

Article

## **The International Criminal Court, the United States, and the Domestic Armed Conflict in Syria**

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### **Abstract**

*This article reviews the various objections made by certain elements to U.S. ratification of the International Criminal Court ("ICC") and considers alternatives to the ICC. Argues that criticisms of the ICC are over-stated and can be answered decisively with good legal arguments. The U.S. should continue its close cooperation with the ICC and seek to ratify the ICC treaty as part of the U.S. pivot out of the failed, expensive, unilateral, and lawless "global war on terror" and toward a multilateral rule of law approach, which correctly constructs terrorism as an illegal cowardly crime, and not an act of war (and thus implicitly lawful if not heroic). This pivot enables the U.S. to credibly call on aid from U.S. friends and allies, as well as persuading possible allies and dissuading actual enemies.*

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## **The International Criminal Court, the United States, and the Domestic Armed Conflict in Syria**

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### **Introduction**

The Rome Statute created the International Criminal Court. The United States was one of the prime movers in the negotiation of the Rome Statute. However, for a variety of political reasons, U.S. accession to the Treaty was limited to signature and was not followed up with domestic ratification to make the treaty directly binding before U.S. courts. That is, the United States signed but did not ratify the Rome Statute of the International Criminal Court. This means that the U.S. has an international treaty obligation under the Rome Statute of the ICC not to frustrate the purpose of the treaty, which it has signed. However, it also means that any U.S. obligations the treaty created are not domestically effective as a part of directly enforceable U.S. law. The concerns that led to the non-ratification by the United States may at the time have seemed legitimate. However, the prudent practice of the ICC, as well as a changed international landscape, shows that those concerns were warrantless. Furthermore, the ICC can play a part in the pivot of U.S. foreign policy from failed unilateralism, which is expensive, isolated, and ineffective, toward confident multilateralist globalisation of the rule of law. Consequently, the U.S. is engaging the International Criminal Court and will continue to deepen its connections to that court.

The ICC presents an opportunity for multilateral globalisation to strengthen human rights, as the eventual fall of the Assad regime in Syria may well lead to trials at the ICC. This article argues that the United States can and should seek to further empower the ICC by making a bi-partisan domestic effort to ratify the Rome Statute.

## I. The International Criminal Court (ICC)

### A. *The ICC Generally*

The International Criminal Court is not a formal organ of the United Nations;<sup>1</sup> it is an international organization created by an international convention, the Rome Statute. Essentially, the Rome Statute codifies various recent customary *jus cogens* crimes of war:<sup>2</sup> genocide, systematic and sustained (as opposed to isolated and individual)<sup>3</sup> war crimes, crimes against humanity, and systematic war-time rape<sup>4</sup> (whether as motivation for soldiers or genocidal tactic),<sup>5</sup> all crimes included in the Rome Statute at the U.S.' behest.<sup>6</sup> The U.S. also successfully advocated for inclusion of war crimes committed during domestic armed conflicts as a basis for ICC jurisdiction during the negotiation of the Rome Statute<sup>7</sup> under Article 8,<sup>8</sup> as well as various crimes that occur outside of any armed conflict.<sup>9</sup>

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<sup>1</sup> *About the Court*, INT'L CRIM CT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Nov. 8, 2013); Marten Zwanenburg, *The Statute for an International Criminal Court and the United States: Peacekeepers Under Fire?*, 10 EUR. J. INT'L L. 124, 130 (1999).

<sup>2</sup> LT Aaron M. Riggio et al., *The International Criminal Court and Domestic Military Justice*, 5 PHOENIX L. REV. 99, 104 (2011).

<sup>3</sup> David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 16 (1999).

<sup>4</sup> *Id.* at 16-17.

<sup>5</sup> *Id.* at 17 ("include[ing] as crimes against humanity (Article 7(1)(g)) and war crimes (Article 8(2)(b)(xxii) and (e)(vii))" and "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude").

<sup>6</sup> *Id.* at 16.

<sup>7</sup> *Id.* at 14 ("Much debate ensued over whether crimes against humanity would include crimes committed during an internal armed conflict and crimes occurring outside any armed conflict (such as an internal wave of massacres). The United States took the lead in advocating both of these propositions and issued a statement during the session arguing that "contemporary international law makes it clear that no war nexus for crimes against humanity is required.").

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.*

### B. ICC Jurisdiction

ICC jurisdiction is limited only to those serious and systematic crimes which are of mutual and not merely several concern to States:<sup>10</sup> Article 13(a)-(c) of the Rome Statute provides for ICC jurisdiction in cases:

- (1) where a state party refers the case to the ICC prosecutor (referral - including "self referral"),
- (2) by resolution the U.N. Security Council pursuant to Chapter VII of the Charter of the United Nations, or
- (3) by the Prosecutor's own motion (*proprio motu*).<sup>11</sup>

Furthermore,

A national of a state which is not a member of the ICC can be subject to ICC jurisdiction in four different situations: (1) if the person commits an ICC crime on the territory of an ICC member state; (2) if the situation is referred to the ICC by a S.C. resolution under Chapter VII of the U.N. Charter; (3) if the person's home state (a non-party) accepts the jurisdiction of the ICC and refers the case to the Court; or (4) if the ICC crime is committed on the territory of a non-member state, but the state with territorial jurisdiction accepts the jurisdiction of the ICC and refers the case to the Court."<sup>12</sup>

Only natural persons (as opposed to corporations or states)

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<sup>10</sup> Rome Statute of the International Criminal Court, art. 5, July 1, 2002, 2187 U.N.T.S. 90 (stating that "[J]urisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.").

<sup>11</sup> Justin H. Whitten, *They're Getting Away With Murder: How the International Criminal Court Can Prosecute U.S. Private Security Contractors for the Nisour Square Tragedy and Why It Should*, 11 WASH. U. GLOBAL STUD. L. REV. 503, 509 (2012).

<sup>12</sup> Stephen Eliot Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration*, 22 FLA. J. INT'L L. 155, 171 (2010).

may be subjected to ICC jurisdiction.<sup>13</sup> Heads of state do *not* enjoy immunity before the ICC.<sup>14</sup>

ICC jurisdiction is “complementary to national criminal jurisdictions.”<sup>15</sup> That is, ICC jurisdiction is intended to cover only places where there is no State power (the high seas, failed states) or where no effective domestic prosecution is possible (whether due to corruption or oppression).<sup>16</sup> All these jurisdictional preconditions mean that the ICC will likely be primarily a Security Council court.<sup>17</sup>

### C. U.S. Accession to the Rome Statute

Although the U.S. has not ratified the Rome Statute, the ICC was inspired by U.S. initiatives, and the U.S. was heavily involved in the negotiations leading to the creation of the ICC. The Nuremberg and Tokyo tribunals, which are among the inspirations of the ICC, were essentially U.S. creations. At the end of the Cold War, U.S. scholars<sup>18</sup> and diplomats successfully argued for the implementation of a permanent international criminal court at the United Nations.<sup>19</sup> As a result, over 100 countries became parties to the Rome Statute.<sup>20</sup>

Like the Convention on the Rights of the Child (CRC), the

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<sup>13</sup> *Id.* at 159.

<sup>14</sup> *The ICC at a Glance*, INT'L CRIM CT., [www.icc-cpi.int/iccdocs/PIDS/publications/ICCAAtAGlanceEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/ICCAAtAGlanceEng.pdf) (last visited Oct. 21, 2013).

<sup>15</sup> Smith, *supra* note 12, at 159.

<sup>16</sup> *Id.*

<sup>17</sup> Riggio, *supra* note 2, at 106-107.

<sup>18</sup> M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L. J. 443 (1999).

<sup>19</sup> U.N. GAOR, 51st Sess., 88th plen. mtg. at 5, U.N. DOC. A/51/207 (Jan. 16, 1997) (“Decid[ing] further that a diplomatic conference of plenipotentiaries shall be held in 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court.”).

<sup>20</sup> David H. Lim, *Beyond Kampala: The U.S.' Role in Supporting the International Criminal Court's Mission*, 39 SYRACUSE J. INT'L L. & COM. 441, 442-443 (2012); Brendan Leanos, *Cooperative Justice: Understanding the Future Of the International Criminal Court Through its Involvement in Libya*, 80 FORDHAM L. REV. 2267, 2279 (2012); Smith, *supra* note 12, at 171.

U.S. signed the ICC treaty,<sup>21</sup> but never ratified that treaty.<sup>22</sup> Legally speaking, the United States is obligated as a matter of *international* law to respect its commitments under the Rome Statute; however, with no ratification, the treaty has no direct effect in *domestic* U.S. law or before U.S. courts.<sup>23</sup> International law does not obligate states to transpose treaties they have signed into their domestic legal order.<sup>24</sup>

Although the ICC and CRC treaties are not domestically directly effective they create U.S. international obligations. Furthermore, the ICC treaty, like the CRC, is taken by U.S. courts as evidence of customary international law, whether as evincing *opinio juris* or as evidence of state practice. Customary international law, unlike treaty law, is directly effective in common law countries' courts and does not require transposition or ratification to be applied by U.S. judges. Thus, while the U.S. has no direct obligations under the treaty before domestic courts, the treaty has persuasive evidentiary value of the state of customary international law, and as such, is evoked before U.S. courts. A similar situation, incidentally, also occurred with the Vienna Convention on the Law of Treaties<sup>25</sup> and the U.N. Law of the Sea Convention (UNCLOS). The U.S. never ratified those treaties, yet they are all evoked before U.S. courts<sup>26</sup> as codifications of customary international law, i.e. as evidence of binding international law. Customary international law is binding domestic law in the common law countries.

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<sup>21</sup> WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 28 (Cambridge, 4th ed. 2011).

<sup>22</sup> Whitten, *supra* note 11, at 509; LAURA M. OLSEN, ET AL., *U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT*, REPORT OF AN INDEPENDENT TASK FORCE, AM SOC'Y INT'L L. V (2009).

<sup>23</sup> *See, e.g., id.* at xi. .

<sup>24</sup> ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 83 (2000).

<sup>25</sup> *See, e.g.,* Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS (May 2002), available at <http://www.asil.org/insigh87.cfm>.

<sup>26</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 270 (2nd Cir. 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (holding JCC evidence of accomplice liability as customary international law).

## II. U.S. Objections to the Rome Statute of the International Criminal Court

The U.S. has, at different times and to different extents, raised a variety of objections to the ICC. These objections are analyzed below and will be shown to be unpersuasive in law or in fact.

### A. *Inclusion of the Crime of Aggression*

One recurrent but ill-founded U.S. criticism of the ICC Rome Statute is its inclusion of an ambiguous and ill-defined<sup>27</sup> crime of aggression.<sup>28</sup> The Nuremberg International Military Tribunal (IMT) defined crimes against peace as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>29</sup> Even if the substantive elements of the crime become clearer in that light, the question of who exactly is to be held responsible for that crime (the state? organs of state? the head of state? ministers?) remain unanswered.<sup>30</sup>

The *political* critique of inclusion of the crime of aggression is that its inclusion enables U.S. critics to argue that President George W. Bush planned and committed a war of aggression against Iraq to seize Iraqi oil. This illustrates the U.S. concern over frivolous political accusations and the bases of such accusations. The price of

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<sup>27</sup> U.S. S. COMM. ON FOREIGN REL., *INTERNATIONAL CRIMINAL COURT, REVIEW CONFERENCE, KAMPALA, UGANDA, MAY 31 – JUNE 11, 2010, S. DOC NO. 111-55, AT 8* (2d Sess. 2010) (“Defining aggression as [t]he 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 manifest violation of the Charter of the United Nations,” and “[t]he use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”).

<sup>28</sup> U.N. Doc. RC/Res.6, at 19 (June 11, 2010).

<sup>29</sup> Charter of the International Military Tribunal at Nuremberg, annex art. VI(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288.

<sup>30</sup> Chance Cammack, *The Stuxnet Worm and Potential Prosecution by the International Criminal Court Under the Newly Defined Crime Of Aggression*, 20 TUL. J. INT'L & COMP. L. 303, 304-305 (2011).

unilateralism is the loss of legitimacy. Had President George W. Bush pursued a multilateralist policy, as President George H. W. Bush did, there would have been no question about U.S. motives in Iraq. The price of unilateralism was also material: the economic costs of the Second Gulf War run around a trillion dollars. In contrast, the first gulf war was funded entirely by U.S. allies who were persuaded that opposing the war-like dictator was in their own interests. George H. W. Bush, due to multilateralism, obtained significant financial and military support from U.S. allies, unlike George W. Bush.

The *legal* critique of the crime of aggression is that it violates the principle of *nullum crimen sine lege* due to vagueness,<sup>31</sup> overbreadth,<sup>32</sup> and circularity.<sup>33</sup> Namely, it is unclear what conduct is covered (vagueness), too much conduct is covered (overbreadth), and the reasons the conduct is covered are not adequately explained (circularity: e.g., the conduct is prohibited because it is forbidden). Thus, the legal critique is that the inclusion of the crime of aggression violates the prohibition of *ex post facto* law (*Rückwirkung*),<sup>34</sup> although some contend these criticisms are overdone.<sup>35</sup>

The most cogent critique of the crime of aggression is presented by Harold Hongju Koh. Koh states:

I think one fundamental point is that the crime of aggression is different from the other three crimes in a

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<sup>31</sup> Riggio, *supra* note 2, at 110.

<sup>32</sup> Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 74 (2010).

<sup>33</sup> Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 421-36 (1999) (discussing the Nuremberg Charter which allowed prosecution of individuals, and the U.N. General Assembly's Resolution 3314 which defines as aggression acts of States).

<sup>34</sup> Glennon, *supra* note 32, at 72.

<sup>35</sup> Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907, 909 (2012); Ian Hurd, *How Not to Argue Against the Crime of Aggression: A Response to Michael Glennon* 1, 6 (Buffett Ctr. for Int'l & Comp. Stu., Working Paper No. 10-001, 2010), available at [http://www.cics.northwestern.edu/documents/workingpapers/Bufett\\_10-001\\_Hurd.pdf](http://www.cics.northwestern.edu/documents/workingpapers/Bufett_10-001_Hurd.pdf).

couple of respects . . . [t]here have been hundreds of prosecutions for genocide, war crimes, and crimes against humanity. There have only been two prosecutions for wars of aggression, namely Nuremberg and Tokyo. Both of those happened before there was a UN system. There's been no successful prosecution for an act of aggression alone. And the question is, since we're making international criminal law for the real world, before you lock in the crime forever, you want to make sure that as a legal matter you've got it right."<sup>36</sup>

Even if the substantive elements of the crime become clearer in that light, the questions of who exactly is to be held responsible for that crime remain unanswered.<sup>37</sup>

Although the criticism of the inclusion of the crime of aggression is understandable, claims of aggression will not be justiciable before 2017. During that time, the criticisms – and adequate responses to them – can be developed. Furthermore, "the [Rome] Statute allows a state that has ratified the Rome Statute to exclude the Court's jurisdiction for acts of aggression committed by its nationals simply by making a declaration to the ICC Registrar that it does not accept the Court's jurisdiction over the crime of aggression."<sup>38</sup> Thus, U.S. citizens are exempt from aggression jurisdiction.<sup>39</sup>

In sum, U.S. critiques of the inclusion of the crime of aggression are ill-founded. Moreover, the inclusion of the crime of aggression actually is not entirely bad for the U.S. Rather, it is in the U.S.' interest to develop an understanding of the meaning of "aggression" because of the problem of "cyber warfare,"<sup>40</sup> i.e. state sponsored network disruption of telecommunications—actions which

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<sup>36</sup> Harold Hongju Koh & Stephen J. Rapp, *US Engagement With The ICC and The Outcome Of The Recently Concluded Review Conference*, U.S. DEP'T ST. (June 15, 2010), available at [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm).

<sup>37</sup> Cammack, *supra* note 30, at 304-305.

<sup>38</sup> Smith, *supra* note 12, at 171.

<sup>39</sup> Trahan, *supra* note 35, at 911.

<sup>40</sup> See Cammack, *supra* note 30, at 303.

both Russia (in Estonia in 2006) and China (more recently) have been accused of, with some accuracy. Industrial espionage might also qualify as aggression.

*B. The ICC Prosecutor's Power to Prosecute on His or Her Own Motion (Proprio Motu)*

Another U.S. criticism of the Rome Statute was that it vests prosecutorial power and discretion in a supposedly unaccountable court. Namely, the ICC prosecutor may initiate prosecution by his or her own motion (*proprio motu*). There were concerns that this practice would lead to a flood of complaints<sup>41</sup> and/or selective politicized prosecutions.<sup>42</sup> In practice, however, those fears have not materialized and the court has behaved responsibly.<sup>43</sup> The Court checks prosecutorial power and defends due process rights.<sup>44</sup> For example, when confronted with the fact of isolated but literally grave human rights violations by British soldiers, the ICC concluded that the killings, which were terrible and did occur, were not sufficiently systematic to overcome the presumption of complementarity: the soldiers were better prosecuted by the Crown.<sup>45</sup> It is thus extremely unlikely that the ICC would ever try any U.S. citizen.<sup>46</sup> This criticism, like others, shows itself to be merely theoretical and in practice unrealistic and unfounded.

*C. The Absence of Jurisdiction over Terrorism*

Another criticism of the ICC is that the Rome Statute does not provide jurisdiction over acts of terrorism,<sup>47</sup> not only because the

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<sup>41</sup> Zwanenburg, *supra* note 1, at 136.

<sup>42</sup> See Riggio, *supra* note 2, at 112-14.

<sup>43</sup> Smith, *supra* note 12, at 177.

<sup>44</sup> Olsen, *supra* note 22.

<sup>45</sup> Smith, *supra* note 12, at 169-170.

<sup>46</sup> *Id.* at 177-178.

<sup>47</sup> Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 MICH. ST. INT'L L. REV. 219, 223 (2012), available at <http://msuilr.org/wp-content/uploads/2012/09/Cohen-Macro-for-publisher-after-Hazels-edits.pdf>.

crime of terrorism is so contentious and ill-defined under customary international law,<sup>48</sup> but also because the crime of terrorism is not one of the core crimes that were of mutual concern to the States, internationally.<sup>49</sup> However, some have argued that terrorism is analogous to piracy and by analogy should be seen as a customary international crime.<sup>50</sup> The crime of terrorism is prohibited by various multilateral international treaties. Those treaties usually feature extraterritorial jurisdiction, police cooperation clauses, and even extradition provisions. The treaty-based crime of terrorism will likely grow into customary international law. If it does, and as it does, the concern that the Rome Statute does not expressly include terrorism will fade. Alternatively, the Rome Statute might yet be amended to include the international crime of terrorism.

#### *D. The Democratic Legitimacy of the ICC*

A more interesting critique of the ICC is its legitimacy in terms of democratic input.<sup>51</sup> That critique is related to claims that the court is "neo-imperialist." However, it is not particularly realistic to expect or demand democratic legitimation of international institutions in failed states, which generally are the sources of criminal defendants before the ICC.

Another argument about the legitimacy of the court is the fact that citizens of non-signatory states may be called before the court. However, the ICC claims jurisdiction only over natural persons, not states or even corporations. Thus, non-party states are not bound by the treaty. States take criminal jurisdiction over non-citizen natural persons regularly, and that which is not forbidden to a state would not be forbidden to an international organization created by states.<sup>52</sup> For these reasons "the [U.S.] Task Force does not consider the ICC's

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<sup>48</sup> *Id.* at 224 ("The first and foremost obstacle to the inclusion of terrorism in the Rome Statute was the lack of a clear and universally accepted definition of what constitutes terrorism, including dissatisfaction with the proposed definition in the text of the draft.").

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 225.

<sup>51</sup> See Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 43 (2012).

<sup>52</sup> Olsen, *supra* note 22, at ix.

jurisdiction over nationals of non-party States to be in conflict with principles of international law."<sup>53</sup>

### *E. The Constitutionality of the Rome Statute*

Much of the criticism of the ICC from the U.S. perspective focuses on constitutional concerns,<sup>54</sup> such as due process or the constitutional admissibility of a treaty in possible conflict with the U.S. federal constitution.<sup>55</sup> Thus, during negotiations, the U.S. put serious effort into making sure that the Rome Statute would cohere with the U.S. Constitution's due process requirements, notably in Parts 5-8 of the treaty.<sup>56</sup> U.S. critics of the ICC nevertheless argue that the Rome Statute does not guarantee, e.g., the right to a prompt public trial by jury with the right to confront and cross-examine the accuser and witnesses.<sup>57</sup> Those rights of the accused are vital, and the concern is understandable. However, those same rights are recognized in civilianist jurisdictions under the rubric of "*droits de la défense*" and thus are part of the general principles of law, a source of binding international law. France incidentally shared the U.S. concern over the absence of a *mens rea* requirement.<sup>58</sup> Consequently, the "Elements of Crimes" were amended to include a requirement of *culpa*, i.e. *mens rea*.<sup>59</sup> Similar U.S. procedural guarantees (e.g., *nulle crimen sine lege*) were also written into the text of the Rome

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<sup>53</sup> *Id.* at x.

<sup>54</sup> *E.g.*, Smith, *supra* note 12, at 180-81.

<sup>55</sup> Olsen, *supra* note 22, at xii (stating that "[t]wo main constitutional objections to the Rome Statute have been raised: 1) the ICC does not offer the same due process rights as does the U.S. Constitution; and 2) ratification would contravene Article I, Section 8 and Article III, Section 1 of the Constitution, dealing with the establishment of domestic courts.").

<sup>56</sup> Scheffer, *supra* note 3, at 17.

<sup>57</sup> Lim, *supra* note 20, at 452; Kristafer Ailslieger, *Why the United States Should Be Wary of The International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 WASHBURN L.J. 80, 94 (1999), available at <http://www.washburnlaw.edu/wlj/39-1/articles/ailslieger-kristafer.pdf>.

<sup>58</sup> John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. R. 57 (2004).

<sup>59</sup> Lim, *supra* note 20, at 458.

Statute.<sup>60</sup>

Thus, general claims that the Rome Statute somehow contradicts the U.S. Constitution are without merit and can be easily met, legally speaking.<sup>61</sup> Laws are presumed to be consistent with each other and are so interpreted. Even when laws manifestly conflict in theory, a law will be upheld as constitutional unless it is in fact applied unconstitutionally; moreover, where a law is in fact unconstitutional and applied unconstitutionally the doctrine of severability indicates that a court ruling that two laws are in conflict will delimit its decision as narrowly as possible so as to leave as much as possible of both laws intact. Thus, the constitutional objections to the ICC are ill-founded.

#### 1. Jurisdiction by the ICC Over U.S. Citizens and on U.S. Territory

One of the express reasons the U.S. decided not to ratify the Rome Statute was the fear that ratification would expose U.S. soldiers and the U.S. government to frivolous<sup>62</sup> political prosecutions before the ICC.<sup>63</sup> Unlike most other States, the U.S. provides large numbers of troops, supplies, and support for international peace-keeping and peace-making operations, which other states cannot or will not provide.<sup>64</sup> Thus, the U.S. is more exposed to the ICC than most other countries in this regard. At the same time, there are definite instances of U.S. abuses, which would be violations, notably by private military contractors.<sup>65</sup> While isolated U.S. military abuses of human rights are cases of "bad apples," i.e. of individual acts, and

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<sup>60</sup> A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144-171 (1999), available at <http://www.ejil.org/article.php?article=570&issue=43>.

<sup>61</sup> Riggio, *supra* note 2, at 109.

<sup>62</sup> Council on Foreign Relations, *Should the United States Support a Strong and Independent International Criminal Court?* (Discussion Round-Table May 5, 1998), available at <http://www.cfr.org/international-criminal-courts-and-tribunals/should-united-states-support-strong-independent-international-criminal-court/p49>.

<sup>63</sup> Zwanenburg, *supra* note 1, at 126.

<sup>64</sup> *Id.*

<sup>65</sup> Whitten, *supra* note 11, at 503.

not of government policies, the fact is that the U.S. has engaged in torture of captured terrorists as a state policy. So, while military prosecutions might never occur before the ICC, the same might not be said of the CIA or its independent contractors. We should never forget that the U.S. has also committed war crimes such as the My Lai massacre during the Vietnam War and the Abu Ghraib prison abuse after the Iraq war. Nazis were not the only people to use humans for deadly medical experimentation; the U.S. also conducted deadly experiments on human test subjects; but the U.S. test subjects poisoned with plutonium did not even know they were being used as lab rats.<sup>66</sup> Exposing criminals to liability for their criminal acts is the nature of justice. However, the Rome Statute permits States to invoke a national security exemption to their cooperation. Thus, the critique that ratification of the Rome Statute may result in the ICC having a form of "universal jurisdiction"<sup>67</sup> over actions by U.S. citizens in the United States<sup>68</sup> is not well founded. Furthermore, if there were any such conflict the time to address that conflict would be when it arises in the concrete case, not as an abstract (and frankly very unlikely) theoretical possibility.

As a factual matter it is extremely unlikely that CIA agents or contractors will ever even be accused of crimes let alone convicted, whether before the ICC or U.S. courts. The question is whether the U.S. thinks the trade-off of increased legitimacy and effective foreign policy in the real world is worth the risk of theoretical liability. Given that the U.S. is over ten years and counting into a "global war on terror" with a resulting massive debt and underperforming economy, the calculus should be obvious. The substantive crimes, except perhaps aggression, are already illegal under U.S. military law.<sup>69</sup> U.S. ratification of the ICC treaty (the Rome Statute) would have positive effects in terms of affirming the rule of law and restoring the United States as champion of human

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<sup>66</sup> Christopher W. Mullens, et al., *The International Criminal Court and the Control of State Crime: Prospects and Problems*, 12 CRIT. CRIM. 285–308, 303 (2004).

<sup>67</sup> Lim *supra* note 20, at 452.

<sup>68</sup> Smith, *supra* note 12, at 181-82.

<sup>69</sup> Riggio, *supra* note 2, at 118-19.

rights, the “heroes of Nuremberg”.<sup>70</sup> It would strengthen multilateralism, improving the U.S. position in the global struggle against poverty, lawlessness, and the resultant terrorism.

## 2. Ratification of the ICC would be Constitutional

U.S. case law makes it fairly clear that ICC ratification would be constitutional. *Ross v. McIntyre*<sup>71</sup> holds that U.S. constitutional guaranties in the international context are proportional to actual exercise of U.S. state power and the practical exigencies of diplomacy. *Neely v. Henkel*<sup>72</sup> makes it even clearer that the U.S. constitutional guarantees are conditioned in the international context by the treaty power. So, for example, it is constitutionally permissible for the U.S. President via a ratified treaty to arrogate to exclusive federal control an area of concurrent federal and state jurisdiction (*State of Missouri v. Holland*).<sup>73</sup> Thus, the constitutional constraints on U.S. foreign policy are simply not sufficient to warrant claims that the ratification of the ICC would be unconstitutional. The President, with the advice and consent of the Senate, may constitutionally employ the treaty power to shape U.S. international obligations a fortiori because the U.S. President is plenipotentiary in foreign relations.

### a. Reservations

Usually a reservation to the treaty would allow the U.S. to insulate itself constitutionally by affirming that the treaty shall not be interpreted or applied as inconsistent with any provision of the United States constitution. However, the Rome statute explicitly forbids reservations.<sup>74</sup> Instead, it allows "declarations." Usually the term "declaration" is not a binding positive rule that may be applied to cases; rather, declarations are mere political assertions. As such they are not binding law on future cases. For example, the French

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<sup>70</sup> *Id.* at 122.

<sup>71</sup> *Ross v. McIntyre*, 140 U.S. 453 (1891).

<sup>72</sup> *Neely v. Henkel*, 180 U.S. 109 (1901).

<sup>73</sup> *State of Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>74</sup> Smith, *supra* note 12, at 183-184.

Declaration of the Rights of Man was a *political* (and thus non-justiciable) document. The French Declaration of the Rights of Man was never seen as creating justiciable legal rights or duties. Likewise, the U.S. Declaration of Independence was a mere assertion, not a legally operative command or general rule; it was a political declaration, not a legally justiciable instrument. The U.S. Declaration of Independence is only of interpretative value, and like the preamble to the U.S. Constitution or the German fundamental law, it does not itself create positive rights and duties. It merely confirms other existing rights and duties and guides their interpretation. Thus, relying on "declarations" in the Rome Statute to address U.S. concerns is a weak argument.

#### b. Complementarity

The ICC is a court of "last resort."<sup>75</sup> The principle of complementarity<sup>76</sup> guarantees that the ICC shall only be resorted to after exhaustion of local remedies at the State level: "the Court's authority is only exercised when a nation is unable or unwilling to independently investigate and prosecute an alleged crime . . . the Rome Statute denies the ICC jurisdiction if, after expressing its intent to investigate a suspect, the suspect's country pushes forth with an investigation on its own."<sup>77</sup> The principle of complementarity has proven itself in practice and should allay any concerns over the legality of the ICC.

#### c. The American Service-Members' Protection Act (ASPA)

During the first term of the President George W. Bush, the U.S. sought to oppose and avoid the ICC, notably by passing the American Service-Members' Protection Act of 2002 (ASPA) and by

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<sup>75</sup> *The ICC at a Glance*, INT'L CRIM CT., [www.icc-cpi.int/iccdocs/PIDS/publications/ICCAAtAGlanceEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/ICCAAtAGlanceEng.pdf) (last visited Oct. 21, 2013).

<sup>76</sup> Rome Statute of the International Criminal Court, art. 17-19, July 17, 1998, 2187 U.N.T.S. 90.

<sup>77</sup> David H. Lim, *supra* note 20, at 453.

seeking bilateral non-prosecution agreements.<sup>78</sup> This policy proved ineffective at securing U.S. interests, so the U.S. no longer pursues so-called Article 98 agreements.<sup>79</sup> However, "if the United States decides to cooperate with the ICC, the President will have to provide a waiver under ASPA's section 2003(c) or employ ASPA's section 2015 in order to do so."<sup>80</sup>

*E. Summation: International Relations "Realism"*

Most of the critiques of the ICC<sup>81</sup> are proposed by people who advocate a flawed theory - international relations "realism" ("IR Realism"). IR Realism is the idea that States are rational power maximizers motivated by their own interest, which is defined in terms of national security, i.e. *Realpolitik*. The principal architect of the self-destructive U.S. efforts to oppose the United States inspired ICC, John Bolton, argues that "[w]hy 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."<sup>82</sup> Bolton, like most IR "realists," short-sightedly failed to consider the persuasive power of attractive rules; we obey laws, and ensure that others obey them too, because they are attractive to us and in our own interest, they guarantee our well being. IR "realists" such as Bolton also underestimate or even ignore the productive synergies generated by multilateralism due to network effects, economies of scale, and reduced transaction costs. The literal bankruptcy of realism as a foreign policy is demonstrated from the fact of the failure of the various "wars against terror" to do other than generate a massive budget deficit. Thus:

"By the time the U.S. came under severe pressure

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<sup>78</sup> Olsen, *supra* note 22.

<sup>79</sup> *Id.* at vi.

<sup>80</sup> *Id.* at xi.

<sup>81</sup> Jenia Iontcheva Turner, *Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court* (University of Chicago, Public Law Working Paper No. 52 (2004)).

<sup>82</sup> John R. Bolton, *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/dos111402wcstmnt.html>.

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."<sup>83</sup>

This explains why the U.S. is pivoting from a policy which opposed the ICC to one inspired toward one of active cooperation with the ICC.

### III. U.S. Cooperation with the ICC: Observer Status and Constructive Engagement

The U.S. is successfully pivoting from a foolish and self-destructive policy of unilateralist confrontation to a nuanced sensible policy of multilateral cooperation with the ICC:

[R]atification would directly advance U.S. national security interests. The International Criminal Court could strengthen America's efforts in stabilizing post-conflict regions as the International Criminal Tribunal for the Former Yugoslavia did in the Balkans. ... by working with the ICC, the United States would have additional diplomatic tools in dealing with countries such as Sudan, where the use of force may not be "politically or practically feasible."<sup>84</sup>

A U.S. dignitary stated: "Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of an international court."<sup>85</sup> The United States has had and will continue to have a compelling

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<sup>83</sup> Jose Alvarez, *The Evolving U.S.-ICC Relationship*, 24 AM. SOC'Y INT'L L. 1 (2008), <http://www.asil.org/newsletter/president/pres080320.html>.

<sup>84</sup> Lim, *supra* note 20, at 454-455.

<sup>85</sup> Ambassador David J. Scheffer, *War Crimes Tribunals: The Record and the Prospects*, Address at the Conference Convocation for the Washington College of Law Conference, 13 AM. U. INT'L L. REV. 1389, 1396 (1998).

interest in the establishment of a permanent international criminal court (ICC).<sup>86</sup> Although the United States did not ratify the Rome Statute, it is an observer thereto<sup>87</sup> and has committed itself to help countries to establish legal infrastructure needed for domestic prosecutions and to cooperate with the ICC investigation of the Lord's Resistance Army ("LRA") in Africa.<sup>88</sup> The current administration recognizes that "[t]he United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court (ICC)"<sup>89</sup> and supports the ICC efforts in Libya and Darfur.<sup>90</sup> For its part the EU is seeking to engage the U.S. into participation in the ICC.<sup>91</sup> One can envision the progressive realization of the ICC Rome Statute into customary international law as well as an eventual U.S. ratification of the ICC Statute.

However, if the U.S. does not ratify the ICC Rome Statute, are there other alternatives to the problems of violations of international law?

#### IV. Alternatives to the ICC

Given that the U.S. has not yet ratified the Rome Statute of the ICC, we can still fairly ask about alternatives and work-arounds to that gap in global governance; U.S. non-participation in the ICC is not as problematic as the U.S. decision not to join the League of Nations but should be seen similarly: as an offer of a free-pass for dictators and tyrants which may well lead to avoidable wars and lost global productivity.

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<sup>86</sup> David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999), available at <http://www.jstor.org/stable/2997953>.

<sup>87</sup> Stephen J. Rapp, *U.S. Official Describes U.S. Policy Toward International Criminal Court*, 106 AM. J. INT'L L. 384, 385 (2012).

<sup>88</sup> Lim, *supra* note 20, at 443-444.

<sup>89</sup> Scheffer, *supra* note 3, at 12.

<sup>90</sup> Olsen, *supra* note 22, at iii.

<sup>91</sup> *Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court [Official Journal L 150 of 18.06.2003]*, EUROPA.EU, [http://europa.eu/legislation\\_summaries/other/r10150\\_en.htm](http://europa.eu/legislation_summaries/other/r10150_en.htm) (last visited Nov. 9, 2013).

### A. Truth and Reconciliation Commissions

Whether as an alternative or as a complement to criminal prosecutions, truth commissions seek to establish what really happened so that the victims and society can move on from the crime to attain some semblance of a normal stable and productive life.<sup>92</sup> One goal of international criminal law is reconciling conflicting parties so that they can escape their conflict and enter into productive peaceful relations.<sup>93</sup> Obviously, truth and reconciliation commissions cannot do all that is needed, but they will equally be appropriate in certain times and places. The Rome Statute may even evolve to account for the possibilities of truth and reconciliation commissions.

### B. Tribunals

The predecessors to the ICC were the various international tribunals, such as the IMTs at Nuremberg<sup>94</sup> and Tokyo, and after the Cold War, the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR).<sup>95</sup> That the U.S. was behind those efforts was evident and that the U.S. should be a staunch supporter of the ICC is a logical extrapolation from history.<sup>96</sup> International Tribunals were not, however, used in Iraq after the Second Gulf War. While some called for the ICC to be invoked in Iraq, neither Iraq nor the United States has accepted the jurisdiction of the ICC.<sup>97</sup> Saddam Hussein was eventually tried by a court established by the provisional government of Iraq, not the ICC, in a trial that has been

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<sup>92</sup> Joseph Yav Katshung, *The Relationship Between the International Criminal Court and Truth Commissions: Some Thoughts on How to Build a Bridge Across Retributive and Restorative Justices*, Centre for Human Rights and Democracy Studies 7, 10 (2005), available at <http://www.lawandsocietysummerinstitutes.org/workshop06/participants/joseph.pdf>.

<sup>93</sup> Rapp, *supra* note 87, at 384-385.

<sup>94</sup> *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, 14 Nov. 1945-1 Oct. 1946, at 279-366 (1947), available at [http://www.loc.gov/rr/frd/Military\\_Law/NT\\_major-war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html).

<sup>95</sup> Riggio, *supra* note 2, at 109 (2011).

<sup>96</sup> *Id.*

<sup>97</sup> Whitten, *supra* note 11, at 508.

criticized by various human rights organizations (notably Human Rights Watch and Amnesty International). Nor were international tribunals used in Sudan.<sup>98</sup>

Why resort to international tribunals? Are national courts sufficient, or even more effective? Generally that may be the case, but exceptionally it is certainly not the case, as can be seen in the case of Iraq where the national tribunal has been characterized as procedurally unfair due to bias. The advantage of international instances over national courts is that the judges in such cases are impartial, as they are not members of any of the conflicting factions.<sup>99</sup> Further, international proceedings garner greater publicity, and thus will have greater deterrent effect than purely national proceedings.<sup>100</sup> Moreover, international crimes concern issues of mutual and not merely several concern, affecting the entire world, which legitimates the application of international criminal law.<sup>101</sup>

If international tribunals are good, why have an ICC? Although international tribunals are good, they are not good enough. The trouble with tribunals is that they are temporary and thus their legitimacy and long-term contribution to the formation of international law is questionable.<sup>102</sup> "A permanent international criminal court would additionally eliminate the need to invest in the establishment of ad-hoc tribunals anytime a post-conflict investigation is mandated."<sup>103</sup>

### *C. Current Events: Arab Spring and the ICC*

The historic experiences with international tribunals and the ICC set the stage for the reactions to the "Arab Spring." One can rightly ask how international law will and should react to the problems of governance presented by revolutionary reactions instigated by outside powers to authoritarian governments?

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<sup>98</sup> Alvarez, *supra* note 83.

<sup>99</sup> Leanos, *supra* note 20, at 2272-2273.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Lim, *supra* note 20, at 444.

<sup>103</sup> *Id.* at 454-455.

## 1. Libya

Libya may be a hopeful sign. Libya is not a state party to the Rome Statute.<sup>104</sup> While Russia clearly opposed the misuse of the U.N. Security Council Resolution as a justification for armed intervention into Libya, Russia nonetheless supported the U.N. Security Council referral of Libyan cases to the ICC. “The U.K., France, Germany and U.S. spent eight hours overcoming opposition in the council by several countries to the ICC referral.”<sup>105</sup> Thus, the ICC, on referral<sup>106</sup> from a unanimous U.N. Security Council<sup>107</sup> issued a request for an arrest warrant against Kadafi<sup>108</sup> and the ICC Prosecutor opened an investigation into the crimes committed by the Libyan government,<sup>109</sup> accusing the Libyan leaders<sup>110</sup> of "planning and implementing 'widespread and systematic attacks against a civilian population, in particular demonstrators and alleged

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<sup>104</sup> John J. Liolos, *Justice for Tyrants: International Criminal Court Warrants For Gaddafi Regime Crimes*, 35 B.C. INT'L & COMP. L. REV. 589, 589 (2012).

<sup>105</sup> Joe Lauria, *U.N. Imposes Sanctions on Gadhafi*, WALL ST. J., Feb. 27, 2011.

<sup>106</sup> S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

<sup>107</sup> Office of the Prosecutor, Int'l Criminal Court, First Report of the Prosecutor of the International Criminal Court to the UN Security Council, Pursuant to UNSCR 1970 (2011), available at <http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf>.

<sup>108</sup> Molly Hennessy-Fiske, *Libya: Rights Groups Praise Arrest-Warrant Request for Kadafi, Call for Action in Syria, Babylon & Beyond*, L.A. TIMES (May 16, 2011), available at <http://latimesblogs.latimes.com/babylonbeyond/2011/05/libya-rights-groups-praise-icc-action-against-kadafi-call-for-more.html>.

<sup>109</sup> Lim, *supra* note 20, at 462.

<sup>110</sup> Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, para. 2 (May 16, 2011), available at: <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf>; Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, para. 41 (June 27, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1099314.pdf>.

dissidents"<sup>111</sup> - basic violations of the right to life.<sup>112</sup>

## 2. Syria

Russia and the U.S. were both willing to invoke the ICC in the case of Libya. The U.S. will very likely be at least as willing to invoke the ICC in the eventual cases that will arise out of the events transpiring in Syria. One can, however, wonder how Russia would react to a request for referral by the ICC regarding cases in Syria. Russia has steadfastly resisted any effort to oust Syria's leader Assad: "Many thousands of people have died in Syria since the uprisings began in March last year. Yet despite months of discussions, the Security Council Member States have failed to agree on a solution. The ceasefire plan sponsored by former UN Secretary-General Kofi Annan has proved an unmitigated failure, leading to his resignation, while Russia and China continue to block efforts to refer the matter to the International Criminal Court (ICC) or launch military intervention."<sup>113</sup> The U.S. clearly wants to hold the Assad regime criminally liable. [Former] "Secretary Clinton has said, 'there must be accountability for senior figures of the regime.'"<sup>114</sup> However, without Russian support, or at least abstention, it is unlikely that an ICC referral would issue from the Security Council. Part of the negotiation of the transition in Syria should include the question of whether and how to invoke the ICC.

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<sup>111</sup> Liolos, *supra* note 104, at 593.

<sup>112</sup> See Prosecutor v. Gaddafi, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, P 20 (June 27, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf> ("[I]t appears from the Materials that people who opposed [Gaddafi's] regime [during the uprising] ... as well as members of their families, were arrested, tortured and in some instances even disappeared.").

<sup>113</sup> Rebecca Lowe, *International Justice: The Anarchical Society*, 66 No. 4 IBA GLOBAL INSIGHT 41 (August, 2012).

<sup>114</sup> Harold Hongju Koh, Address to the American Society of International Law Annual Meeting: Statements Regarding Syria (March 30, 2012).

### Conclusion

As seen, the United States has much to gain and little to risk by deepening its connection to the ICC. Unless the U.S. ratifies the Rome Statute it will be dependent on the Security Council for referrals; since Russia or China could veto referral from the Security Council, it is in the U.S. interest to ratify the ICC despite any theoretical risk to CIA personnel or CIA contract employees. By working its way deeper into the ICC machinery, the U.S. has the chance to legitimize its foreign policy as multi-lateralist, pro-human rights, and to present the Putin government with a challenge to the "race to the top" model for the industrializing world to emulate. While Obama and Putin alike may see the opportunity, will they seize it – as they did in Libya? To some extent this depends on the ability of "the President's Men" to Swallow hard and stand fast. Senior level personnel in the CIA actively *opposed* the use of torture (unlike extraordinary rendition) because torture generates false leads, bad intelligence, and encourages enemy resistance. Abduction is not always torture and not all interrogations were torture. Professional intelligence personnel should interpose that objection to any claims of wrong-doing as an exculpating and/or mitigating factor, were they ever to be held accountable (which they most likely never will be) - *c'est la guerre*.