-member countries and NGOs also opposed to U.S. policies. It worried that they might pressure the prosecutor to investigate the U.S. and its allies' conduct in the Afghanistan, Iraq and Al Qaeda wars. It also feared investigations of Israeli activities assisted by U.S. intelligence, military and economic aid.

The Bush administration and Congress voiced many other objections to the ICC in order to protect American military and intelligence personnel engaged in the wars in Iraq, Afghanistan, and against Al Queda. As early as 1998 the State Department issued a statement saying:

"The American armed forces have a unique peace-keeping role, posted to hot spots around the world. Representing the world's sole remaining superpower, American soldiers on such missions stand to be uniquely subject to frivolous, nuisance accusations by parties of all sorts, and (the U.S.) cannot be expected to expose its people to those sorts of risks." **(16)**

The Defense Department has been and continues to be adamant in its support of that statement.

The Bush administration originally persuaded the U.N. Security Council to pass a resolution preventing soldiers from non-ICC member countries (including the U.S.) providing U.N. peace-keeping forces from being investigated or prosecuted by the ICC.

The U.S. did not oppose the ICC when it declined to honor the Principle of Complementarity and issued arrest warrants for Al-Bashir in Sudan. The ICC decided that Sudan failed to conduct a credible investigation of its own head of state's alleged crimes.

The State Department publicly agreed with the ICC. During the Bush Administration's second term, the U.S. supported the ICC investigation and prosecution of Al-Bashir for Genocide in Sudan. According to former legal adviser to the State Department at the time, John Bellinger, it supported the ICC because Sudan refused to conduct its own credible investigation.

Given the fact that the Bush Administration was opposed to the ICC it was surprising that in addition to its support of the Al-Bashir prosecution, it neglected to join the chorus of complaints that Moreno-Ocampo's prosecutions were partially motivated by publicity-seeking.

The State Department took a totally different position when the ICC declined to invoke the Principle of Complementarity during its investigation of U.S. and its allies' alleged torture and mistreatment of detainees in Afghanistan. It concluded that the U.S. failed to credibly carry out its own investigations. (17)

The U.S. claimed it did adequately investigate most of the alleged Afghanistan offenses. John Bellinger said many years later:

"*You can argue about whether the investigations were full enough, but there was a big difference between the investigations that were conducted by the U.S. (compared to) Russia claiming it did absolutely nothing wrong in Ukraine."* (18)

U.S. investigations included the resulting in the court martial trial in 2005, United States v Sgt. Darin Broady(2005). Broady, an Army reservist accused of severely beating a detainee in an Afghan military prison camp. He was acquitted by a military jury. He was the last of five military police from a Cincinnati-based reserve unit investigated and, or tried. There were no convictions.

The Bush administration also feared the concept of "universal jurisdiction". It has been used (though rarely) by countries to prosecute crimes outside of its territory even if the suspect, victims and the state itself have no direct connection to the crimes. Germany used it regarding certain alleged abuses during the Iraq war. The U.S. applied political pressure and Germany stopped.

The objections continued. The Bush Administration scrutinized the rights of a criminal defendant included in Article 12 of the Rome Statute. It found the Rome Statute in-

compatible with the Sixth Amendment to the U.S. Constitution. In criminal prosecutions it provides an accused the right to a jury trial.

The Bush Administration argued that not every crime set out in the Rome Statute was compatible with crimes recognized under U.S. law. It objected strongly to the definition of "Crimes of Aggression" as a war crime punishable by the ICC, then being debated in the Assembly of States Parties.

It was considered much too broad. U.S. military and intelligence entities feared a politically motivated prosecutor could tinker with the definition and use it to investigate U.S. conduct in Afghanistan and Iraq.

The final definition of Crimes of Aggression was eventually approved in 2018 by the ICC courts. It includes use of armed force by a state against the sovereignty, integrity and, or independence of another state. As of April, 2023 45 ICC states parties have ratified it.

GUANTANAMO BAY

If any conduct which could cause a potential ICC investigation worried the Bush Administration during its war on terror it was interrogation of detainees at its detention facility in Guantanamo Bay, Cuba and various "black sites" around the world.

U.C. Berkeley Law School's International Human Rights Law Clinic and Human Rights Center and the Center for Constitutional Rights submitted a report in November of 2014 to the Convention Against Torture Committee regarding alleged U.S. violations of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The U.S. was a signatory to the convention.

The report included a study which found that the U.S. for several years promoted a system of confinement which dehumanized detainees by sexual humiliation, short shackling and other stress positions, prolonged exposure to extreme temperatures, desecration of the Quran, prolonged isolation and water-boarding. Major General Geoffrey Miller commanded the facility and ordered many of the torture techniques.

Detainees who were released (some of whom the U.S. concluded were held by mistake) often suffered serious psychological injuries consistent with torture, cruel, inhuman or degrading treatment and prolonged mental harm, all of which violate CAT's provisions.

Former detainees reported being left alone in a room where a woman undressed and touched them. FBI agents claimed female military interrogators straddled detainees and whispered in their ears. Other detainees reported being hunched over with their hands and feet shackled to a metal ring on the floor with loud music and strobe lights for a full day. They claimed if you moved to avoid numbness, the shackles cut into you.

Eight detainees claimed they were shackled to the floor unable to move at all in rooms with freezing air conditioning. Many were held in solitary confinement in conditions far worse than those existing at the U.S. Bureau of Prisons Super-Max facility in eastern Colorado.

One detainee claimed he spent 23 hours a day in a cell with only solid walls for a year. He could not speak to other detainees. Five detainees reported instances where U.S. soldiers poured water on the Quran, stepped on it and kicked it on the floor.

Detainees were continually denied hearing dates and told that they would remain where they were in those conditions for the rest of their lives. This led to several suicide attempts.

Over 600 detainees were transferred from "Gitmo" and "rendered" to over 45 countries, including Egypt and Syria, where they continued to be mis-treated as they were in Gitmo. Some detainees claimed they were forced to take hallucinatory drugs which in one case made the victim think he saw snakes coming through the floor. Secretary of Defense Donald Rumsfeld specifically approved harsh interrogation techniques, including use of guard dogs to induce fear, painful shackling and stress positions, and nudity. Several of the methods violated the U.S. Army field manual.

The United States took the position that many of the above tactics (which were spelled out in governmental "torture memos") used against detainees who they classified as "enemy combatants" were governed not by CAT provisions or the Geneva Conventions, but the rules of war, which were not violated. (19)

Military commissions, used extensively during the Bush administration, afforded the accused enemy combatants a copy of charges against them and free representation by military counsel. However due to claims of national security they could not see or hear all of the evidence against him, including some witness statements. The hearings could take place with the accused absent.

Hamdan was Osama Bin Laden's chauffeur. He was designated an enemy combatant, tried and convicted by a military commission of conspiracy to provide material support for terrorism as a war crime, violating the laws of war. He sought habeas corpus relief.

In HAMDAN v RUMSFELD 548 U.S. 557(2006) the Supreme Court held that alien Guantanamo detainees who had been classified as enemy combatants were still protected by the Suspension Clause (Article 1, Sec. 9, U.S. Constitution) and entitled to seek habeas corpus relief in U.S. courts. See RASUL v BUSH 542 U.S. 466 (2004)

The Supreme Court disagreed that only the laws of war applied. The Geneva Convention and the Uniform Code of Military Justice also applied. The military commission hearing unconstitutionally violated both in many ways, including not allowing Hamdan to attend.

In response the Bush administration convinced Congress to pass the Military Commissions Act of 2006 (MCA), specifically prohibiting federal courts from hearing habeas corpus petitions of foreign detainees and specifically allowing hearings to only abide by the laws of war.

As a result the Supreme Court decided BOUMEDIENNE v BUSH 553 U.S. 723 (2008). The court held that the Military Commissions Act of 2006 (MCA) could not strip federal courts of habeas corpus jurisdiction over petitions filed by foreign nationals detained at Guantanamo. The Act violated the Suspension Clause of the Constitution.

Detainees at Guantanamo were entitled to Fifth Amendment rights not to be deprived of liberty without due process of law and entitled to all protections of the Geneva Conventions. Detainees could also directly challenge the adequacy of the review provisions of the MCA.

After passage of the MCA Hamdan remained in Guantanamo and was released in November, 2008 to Yemen to serve the remaining months of his 66 month detention. The Yemen government released him in January, 2009. He then lived with his family.

Hamdan still pursued his claims that his conviction was illegal and unconstitutional. On October 16, 2012 in HAMDAN v UNITED STATES 696 F. 3rd. 1238, 1244 (2012) the U.S. Court of Appeals, D.C. Circuit, in a decision written by Judge (now Supreme Court Associate Justice) Brett Kavanaugh, the court held that his conviction for terrorism was not a war crime punishable by the international laws of war when he was accused of performing it. The court found it an illegal ex-post-facto conviction, vacated it and acquitted him of all charges.

In a footnote Judge Kavanaugh stated: *"We do not have occasion to question that, as a matter of fact, Hamdan engaged in the conduct for which he was convicted."* 696 F. 3rd. at 44.

On November 15, 2015 the McCain-Feinstein Anti-Torture Amendment, passed 78-21, was signed into law as an amendment to the National Defense Authorization Act for Fiscal Year 2016. It restricted interrogation techniques upon detainees during any armed conflict to only those authorized in the U.S. Army Field Manual.

The Manual lists several specific acts of torture that are prohibited (waterboarding, forced nudity and other forms of torture), requires that all prisoners and detainees be treated humanely, and explicitly prohibits cruel, inhuman and degrading treatment.

The amendment also specifically authorized International Red Cross direct access to any detainees in U.S. custody. (20)

For a chilling in-depth study of post 9-11 torture and mal-treatment of detainees at Guantanamo, see *The Guantanamo Effect* by Eric Stover and Laurel E. Fletcher (University of California Press, 2009).

This book exposes in detail U.S. detention and interrogation practices and their terrible consequences. It reviews participating agencies, relevance of the Geneva Conventions, operation of Combatant Status Review Tribunals, legislative reaction and eventual prohibition of certain practices.

Official documentation signed and, or explicitly approved by high officials in the Bush Administration spelling out permissible harsh interrogation techniques are included in the book. To-date substantial portions of governmental investigations conducted after publication of the book, including findings of the Senate Intelligence Committee, remain classified.

Today, almost 23 years since 9-11, the detention facility at "Gitmo" remains open. As of April, 2023, 31 detainees remain, 17 are eligible for transfer, 3 are eligible for periodic review, 9 have cases pending in the military commission process, and two were convicted by a military commission.

The oldest detainee released was Saifullah Paracha, 75, who spent 18 years at the facility. He was released to Pakistan. In March of 2023 Ghassan Al Sharbi was released to the Kingdom of Saudi Arabia. He spent 21 years at Gitmo, having been accused of making bombs for the specific group of terrorists who planned and, or carried out the September 11, 2001 bombing of the World Trade Center. (21)

His complicity was undermined by Judge Kavanaugh's decision in HAMDAN v UNITED STATES in 2012. It was decided by the government that Al Sharbi's activities did not meet criteria sufficient to justify continuing charging him.

He was similar to many other detainees who spent years in Gitmo, even after being deemed subject to release, because it was difficult to find countries willing to accept them.

At least two detainees convicted by military commissions were sent to the U.S. mainland to serve their sentences. In early 2023 there were un-documented rumors of plea deals being discussed with remaining masterminds of the 9-11 bombing remaining in custody. Nothing has been confirmed.

The Obama and Biden administrations both expressed willingness to close the detention facility. Congress is still very concerned that some of the detainees no longer charged could potentially be released to the U.S. mainland, and to-date will not authorize funds to release them or close the facility.

ABU GHRAIB

Probably the most humiliating example of the dismal descent of the U.S. to the netherworld of war on terror prisoner abuse would be the carnival of horror and

degradation of prisoners in Abu Ghraib prison in Iraq, maintained by U.S. military personnel and private contractors.

U.S. Army soldiers, CIA personnel and private contractors committed a series of human rights violations which rose to the level of war crimes at the prison during early stages of the Iraq war. Abuses included physical and psychological torture, sexual humiliation, rape, and the killing of prisoner Manadel-al Jamadi.

The Department of Defense removed seventeen soldiers and officers from duty. Eleven were charged and convicted in court martial trials of dereliction of duty, maltreatment, and aggravated assault and battery. They were dishonorably discharged and sentenced to military prison.

Military Police Brigade member Specialist Charles Graner received a 10 year sentence. PFC Lynndie England received a 3 year sentence. Brigadier General Janis Karpinski, commanding officer of all Iraq detention facilities, was reprimanded and demoted to the rank of colonel. When she assumed command she had no prior experience running a prison of any kind. (22)

In 2012 a civil suit filed in U.S. district court in Virginia by 71 Iraqis detained in Abu Ghraib and other detention facilities against L-3 Services, a private contractor hired by the Defense Department to provide translation, was settled when the parent company, Chantilly Holdings, Inc. of Chantilly, Va., paid out $5.28 million.

Allegations of several plaintiffs included rape and another alleged having a gun pressed against his head and the trigger pulled. This is the only known civil case resulting in damages being paid to-date.

In a civil action, Suhail Najim Abdullah Al Shimari and three other plaintiffs, all Iraqi prisoners at Abu Ghraib, filed civil damages claims in March, 2009 in the U.S. district court, eastern district of Virginia, against CACI Premier Technology and CACI International, Inc., private contractors who provided interrogation services for the Defense Department.

Claims were made on behalf of the four plaintiffs regarding a series of serious abuses under the Federal Tort Claims Act and the Alien Tort Claims Act by the Center for Constitutional Rights.

Military Policemen Charles Graner and Ivan Fredereick, convicted in court martial proceedings discussed above, both specifically claimed that CACI contractors Daniel Johnson and Steven Stefanowicz ordered that several of the abuses discussed above be carried out.

The case has lasted for over 14 years. The U.S. Supreme Court denied the defendants' petition for a writ of certiorari in June of 2021 and remanded the case to the district court. It continues to-date.

THE OBAMA YEARS

The Obama administration signaled its intent to cooperate with the ICC. It sent Ambassador at Large for War Crimes Steven Rapp to the 2009 annual meeting of ICC States Parties as an observer for the first time in ICC history. Secretary of State Hilary Clinton told the Senate Foreign Relations Committee that the U.S. will end its hostility towards the ICC. (During a trip to Kenya she expressed regret that the U.S. had not joined the ICC earlier.) (23)

As discussed above, all sanctions against BIA non-signers were removed. U.N. Ambassador Susan Rice supported the ICC investigation in Sudan. State Department director of policy planning, Harold Koh, expressed support for the ICC.

The U.S. pledged support to the ICC in its prosecution of Lord's Resistance Army leader Joseph Kony and offered support to the Democratic Republic of Congo's judicial system to prosecute war crimes on its own.

Koh, Rapp and Samantha Power (on the Obama National Security Council) all were friends of ICC chief prosecutor Moreno-Ocampo. They were referred to as an ICC "glee club."(24)

In 2010 Mary DeRosa, Legal Adviser to the National Security Council, asked for a memo from the Justice Department's Office of Legal Counsel regarding engagement with the ICC and how Bush era legislation passed by Congress still impeded it. The memo was signed by Acting Assistant Attorney General David J. Barron, Office of Legal Counsel, U.S. Department of Justice.

An exhaustive 25 page memo was submitted, examining all aspects of any relevant legislation. It concluded that the U.S. could sponsor resolutions, including U.N. Security Council resolutions, referring matters to the ICC. The U.S. could conduct diplomatic activities with the ICC.

ASPA (discussed above) did still prohibit providing material or financial support to the ICC, except as provided by the Dodd Amendment (also discussed above), which allowed Congress to authorize funds to help find and bring foreign nationals (not U.S. citizens or personnel) charged by the ICC with war crimes to justice.

The memo also concluded that the U.S. could provide intelligence, law enforcement assistance, testimony and similar aid for particular ICC prosecutions.

The memo was circumspect when it came to training for ICC personnel in selected prosecutions. It said the Dodd Amendment and ASPA provide narrow exceptions allowing such training. It also said the U.S. could provide personnel for particular foreign national war crime investigations, but the personnel could not aid the ICC as an institution. (A good example of legal hair-splitting which took place throughout the memo.)

It suggested using caution and deciding on a case by case basis. The Obama administration was obviously trying, carefully in light of Congressional, Defense Department and intelligence agency opposition, to walk back the strict limitations of the Bush years.

The Obama administration did not always cooperate with the ICC. Prosecutor Moreno-Ocampo complained the U.S. was not doing enough to facilitate Al-Bashir's arrest. Obama special envoy to Sudan Scott Graton wanted the arrest placed on the back-burner so it could continue with delicate negotiations regarding both Darfur and South Sudan, both of which needed Sudan's cooperation. Since Al-Bashir remained as president the U.S. had to deal with him.

The Obama administration also opposed Congressional anti-terrorism legislation. In September of 2016 Congress passed the Justice Against Sponsors of Terrorism Act (JASTA). It narrowed the scope of foreign sovereign immunity and amended that act regarding civil claims against a foreign state.

Previously U.S. citizens could only sue a foreign state for injuries, death or damages caused by international terrorism if the state was a designated sponsor of terrorism (The U.S. designates only Cuba, Iran, North Korea and Syria.)

The Act gave federal courts jurisdiction over any foreign state's support of acts of international terrorism against a U.S. national or property regardless of whether the state is designated as a sponsor of terrorism. Under JASTA civil suits by families of victims of 9-11 were continued or re-designated against Saudi Arabia.

President Obama vetoed the Act. The Administration said it was concerned that the Act could subject the U.S. and its nationals to extreme risk if, as a result, similar laws were passed by other countries, especially those opposed to U.S. military and national security activities. The veto was overridden by the Senate (97-1 with two abstentions) and the House (348-77). It was the only veto override in Obama's presidency.

THE TRUMP YEARS

The Trump Administration abruptly reversed the direction of the Obama Administration and opposed not only joining the ICC, but the organization itself. It was upset over the ICC's ongoing investigation into alleged war crimes in Afghanistan of the U.S. and its allies. Members of the Administration, including John Bolton and Secretary of State Mike Pompeo, made explicit statements opposing the ICC's methods of operation.

In a speech to the 73rd Session of the U.N. General Assembly in September of 2018 President Trump said:

> ***"So the United States took the only responsible course: we withdrew from the Human Rights Council, and we will not return until real reform is enacted. For similar reasons, the United States will provide no support in recognition of the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness and due process. We will never surrender America's sovereignty to an un-elected, un-accountable global bureaucracy."*** **(25)**

The Trump Administration imposed economic and travel sanctions by executive order directly upon ICC prosecutors, including revocation of U.S. visas of ICC chief prosecutor Bensouda and her deputies. The sanctions included freezing assets of anybody directly aiding the ICC investigation.

THE BIDEN ADMINISTRATION

As discussed above, the Biden Administration lifted the Trump sanctions against the ICC, including travel bans, in April of 2021. However, Secretary of State Anthony Blinken issued a statement reiterating the: "*…longstanding objection (of the U.S.) to the (ICC) court's efforts to assert jurisdiction over non-States Parties, such as the United States and Israel.*"

He did add: *"our concerns about these cases would be better addressed through engagement with all stakeholders in the ICC process rather than through the imposition of sanctions."* (26)

The Biden administration has indicated support for multilateral institutions, especially those putting human rights at the center of their efforts. However, it did not take any steps to further U.S. membership in the ICC.

RUSSIAN INVASION OF UKRAINE

When the Russian Federation invaded Ukraine in February of 2022, Congress immediately reacted. Several measures were proposed to sanction Russia and provide relief to victims of war crimes. In late 2022 Congress sent the Justice for Victims of War Crimes Act to President Biden, who signed it. (27)

Under previous law the U.S. could only prosecute war crimes if the alleged perpetrator or victim were a U.S. national. If a Russian soldier committed war crimes against a Ukrainian national and came to the U.S. as a safe-haven or a place to park their investments, they could not be prosecuted here.

Now the perpetrators, if they come to the U.S. to escape accountability abroad, can be prosecuted here, even if the victims were Ukrainian, and the crimes were solely committed on foreign soil. Prosecutors have to produce sufficient evidence to proceed to trial. The Attorney General must certify that prosecution is in the public interest and

required to achieve substantial justice. This legislation is much more consistent with U.S. obligations under the Geneva Conventions.

While the ICC can prosecute a soldier, it often only pursues the most serious crimes and high level perpetrators, and only if national courts of the perpetrator or scene of the war crimes are unwilling or unable to meaningfully investigate and prosecute them. Now lower-level actors can be prosecuted by the U.S. if they are here, irrespective of other national courts.

On March 3, 2023 Attorney General Merrick Garland met with President Zelensky in Lviv, Ukraine in a conference focused upon justice and human rights. He supports efforts to hold Russia accountable for war crimes and signed an agreement sharing data with Ukraine about Russian atrocities like targeting maternity hospitals, schools and civilian apartments.

The efforts include a war crimes accountability team, assisting Ukrainian prosecutors in forensic analysis of crime scenes and providing investigative training with a joint investigative team. The U.S. is also establishing a sophisticated database for the prosecutors based upon the complex crimes model used in the Justice Department.

Garland told National Public Radio after the meeting that he is descended from a family from Belarus, not far from the meeting in Lviv, some of whom were killed by Nazi atrocities. His family never had verification of what happened, and he stressed that Ukrainian victims need that kind of verification for atrocities their families suffered at the hands of Russia.

He said the U.S. would assist Ukraine in prosecuting war crimes, and it would continue to sanction individuals and groups directly aiding the Russian war machine (oligarchs), prosecute sanction evaders and violators, and seize their assets.

He spoke favorably about the ICC bringing those accused of Crimes Against Humanity to justice, and said the U.S. is considering establishing its own center for the investigation of war crimes which may share data with the ICC.

The U.S. has identified war crimes suspects who fall under U.S. jurisdiction under U.S. law. Garland named Yevgeny Prigozhin, an oligarch who heads the Wagner Group, calling him: *"a bad actor"*. The U.S. is looking into extraditing suspects, and prosecuting them in U.S. courts if they are in the country.

The Biden Administration is not in total agreement about these steps. On March 12, 2023 the New York Times reported that Defense Secretary Lloyd Austin said the Pentagon is attempting to block sharing any data gathered by U.S. intelligence agencies about Russian atrocities in Ukraine with the ICC. It fears that a precedent would be set which would encourage the ICC to prosecute Americans in the future for similar alleged atrocities.

The Justice Department and the State Department favor providing such data to the ICC. President Biden has not yet resolved the dispute.

Five days later, on March 17, 2023, the ICC issued arrest warrants for Putin and Lvova-Belova. The next day President Biden publicly stated that Putin clearly committed war crimes justifying the ICC's issuance of arrest warrants. He said the ICC made a strong case against Putin. He told reporters on March 17th: "*It's (the ICC) not recognized internationally by us either, but I think it makes a very strong point.*"(28)

The Biden Administration is developing several more new tools to take action against Russian atrocities and alleged war crimes in Ukraine. Task Force KleptoCapture is a Justice Department unit established in March, 2022 to enforce sanctions against Russian oligarchs promoting the Russian invasion of Ukraine.

It was announced the day after President Biden warned the oligarchs in his State of the Union Address on March 1, 2022: "*We're joining with European allies to find and seize their yachts, luxury apartments, their private jets. We're coming after your ill-begotten gains.*" (29)

The task force includes veteran Justice Department prosecutors and representatives from the FBI, U.S. Marshals Service, IRS, Postal Inspection Service, Immigration and Customs Enforcement, and the Secret Service.

An executive order was issued on March 11, 2022 prohibiting imports, exports and new investment and issuing economic sanctions prohibiting trade in luxury goods. As a result an Airbus jet, a Boeing 787-8, a Gulfstream G650ER, luxury yachts, and other items were seized due to allegations of conspiracy to commit bank fraud and money laundering.

On the one-year anniversary of the Russian invasion of Ukraine on February 24, 2023 the U.S. announced establishment of an Enforcement Coordination Mechanism, which it would chair the first year, with G7 nations to enforce their sanctions against Russia and prevent evasion.

New sanctions are being imposed against 200 individuals and entities including other countries supporting Russia's war efforts. Targets include Russian metals and mining sectors, Russian tech industries (including software and semiconductors), future Russian energy production, components found in Iranian drones used by Russia in Ukraine, industrial machinery and luxury goods. It includes entities, countries or individuals backfilling Russian stocks of sanctioned items.

The U.S. announced increased tariffs on Russian imports, including metals, minerals and chemical products worth approximately $2.8 billion.

In July, 2022 Senators Richard Blumenthal and Lindsey Graham sponsored a bill to designate Russia a state sponsor of terrorism. It would drastically curtail defense and technology exports, significantly reduce any foreign assistance, and impose additional

financial restrictions on Russia. The U.S. recognizes North Korea, Syria, Cuba and Iran as state sponsors of terrorism.

In November, 2022 the European Parliament approved a resolution allowing the EU to designate Russia a state sponsor of terrorism. On the one year anniversary of the Russian attack of Ukraine, President Zelensky specifically asked the U.S. to so designate Russia. The Biden Administration opposed the designation, claiming that it would tie U.S. hands in engaging with Russia and limit diplomatic efforts to end the Ukraine war.

Instead, in an effort to compromise with Congress, President Biden proposed that the U.S. designate Russia an Aggressor State, which would allow new sanctions. The negotiations have stalled.

Congress then proposed legislation designating the Wagner group a Foreign Terrorist Organization (FTO). The State Department opposes the designation because many African governments do business with Wagner and its mercenaries. The U.S. is delicately trying to change the focus of these governments, and if FTO status was applied to Wagner, African government officials dealing with Wagner would immediately be blocked from travel to the U.S. and their assets would be subject to seizure.

Vice President Kamala Harris announced at the Munich Security Conference on the one year invasion anniversary that the U.S. would continue to support a range of investigations into Russian atrocities.

These include efforts against Russia by Ukraine's prosecutor general through the U.N., expert missions established under the Organization for Security and Cooperation in Europe (OSCE), and use of the Moscow Mechanism.

The OSCE has 57 participating states in North America, Europe and Asia, including the U.S. It's the world's largest security organization which conducts political forums, manages crises, and uses field operators to act as monitors, including in Ukraine with the aim of reducing tensions.

The Moscow Mechanism, established in 1991, is a vehicle for member states to request establishment of independent experts to investigate a question or problem including fact finding and mediation.

Harris also expressed support for steps being taken by the ICC, among others.

Regarding Russian conduct in Ukraine, Congress continues to take a much more aggressive position than the Biden Administration. But the Russian invasion, as can be seen above, has "lit a fire" under the Administration. It continues to propose, provide and streamline many tools to prosecute perpetrators of war crimes. How effectively it uses them remains to be seen.

U.S. ICC MEMBERSHIP: YES OR NO?

Both the arguments in favor and against U.S. membership have merit. They often use the same facts, but reach opposite conclusions. Many of these arguments have been discussed above. Here is a summary.

OPPONENTS' ARGUMENTS

Opponents continue to stress that the Rome Statute fails to follow U.S. Constitutional due process guarantees, including the right of a person accused of a crime to a jury trial. Objections include claims set out by a Heritage Foundation article that only U.S. courts, not the ICC, can try U.S. citizens for alleged war crimes committed on U.S. soil. They are within the exclusive jurisdiction of U.S courts. The Supreme Court has long held that only U.S. courts, as established by the Constitution, can try such offenses. (30)

Opponents object to the substantial independence of the ICC prosecutor in deciding whether or not to investigate, the cumbersome slowness of the process, of approval and issuance of arrest warrants, allowing suspects plenty of time to plan and carry out substantial efforts to evade arrest.

States Parties can use investigations to hamper U.S. policy, a tactic referred to as "law-fare". Non-Governmental Organizations with "axes to grind" against U.S. policy could band together and influence sympathetic ICC States Parties to push for investigations. (31) The prosecutor can receive information from any source, including radical NGOs.

The U.S. objected vigorously to the ICC definition of Crimes of Aggression. It is so broad that in the wrong hands it can be tailored to use against legitimate U.S. covert intelligence and military activities.

The Pentagon and various intelligence agencies cited ICC prosecutorial efforts to look into alleged U.S. military and intelligence abuses during the Afghanistan war. They fear that Crimes of Aggression can be manipulated to investigate and prosecute activities of the U.S. which are required and acceptable under the laws of war.

In addition, there is no statute of limitations in the Rome Statute. Any nationals of a non-member state (including the U.S.) can be investigated at any time for acts alleged to have been committed long ago.

Diplomatic objections include previous investigations of activities of close U.S. allies, such as Israel, which could have a chilling effect upon U.S. foreign policy and Israeli national sovereignty. It provoked the ire of various State Department officials, including John Bolton (quoted above) (32) and former Secretary of State Mike Pompeo.

In March of 2021 Secretary of State Antony Blinken issued a press statement opposing the ICC opening of investigation of Israeli acts in Palestine. He pointed out that the ICC is a court of only limited jurisdiction and runs into trouble due to lack of legal grounds to fully and fairly investigate the issues. He went on to say:

"…the United States believes a peaceful, secure and more prosperous future for the people of the Middle East depends upon building bridges and creating new avenues for dialogue and exchange, not unilateral actions that exacerbate tensions and undercut efforts to advance a negotiated (Palestine) two-state solution." **(33)**

Why allow the ICC to potentially disrupt sound diplomatic efforts of the U.S. with its allies and other nations based upon fundamental human rights, a cornerstone of its foreign policy?

The U.S. has plenty of statutory tools to deter war criminals and human rights violators on its own or with others of its own choosing. With its vast influence and substantial power the U.S. does not need to join the ICC, which could limit U.S. activities and tie its hands.

PROPONENTS' ARGUMENTS

A major argument in favor of the U.S. joining the ICC claims that ICC States Parties have a much higher level of human rights protection, fewer human rights abuses and fewer instances of internal violence. Further, the ICC influences non-member states by deterring them from enabling war crimes. This has been supported by studies.

In 2015 James Meernik's abstract claims that states who ratified the Rome Treaty made commitments to the rule of law within its borders, adjusted its own regulations and supported the ICC's powers to prosecute war criminals. (34)

Another study claims that the ICC's efforts to prevent egregious human rights abuses and international crimes has had a deterrent effect upon some non-member governments and rebel groups seeking international legitimacy. (35)

Still another study argued that ICC investigations can deter governments from committing human rights abuses by imposing a variety of "costs" upon them which will deter their willingness to allow abuses and fail to act against them. The author offers statistical evidence in support. (36)

The U.S. remains a member of a group of major nations who refuse to join or materially aid or cooperate with the ICC. That group includes Iran, North Korea, Cuba and Syria, all designated as state sponsors of terrorism by the U.S.

The group also includes the Russian Federation, China, India, Sudan, Libya, Turkey, Iraq, Saudi Arabia and Israel. The Philippines withdrew in 2019 when the ICC investigated President Duterte for Crimes Against Humanity.

This puts the U.S. in the embarrassing company of a "rogue's gallery" of non-member states, including dictatorships. It diminishes U.S. international prestige and engagement with countries, especially those who currently oppose certain U.S foreign policy tactics.

Israel claims that it will be persecuted by the ICC for extreme actions it must take to survive the threat of neighbors such as Palestine and other nations, including those controlled by terrorist organizations, which openly attack it and publicly call for destruction of the Israeli state.

Proponents claim that Israel at times engages in its own terror tactics, some of which are claimed to be deadly. The U.S. should join the ICC and not hesitate to support legitimate investigations into alleged deadly terror tactics of Israel and its neighbors. It can still be a valued ally of Israel. It does not need to be over-protective.

U.S. membership would vastly improve the court's legitimacy and effectiveness. With its vast resources, international prestige and U.N. Security Council membership, no nation could offer the ICC support like the U.S.

The U.S. has the power, as a condition of membership, to seek trade-offs with the ICC. It could insist that the ICC agree not to expressly or implicitly limit legitimate U.S. foreign policy, including its own efforts to defend human rights.

Proponents argue that the U.S. is publicly committed to defend human rights internationally. It has previously called for an international criminal court that would hold accountable perpetrators of Genocide, War Crimes and Crimes Against Humanity.

The ICC is that court, the only one in existence today. Its Assembly of States Parties has worldwide membership of 123 nations. Joining would certainly be consistent with defending human rights.

After the Russian invasion of Ukraine the Biden Administration is offering a whole slate of new regulations and taking many positive steps to punish Russian war crimes and prevent future war crimes. It is even making public statements suggesting possible data sharing with the ICC and support of its Russia investigations

Congress needs to be convinced before it will ratify the Rome Statute by the required two-thirds majority. The U.S. could temporarily be an observer at the Assembly of States Parties. It could choose to work with it and, or individual members on a case by case basis It could also use its permanent U.N. Security Council seat to refer atrocities to the ICC for investigation.

Proponents argue that by accelerating U.S. efforts to work directly with the ICC on a step by step basis members of Congress and other doubters could evaluate the results without having to immediately say yes or no to membership.

Russia continues to commit war crimes in Ukraine. There could not be a better time for the U.S. to step up its efforts with the ICC. It would be a hypocritical shame if the U.S. returns to the Bush and Trump years of strident ICC opposition. The time has passed to return to the limited ICC engagement of the Obama and early Biden years.

IT CAN GO BOTH WAYS

Certain identical facts can be cited by both proponents and opponents to bolster their respective arguments.

Opponents point to the court decisions in the HAMDAN, BOUMEDIENE, AND RASUL cases, congressional action, including the 2015 McCain-Feinstein Anti-Torture Amendments, additional executive orders, the courts martial convictions and sentences following the Abu Ghraib scandal and ongoing civil litigation by victims against private contractors in Iraq hired by the U.S.

They illustrate that the U.S. is more than capable on its own of credibly investigating prosecuting and taking other remedial action against any alleged war crimes committed by its citizens. The ICC is limited to prosecuting individuals. The U.S. can police itself without joining the ICC.

Proponents point to the exact same steps to illustrate how substantial the U.S. wrongdoing must have been. According to the studies cited above by proponents, ICC membership would compel the U.S. to make those efforts ongoing and prevent future Iraq-Afghanistan war abuses, Guantanamo, black sites, and Abu Ghraib from occurring.

In his book, *The Four Ages of American Foreign Policy*, Michael Mandelbaum traces the evolution of the U.S. from weak power to great power to superpower and to hyper-power today.

No nation or, arguably, group of nations can come close to matching the financial, economic, military, diplomatic and political clout of the U.S. in world affairs. It spreads its political ideals beyond its borders and uses economic (and on occasion military) instruments to achieve foreign policy goals.

Due to an unusually democratic process which formulates and implements its foreign policy with the influence of its citizens playing a major role, the U.S. claims it achieves global influence other less democratic nations can't match. (37)

Proponents argue that hyperpower status, the powerful leadership position the U.S. enjoys today in world affairs, will allow it to overcome particular objections to joining the ICC.

The only hyperpower can use its vast power and influence to work with the ICC to diminish or eliminate them. The ICC wants and needs the U.S. It will make some deals. The U.S. would no longer need to fear anti-American nations and NGOs influencing a rogue ICC prosecutor to do damage against it.

In 2009 then Vice President Joe Biden in a speech in Kyiv, Ukraine said that the United States was not seeking a sphere of influence, but rather was pursuing the creation of a multi-polar world in which: *"like-minded nations make common cause of our challenges."* (38)

Fourteen years later, President Biden has come out in strong support of efforts to punish the war crimes and atrocities of Putin, and the U.S. is taking its own action using new and powerful tools. Biden publicly stated that the ICC indictments make a strong case and a very strong point.

Proponents claim if the U.S. still is pursuing *"the creation of a multi-polar world in which like-minded nations make common cause of our challenges,"* what better example could there be than the Russian indictments of the ICC, and its 123 "like- minded" member nations." They make, as President Biden said, a strong case and a very strong point.

Proponents say that with all of the support voiced continually by the Biden Administration for protecting and maintaining international human rights in light of the Russian invasion of Ukraine, why not join the ICC?

Proponents argue that ICC investigations, prosecutions, and reparations for victims have come a long way. They are not perfect and the process may need to improve further. The U.S. could play a major role in fostering that improvement. It's time for the U.S. to practice what it preaches and take the moral high-ground.

Opponents point to the same steps now being taken by the U.S, some for the first time, to sanction Russia and its supporters, and directly aid Ukraine in the prosecution of atrocities devastating their nation. Some members of Congress (designating Russia the fifth state sponsor of terrorism) are even more aggressive than the Biden Administration.

The U.S. can use its U.N. Security Council position to make its own resolutions to punish war criminals, including establishing a U.N. tribunal similar to those that tried war crimes in Rwanda, Darfur and the former Yugoslavia.

The hyperpower is more than capable by itself of using its enormous influence to punish Russian war criminals and their supporters. It is practicing what it preaches. It is taking the moral high ground.

Now is not the time to engage in what would likely be a long-term fight over the Rome Statute with Congress. It would be a battle to obtain the approval of the two-thirds majority needed pursuant to Article II, Sec. 2 of the Constitution to ratify treaties.

CONCLUSION

During debates about the causes of war Carl Von Clausewitz is often quoted. He said: "*War is not merely a political act, but a real political instrument, a continuation of political intercourse, a carrying out of the same by other means.*" (39)

Wars, including those conducted by the U.S., have been justified politically for centuries. Unfortunately war turns a political instrument into horror without much difficulty. The horrors ultimately destroy not only humans, but also human rights.

Modern day war can include intentional city-wide carpet- and fire-bombing of civilians, intentional sinking of civilian ships, use of poisonous defoliants and disease-spreading substances on civilians, dropping an atomic bomb on cities, denial of any rights to prisoners, torture and killing of prisoners, and targeting civilians for destruction in order to kill specific enemies.

Leaders and their subordinates from every nation which engaged in modern war, including the United States, carried out some of the above horrors. This is not the place to debate whether they were violations of Genocide, Crimes Against Humanity, Acts of Aggression and, or War Crimes.

They demonstrate the difficulties and delicate issues that arise in deciding whether to charge leaders and their subordinates with the above crimes. The decisions should obviously be made with un-biased care by a skilled and experienced entity.

The Biden Administration has expressly stated that preventing those violations is its goal, especially in light of the Ukraine invasion. The question for the U.S. is should it achieve that goal as an ICC member, or by other means. It's a close call.

Proponents say the U.S. should achieve that goal by joining the ICC, the only existing international criminal court, and a skilled and experienced entity. Opponents say the U.S. does not need ICC membership to achieve that goal. It is perfectly capable of doing so by itself, or by other means.

Jan Karski was a Polish patriot sent to meet with Roosevelt, Churchill and their immediate subordinates at the height of World War II to convince them to take immediate military steps, including the bombing of Auschwitz, to stop Nazi murder of Jews and others in concentration camps, which Karski witnessed first-hand. He failed to convince them.

They claimed it was far more important to use all available military resources to defeat the Nazis, their allies, and win the war. Some leaders simply could not believe his eye-witness accounts of the slaughter. Karski concluded, sadly, that governments do not have a soul. (40)

A nation is ultimately a political entity, not a living, breathing person with a soul. A national government chooses to act for political reasons. Those acts, including waging war, are usually designed to further its own best-interests, protection and, at times, to obtain advantages.

Regarding the ICC and opposing war crimes, the U.S. should act to further its own best interests. Steps the U.S. takes to reach its goal of deterring the horrors of war crimes are in its own best interests. But which steps best accomplish that goal?

The League of Nations offered impressive sounding resolutions to reduce the risk of future war crimes and atrocities. They didn't work. In order to work the steps must successfully change individual behavior that results in war crimes and atrocities.

The ICC, with 123 States Parties, is the only ongoing international court whose sole purpose is to prosecute individual war crimes. Since its inception 23 years ago it has broadened its scope and become much more effective. Will the ICC succeed where the League of Nations failed?

Joining creates advantages for both the U.S. and the ICC. The ICC definitely has a much better chance to succeed if the U.S. joins. Hyperpower membership could increase the prestige of the U.S. with ICC member countries who criticize the U.S. because it would not join. It might encourage other nations on the fence to join the ICC.

It sends an unmistakable message to other non-member nations and their leaders who do not support the U.S., that the U.S. abides by the Rome Statute, will not tolerate war crimes, and is taking every step it can to punish war criminals and prevent violations in the future, including those announced in response to the Russian invasion of Ukraine.

Joining could force most totalitarian nations, including designated State Sponsors of Terrorism, and terrorist groups sharing enmity for the U.S., to think twice about committing war crimes and other atrocities.

If the U.S. still refuses to join and chooses to proceed on its own, some of the above advantages would still be created, but not all of them.

To join or not to join. It's a very close call.

These are troubled times. Alleged atrocities resulting from Crimes Against Humanity, Genocide, War Crimes and Crimes of Aggression occur every day in the Ukraine

creating thousands of new victims. Most of them lose everything, except hope. That may be all they have to cling to.

Governments may not have a soul. But they can still act morally in their own best interests. The U.S. should join the ICC during these troubled times because it is the most immediate and comprehensive way to increase victims' hopes. The U.S. would certainly be acting morally in its own best interests.

APPENDIX A

CURRENT INTERNATIONAL CRIMINAL COURT MEMBERS

A		
Afghanistan Albania	**Andorra**	**Antigua and Barbuda**
Argentina	**Australia**	**Austria**
B		
Bangladesh	**Barbados**	**Belgium**
Belize	**Benin**	**Bolivia**
Bosnia and Herzegovina	**Botswana**	**Brazil**
Bulgaria		
C		
Cabo Verde	**Cambodia**	**Canada**
Central African Republic	**Chad**	**Colombia**
Comoros	**Congo**	**Cook Islands**
Costa Rica	**Côte d'Ivoire**	**Croatia**
Cyprus	**Czech Republic**	
D		
Democratic Republic of the Congo	**Dominican Republic Denmark**	**Djibouti**
Dominica		
E	**Ecuador**	**El Salvador**
Estonia		
F		
Fiji	**Finland**	**France**
G		
Gabon	**Gambia**	**Georgia**

Germany	**Ghana**	**Greece**
Grenada	**Guatemala**	**Guinea**
Guyana		
H		
Honduras	**Hungary**	
I		
Iceland	**Ireland**	**Italy**
J		
Japan	**Jordan**	
K		
Kenya	**Kiribati**	
L		
Latvia	**Lesotho**	**Liberia**
Liechtenstein	**Lithuania**	**Luxembourg**
M		
Madagascar	**Malawi**	**Maldives**
Mali	**Malta**	**Marshall Islands**
Mauritius	**Mexico**	**Mongolia**
Montenegro		
N		
Namibia	**Nauru**	**Netherlands**
New Zealand	**Niger**	**Nigeria**
North Macedonia	**Norway**	
P		
Panama	**Paraguay**	**Peru**
Poland	**Portugal**	

R		
Republic of Korea	**Republic of Moldova**	**Romania**
S		
Saint Kits and Nevis	**Saint Lucia**	**Saint Vincent and the Grenadines**
Samoa	**San Marino**	**Senegal**
Serbia	**Seychelles**	**Sierra Leone**
Slovakia	**Slovenia**	**South Africa**
Spain	**State of Palestine**	**Suriname**
Sweden	**Switzerland**	
T		
Tajikistan	**Timor-Leste**	**Trinidad and Tobago**
Tunisia		
U		
Uganda	**United kingdom**	**United Republic of Tanzania**
Uruguay		
V		
Vanuatu	**Venezuela**	
Z		
Zambia		

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