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Gulliver No Longer Quivers: U.S. Views on and the Future of the International Criminal Court

JOHN F. MURPHY*

I. Introduction and Brief Background

In the year 2000, I wrote an article titled "The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court," which appeared in this journal¹ as part of a symposium on the International Criminal Court (ICC).² My 2000 article examined, *inter alia*, U.S. concerns (fears) about the International Criminal Court and suggested that, at least to some extent, the U.S. concerns were exaggerated, although the article acknowledged the existence of some valid U.S. concerns.³ In light of developments over the last decade, especially the ICC's Review Conference in Kampala, Uganda from May 31-June 11, 2010,⁴ it seems to be an appropriate time to reexamine U.S. views on the Court and the outlook for the future of the Court.

Before doing so, however, we should briefly recall the environment that existed at the time my earlier article was written. Then, despite earlier strong statements by President Clinton and other members of his administration in support of a permanent international criminal court,⁵ the United States joined six other states in voting against the Rome Statute, as against 120 in favor and 21 abstentions.⁶ After the vote, Ambassador David Scheff-

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1. See John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45 (2000).

2. Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 INT'L LAW. 7 (2000); Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21 (2000); Jelena Pejic, *The ICC Statute: An Appraisal of the Rome Package*, 34 INT'L LAW. 65 (2000).

3. Murphy, *supra* note 1, at 45-46.

4. Press Release, ICC, Review Conference of Statute Concludes in Kampala (June 12, 2010), *available at* <http://www.icc-cpi.int/Menus/ASP/ReviewConference/PressReleaseRC/Press+Releases+2010.htm>.

5. See Murphy, *supra* note 1, at 45 n.2.

6. According to an excellent article by Stephen Eliot Smith, there is still some doubt as to who the other six dissenting states were because the vote itself was not recorded. Since they publically explained the reasons for their dissenting votes, there is no doubt that China, Israel, and the United States voted against the Statute. Otherwise, various authors and commentators have made inconsistent claims as to who the other dissenting

fer, the lead American negotiator, declared that "the United States will not sign the treaty in its present form."⁷ On December 31, 2000, the last day on which the Statute was open for signature, the lame duck Clinton administration signed the Rome Statute.⁸ President Clinton stated that being a signatory would provide the United States with a platform from which it could more effectively negotiate modifications to correct the "significant flaws" of the ICC.⁹

In hearings held following the Rome conference, many of the views expressed bordered on the apocalyptic.¹⁰ For example, Senator Jesse Helms, then chairman of the Senate Foreign Relations Committee, stated that the Rome Statute would empower the court "to sit in judgment of United States foreign policy" and would constitute "a very real threat to our military personnel and to our citizens and certainly to our national interests."¹¹ John R. Bolton, then Senior Vice President of the American Enterprise Institute, claimed that "the Administration's own naive support for the concept of an ICC has now left the United States in a far weaker position internationally than if we had simply declared our principled opposition to the very concept in the first place."¹² He further contended that "[o]ur main concern should be for the President, the Cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the real potential targets of the politically unaccountable prosecutor. . . ."¹³ Senator Rod Grams expressed the hope "that now the Administration will actively oppose this court to make sure that it shares the same fate as the League of Nations and collapses without U.S. support, for this court truly I believe is the monster and it is the monster that we need to slay."¹⁴

Senator Grams' hope that the George W. Bush administration would actively oppose the International Criminal Court was fully realized, but not his desire that the Court would suffer the same fate as that of the League of Nations because despite the active indeed fervent U.S. opposition to the Court, it did not collapse. Indeed, it is arguable that the many steps the United States took to undermine the Court caused its supporters to redouble their efforts to ensure that the Court would be operational and able to carry out its mandate.

Time and space considerations preclude an extended discussion of the many steps taken by the Bush administration in opposition to the Court, but a brief summary of the primary steps may provide some context for discussion of later developments. Early on in President Bush's first term, the United States withdrew from the ICC negotiations.¹⁵ On May

states were. See 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, 160 n.38 (2010).

7. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 21 (1999).

8. Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, <http://www.nytimes.com/2001/01/01/world/us-signs-treaty-for-world-court-to-try-atrocities.html>.

9. *Id.*

10. *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. (1998).

11. *Id.* at 6.

12. *Id.* at 48.

13. *Id.*

14. *Id.* at 4.

15. See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT* 178 (2003).

6, 2002, John R. Bolton, who had become the Undersecretary of State for Arms Control and International Security for the Bush administration, wrote to U.N. Secretary-General Kofi Annan by letter that the United States did not intend to ratify the Statute and that therefore "the United States has no legal obligations arising from its signature on December 31, 2000."¹⁶

Perhaps the most openly hostile act toward the Court taken by the United States was the adoption in August 2002 of the American Servicemembers' Protection Act (ASPA).¹⁷ The ASPA prohibited any U.S. government agency, including courts, from cooperating with or providing assistance to the ICC.¹⁸ The Act also prohibited the United States from providing military aid to ICC member states, subject to certain specified exceptions,¹⁹ and permitted the President to use "all means necessary and appropriate" to free any American national being detained by or on behalf of the ICC.²⁰ The last provision was sarcastically dubbed the "Hague Invasion Act" by its critics, but it received broad bipartisan support in Congress.²¹

In addition to enacting domestic legislation designed to handicap the ICC in its operations, the United States sought a resolution in the U.N. Security Council that would permanently guarantee immunity from ICC prosecution for all U.N. peacekeepers. This effort faced fierce opposition from other member states of the Council, but after the United States vetoed a resolution that would have renewed the mandate of the U.N. mission in Bosnia and Herzegovina because it did not exempt peacekeepers from ICC jurisdiction, the Council adopted a resolution on July 12, 2002, that imposed a one-year exemption.²² A year later, the immunity was renewed for another twelve months.²³ But U.S. efforts to renew the immunity in 2004 failed in the face of the outrage expressed over the photographs of American soldiers committing prisoner abuse in Abu Ghraib prison in Iraq.²⁴

Also at the international level, the United States pursued the negotiation and conclusion of bilateral immunity agreements (BIAs), also known as "article 98 agreements" after article 98 of the Rome Statute. Article 98 of the Statute prohibits the ICC from demanding the extradition of a person if the request "would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the con-

16. Letter from John R. Bolton, Undersec'y of State for Arms Control and Int'l Sec., U.S. State Dep't, to Kofi Annan, U.N. Sec'y-Gen. (May 6, 2002), *available at* http://articles.cnn.com/2002-05-06/us/court.letter.text_1_letter-treaty-rome-statute?_s=PM:US.

17. American Servicemembers' Protection Act, 22 U.S.C. §§ 7421-33 (2002).

18. *Id.* §§ 7423, 7425.

19. Pub. L. No. 107-206, § 2007, 116 Stat. 820, 905 (2002) (repealed 2008). Exceptions were made for NATO member states, major non-NATO allies (including Argentina, Australia, Egypt, Israel, Japan, Jordan, New Zealand, and South Korea), and Taiwan. The President was also authorized to waive the prohibition if the country entered into a bilateral immunity agreement with the United States.

20. 22 U.S.C. § 7427.

21. *See* Smith, *supra* note 6, at 162-63.

22. *Id.* The resolution adopted was S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002). The Rome Statute, in Article 16, permits the Security Council to use its U.N. Charter Chapter VII powers to defer investigation or prosecution of any case for a renewable period of 12 months. Rome Statute of the International Criminal Court art. 16, July 17, 1998, U.N. Doc. A/CONF.183/9*, *available at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

23. S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003).

24. Smith, *supra* note 6, at 163.

sent of a sending State is required to surrender a person of that State to the Court.”²⁵ Under the typical BIA agreement negotiated by the United States, the other party to the agreement agrees never to arrest a U.S. national on an ICC warrant or extradite him or her to the ICC for trial without U.S. consent.²⁶ By January 2010, ninety-six of these agreements were in force.²⁷

Interestingly, the Bush administration’s policy toward the ICC moderated considerably near the end of its first term and “all but died out during the second Bush term.”²⁸ Stephen Eliot Smith has aptly described this abrupt demarche in attitude and actions by the Bush administration:

All three strategies in the administration’s three pronged attack were somewhat blunted during the second term. First, at no time during the second term did the United States request the S.C. to institute a permanent or temporary blanket ICC immunity for U.N. Peacekeepers. Second, the provision of ASPA that prohibited U.S. military aid from being provided to an ICC Member State was repealed in 2008. Finally, the State Department slowed, though did not cease, bilateral immunity negotiations: the vast majority of BIAs were negotiated and concluded during the first Bush term. The Administration’s more restrained approach was most evident in 2005, when the United States opted not to veto S.C. Resolution 1593, which referred the situation in Darfur, Sudan to the ICC Prosecutor in accordance with the procedure set out in article 13 (b) of the Rome Statute. (The United States agreed to abstain from voting on the resolution once a clause was inserted that guaranteed exclusive jurisdiction to the sending state if any non-Sudanese national committed ICC crimes while acting as a peacekeeper in Sudan). By 2006, senior U.S. military officials appeared to be engaging in a “fresh assessment” of the ICC and its potential.²⁹

In the autumn of 2008, itself also believing in the desirability of a “fresh assessment” of the ICC, the American Society of International Law convened a task force to examine the U.S. relationship with the ICC.³⁰ The task force’s report, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement*, was published in March 2009 by the American Society of International Law (ASIL).³¹ As the Foreword to the Report by Lucy F. Reed, President of the American Society of International Law, noted: “The Task Force on U.S. Policy Toward the ICC studied the Court’s work to date, reviewed current U.S. policy on the Court and developed recommendations to inform that policy. The advent of the new administration in 2009 and the ICC Review Conference in 2010 gives the Task Force’s work added significance and timeliness.”³²

25. *Id.*

26. *Id.*

27. *Id.* at 164.

28. *Id.*

29. *Id.* at 164-65.

30. The co-chairs of the task-force were William H. Taft, IV and Patricia Wald. The other members of the task-force were Mickey Edwards, Michael A. Newton, Sandra Day O'Connor, Stephen M. Schwabel, David Tolbert, and Ruth Wedgwood. See *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement*, AM. SOC'Y OF INT'L LAW, i (2009), <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>.

31. *Id.*

32. *Id.*

There will be further references to the ASIL Report later in this article. Now, however, it is time to turn to the Review Conference of the Rome Statute of the ICC, and the implications of the extraordinary developments at that conference for U.S. policy toward the Court and for the future of the Court itself.

II. The Review Conference: U.S. Concerns Greatly Abated, the Future of the Court Made More Uncertain

Article 5 (1) of the Rome Statute provides that the "jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole."³³ These are listed as genocide, crimes against humanity, war crimes, and aggression.³⁴ Paragraph 2 of article 5, however, puts limitations on the Court's jurisdiction over aggression and states in pertinent part that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."³⁵ For its part, article 123 (1) provides in pertinent part that "[s]even years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5."³⁶

In an ASIL Insight David Scheffer, who was U.S. Ambassador at Large for War Crimes Issues from 1997-2001 and currently is the Mayer Brown/Robert A. Helman Professor of Law, and Director of the Center for International Human Rights at Northwestern University School of Law, wrote that the Kampala Review Conference had "achieved a historic milestone in the development of international criminal law. For the first time since the Nuremberg and Tokyo military tribunals following World War II, the prospect now exists that individual leaders who plan and launch military aggression will be held accountable before an international court of law."³⁷ With the greatest respect for Ambassador Scheffer, I view the outcome of the developments at Kampala in an entirely different light. In my view, because of developments at Kampala, there now exists little if any prospect those individual leaders who plan and launch military aggression will be held accountable before an international court of law. The reason for this is that such leaders are likely to be outside the International Criminal Court's jurisdiction, either because the states they represent are non-parties to the Rome Statute or even if their states are parties, they have opted out of the Court's jurisdiction over the new crime of aggression.

At the Kampala conference a major issue involved the different means of referring or initiating an investigation of the crime of aggression before the Court. As Scheffer notes, during the negotiations an important distinction arose between, "on the one hand, a State Party's referral of a situation of aggression (Article 13 (a) or the Prosecutor's initiation of an investigation of aggression (Article 13(c)) and, on the other hand, the Security Coun-

33. Rome Statute of the International Criminal Court, *supra* note 22, art. 5.

34. *Id.*

35. *Id.*

36. *Id.* art. 123.

37. See David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, 14 AM. SOC'Y OF INT'L LAW 1 (June 22, 2010), available at <http://www.asil.org/files/insight100622pdf.pdf>.

cil's referral of a situation of aggression (Article 13(b))".³⁸ If the Security Council refers a situation of aggression to the Court pursuant to a United Nations Charter Chapter VII resolution, it does not matter whether a state is a party to the Rome Statute or not, nor whether it has opted out of the Court's jurisdiction over the crime of aggression. Its nationals can be subject to investigation and prosecution for the crime of aggression.³⁹

In sharp contrast, if a State Party refers a situation of aggression or the Prosecutor initiates an investigation of aggression, the Court must determine whether the crime of aggression arises from an act of aggression by a State Party that previously declared to the Registrar of the Court that it does not accept the Court's jurisdiction on aggression.⁴⁰ If the State Party issued such a declaration, the Court may not proceed against the nationals of that State Party. Similarly, and crucially, the Court cannot exercise jurisdiction over the crime of aggression when committed by a non-party State's nationals or on a non-party State's territory.⁴¹

As previously noted in this article, the United States has consistently followed a policy of ensuring that no U.S. national will ever be tried before the International Criminal Court. Other key non-party States, such as China, India, Indonesia, Israel, and Russia have followed a similar policy. Hence, the provision excluding non-party States from the Court's jurisdiction over the crime of aggression represents a major victory for these key non-party States. As Scheffer points out, this corrects "at least for the crime of aggression, the apparent drafting flaw in Article 121(5) [of the Rome Statute] in which only a State Party can declare its non-acceptance of a new crime to the Rome Statute."⁴²

It is important to note, however, that only those key non-party states that are permanent members of the U.N. Security Council can fully ensure that their nationals will never be subject to the Court's jurisdiction over the crime of aggression.⁴³ This is, of course, because only permanent members of the Council can veto a resolution that would refer a situation allegedly involving the crime of aggression to the Court. Other key non-party states would, at least theoretically, be vulnerable to such a Security Council resolution. To be sure, the adoption of such a resolution would be highly unlikely.

One reason the adoption of such a Security Council resolution is highly unlikely is the highly complex and convoluted procedures adopted at Kampala governing the entry into force of the amendments on aggression. After a contentious debate over whether the amendments on aggression would enter into force in accordance with Article 121(5) of the

38. *Id.*

39. Review Conference of the Rome Statute, June 11, 2010, *The Crime of Aggression*, Resolution RC/Res.6, Annex III, (2) (June 28, 2010), available at <http://www.icc-trialcompetition.org/cms/images/Crime%20of%20Aggression%20Definition.pdf> [hereinafter RC/Res. 6].

40. *Id.* Annex I, art. 15 *bis* (4).

41. *Id.* Annex I, art. 15 *bis* (5).

42. Scheffer, *supra* note 37, at 2. Article 121(5) of the Rome Statute reads:

"Any amendment to articles 5 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

Rome Statute, *supra* note 22, art. 121(5).

43. RC/Res. 6, Annex III, (2).

Rome Statute or Article 121(4),⁴⁴ delegations in the Review Conference agreed that the amendments on aggression would enter into force in accordance with Article 121(5) of the Rome Statute. They did so, however, with modifications to the normal procedures of Article 121(5). As David Scheffer explains, the procedures of Article 121(5) normally would have meant that the amendments on aggression would come into force for a State Party one year following the ratification or acceptance of the amendments by that State Party:

However, the amendments for new Articles 15 bis and 15 ter modify the Article 121(5) procedures with two critical and unusual conditions: 1) the Court may exercise jurisdiction only over crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties; and 2) the Court may exercise jurisdiction only following at least a two-third vote of the Assembly of States Parties after January 1, 2017, reconfirming the agreed procedures in the amendment to activate jurisdiction over the crime of aggression.⁴⁵

In other words, at least two-thirds of the States Parties will have to agree in 2017 that the Court should exercise jurisdiction over the crime of aggression for the Court to be able to exercise such jurisdiction. As is well known, the United States has long opposed the inclusion of the crime of aggression within the jurisdiction of the Court. Both the United States and China were concerned that this would create a potential conflict between the ICC's jurisdiction and the role of the Security Council. Another concern, one that I share, is that the term "aggression" is simply too ambiguous a concept to serve as the basis for criminal prosecution. In 1974, the U.N. General Assembly adopted a resolution⁴⁶ that set forth a definition of aggression, but it was designed as guidance to the Security Council, not for the purposes of criminal prosecution. Moreover, this definition was subject to sharp criticism.⁴⁷ In the seven years that lie between 2010 and 2017, the United States and other States' opposition to the inclusion of the crime of aggression within the Court's jurisdiction may finally prevail.

As noted in the previous paragraph, the United States and other States were concerned that inclusion of the crime of aggression within the Court's jurisdiction might undermine the role of the Security Council in maintaining international peace and security and deciding whether an act of aggression has occurred. It has not been the practice of the Security Council, however, to determine whether an act of aggression has occurred in cases involving the use of armed force. Although Article 39 of the U.N. Charter authorizes, indeed instructs, the Security Council to determine "the existence of any threat to the peace, breach of the peace, or act of aggression,"⁴⁸ the practice of the Council has been to determine whether there has been a threat to the peace, or a breach of the peace, but not to

44. For a description of this debate, see Scheffer, *supra* note 37, at 3.

45. *Id.* at 3 (citing RC/Res. 6, at Annex I, art. 15 *bis* (3); Rome Statute, *supra* note 22, at art. 121(3)).

46. See generally G.A. Res. 3314 (XXIX), U.N. Doc. A/Res/3314 (Dec. 14, 1974), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0739/16/IMG/NR073916.pdf?OpenElement>.

47. See Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 224-25 (1977); INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 782-85 (David Luban et al. eds., 2010).

48. U.N. Charter art. 39, <http://www.un-documents.net/ch-07.htm> ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

address the issue of whether there has been an act of aggression. For example, although surely Iraq's invasion of Kuwait in 1990 was an act of aggression, none of the many resolutions adopted by the Security Council made such a determination. Rather, the Council simply determined that "there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait."⁴⁹

This would surely change, however, if the amendments activating the crime of aggression were to come into force. The relationship between the ICC and the Security Council under the amendments is complex. If there is either a State Party referral under Article 13(a) of the Rome Statute or an investigation by the Prosecutor under Article 13(c) of a situation or crime of aggression, new Article 15 *bis* requires that a particular procedure be followed to determine whether the matter will be investigated and prosecuted by the Court.⁵⁰ The Prosecutor must first determine whether there is a reasonable basis to proceed with an investigation of a crime of aggression following an Article 13(a) or (c) action. Next, the Prosecutor must "ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned."⁵¹ If the Council has made such a determination, the Prosecutor may proceed to investigate a crime of aggression.⁵²

Another reason the ICC is highly unlikely ever to prosecute anyone for the crime of aggression is the definition of the "crime of aggression" as well as the definition of an "act of aggression" adopted by the Review Conference, both of which are unlikely to apply to the uses of armed force characteristic of the current environment. The definition of the crime of aggression states that, "[f]or the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."⁵³ For its part, the definition of an act of aggression⁵⁴ states that "[f]or purposes of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression. . . ."⁵⁵ Both of these definitions are designed to cover an

49. S.C. Res 660, preamble, U.N. Doc. S/RES/660 (Aug. 2, 1990).

50. RC/Res. 6, *supra* note 39, Annex I, art. 15 *bis* (6).

51. *Id.*

52. *Id.* Annex I, art. 15 *bis* (7).

53. *Id.* Annex I, art. 8 *bis* (1).

54. *Id.* Annex I, art. 8 *bis* (2).

55. *Id.* Examples of "acts of aggression," taken directly from G.A. Res. 3314, include:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agree-

international armed conflict along the lines of Germany's aggression in World War II. But the nature of armed conflict today has changed from the traditional model. Most armed conflict involves internal struggles in the form of civil wars or so-called asymmetrical warfare conducted by Al-Qaeda or other terrorist groups. These armed conflicts are simply not covered by the definitions of aggression or acts of aggression.

As noted in the preceding paragraph, an "act of aggression" is one that "by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations."⁵⁶ In "[u]nderstandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression,"⁵⁷ there is an elaboration on the concept of a "manifest violation of the Charter of the United Nations."⁵⁸ Understanding 6 provides, in pertinent part, that "[i]t is understood . . . that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations."⁵⁹ Understanding 7 builds on Understanding 6 and provides, in pertinent part, "that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself."⁶⁰

In other words, the standard of proof required to fulfill the requirement of a "manifest violation" is likely to be difficult to meet. Still another barrier for the ICC to overcome before it can prosecute successfully the crime of aggression.

It appears fairly certain that, although the United States now has no concern that U.S. nationals will ever be prosecuted before the ICC for the crime of aggression, it still would greatly prefer that the crime not be included as one of the crimes within the Court's jurisdiction. In a briefing before the U.S. Department of State following the Review Conference, Harold H. Koh, the Legal Advisor of the Department of State, stated:

I think one fundamental point is that the crime of aggression is different from the other three crimes in a couple of respects . . . there 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 interna-

ment or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

G.A. Res. 3314 (XXIX), art. 3(a)-(g), U.N. Doc. A/Res/3314 (Dec. 14, 1974), *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>.

56. RC/Res.6, *supra* note 39, Annex I, art. 8 *bis* (1).

57. *Id.* Annex III.

58. *Id.* Annex III, ¶ 7.

59. *Id.* Annex III, ¶ 6.

60. *Id.* Annex III, ¶ 7.

tional 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.⁶¹

The reason there have been no prosecutions for wars of aggression since Nuremberg and Tokyo is that there has been no tribunal, at either the national or the international level, which has had jurisdiction over the crime of aggression, or to use the nomenclature of the Nuremberg and Tokyo tribunals, the crime against peace. There is a great irony here. For the Nuremberg trial in particular, the primary focus was on the criminalization of aggressive war through recognizing the crime against peace in its charter. The Nuremberg Judgment highlighted this reality when it stated: "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. . . . To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."⁶²

As noted by Professor David Luban, however, the primary significance of the Nuremberg trial and Judgment to later generations is quite different from that of the trials' framers or of the judges at Nuremberg: "For us Nuremberg is a judicial footnote to the Holocaust; it stands for the condemnation and punishment of genocide, and its central achievement lies in recognizing the category of *crimes against humanity*. . . ."⁶³ This statement by Luban is supported by the adoption of the Convention on the Prevention and Punishment of Genocide by the U.N. General Assembly in 1948,⁶⁴ and the total inaction with respect to the crime against peace at the national and the international levels since the Nuremberg and Tokyo trials.

There seems little doubt that developments regarding the crime of aggression at the Review Conference are beneficial for the United States, as well as other key non-party states. Whether they are beneficial for the ICC itself is perhaps a closer question. If these developments result, as I suspect, in the Court never exercising jurisdiction over the crime of aggression, this will be a benefit for the Court only if the critics are right in their position that the crime of aggression should never have been listed in article 5 of the Rome Statute as a crime within the jurisdiction of the Court in the first place. In contrast, if the proponents of listing the crime of aggression within the jurisdiction of the Court are right, thereby reflecting the attitude dominant at Nuremberg, then the developments regarding the crime of aggression at the Review Conference have dealt the Court a severe blow.

As things now stand, the status and future of the crime of aggression for the Court remain in limbo until 2017. In the meantime, there are serious questions as to the capability of the Court to deal effectively with the three generally accepted "core crimes"—genocide, war crimes, and crimes against humanity—within its jurisdiction.

61. Special Briefing, Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, US Engagement With The ICC and The Outcome Of The Recently Concluded Review Conference (June 15, 2010), *available at* http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

62. BETH VAN SCHAACK & RONALD SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 347 (2d ed. 2010).

63. Luban et al., *supra* note 47, at 86 (excerpt from DAVID LUBAN, *LEGAL MODERNISM* 336 (1994)).

64. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, *available at* <http://www1.umn.edu/humanrts/instree/xlcpcpg.htm>.

III. The United States and the Future of the International Criminal Court

When I consider the debate, especially in the United States, over the International Criminal Court, and the future of the Court, I am reminded of the debate surrounding the issue whether the United States should ratify the Genocide Convention. The opponents of ratification claimed that all sorts of disasters would befall the United States and allies of the United States, especially Israel, if ratification would occur. High ranking officials of the U.S. government, possibly including the President, as well as the commanders of U.S. armed forces, would allegedly be subject to trials for genocide in the courts of enemies of the United States, perhaps even in a not yet established international criminal court. The truth was that these allegations had no basis in reality.⁶⁵ The reality was rather that the Convention was fatally flawed as an operative instrument for preventing and punishing genocide,⁶⁶ and no trials for genocide took place until the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were established by the U.N. Security Council.

To be sure, unlike under the Genocide Convention, there is, at least theoretically, some risk that U.S. civilian and military officials under the Rome Statute could face trial before the International Criminal Court, but for reasons we will consider below, the risk is extremely low. Rather, the real risk is that the Court will be unable effectively to carry out its responsibilities to prosecute and punish those individuals who commit the crimes of genocide, war crimes, and crimes against humanity, as defined under the Rome Statute.

A. THE RECORD SO FAR: THE ICC AND THE UNITED STATES

As indicated previously in this article, even the George W. Bush administration's hostile policy toward the ICC moderated considerably near the end of its first term and disappeared during the Bush administration's second term.⁶⁷ Surely, this change in attitude and the Obama administration's decision to move from "hostility to positive engagement"⁶⁸ was based on the ICC's professional approach that in no way threatened U.S. vital interests.

As an example of the ICC's professional approach, the ASIL Task Force on the U.S. Relationship with the ICC cited the Prosecutor's handling of various allegations regarding the war in Iraq.⁶⁹ As summarized by the task force's report:

The Prosecutor received over 240 communications on the situation in Iraq, expressing concern about the launching of military operations and civilian deaths. The Prosecutor declined to initiate an investigation and explained the strict criteria of the

65. For my views on some of these issues, see *Constitutional Issues Relating to the Proposed Genocide Convention: Hearing before the Subcomm. on the Const. of the Comm. on the Judiciary*, 99th Cong. 80-95 (1985) (statement of John F. Murphy, Professor of Law at Villanova University).

66. The main flaw of the Genocide Convention is that jurisdiction over the crime is limited by Article VI of the Convention, to "a competent tribunal of the State in the territory of which the act was committed . . ." Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 64, art. 6. Because genocide is a quintessential example of a crime authorized or committed by government officials, the prospect of trials in national courts was remote.

67. See *supra* text accompanying notes 24-29.

68. Special Briefing, *supra* note 61, at 1.

69. *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement*, *supra* note 30, at 19.

Rome Statute that limit any decision to open an investigation: 1) available information must provide a reasonable basis to believe a crime within ICC jurisdiction has been or is being committed; 2) the matter must satisfy admissibility considerations relating to the gravity of the conduct and complementarity with national proceedings; and 3) considerations must be given to the interests of justice.

The Prosecutor determined, for a variety of reasons, including jurisdictional limitations, that the "Statute requirements to seek authorization to initiate an investigation in the situation in Iraq have not been satisfied." With respect to U.S. nationals, the Prosecutor determined that the ICC does not have jurisdiction over actions of non-party States' nationals on the territory of Iraq, itself a non-party State.⁷⁰

Stephen Eliot Smith has also recounted the Prosecutor's handling of a situation which would indicate the United States has nothing to fear from a "rogue prosecutor." The United Kingdom has been a member of the ICC since its inception, and therefore British soldiers are subject to the ICC's jurisdiction, regardless of where their actions take place.⁷¹ When he received complaints regarding the action of British nationals in Iraq, the Prosecutor determined in a preliminary investigation that "'there was a reasonable basis to believe' that the war crimes of wilful [sic] killing and inhuman treatment were committed by British military personnel against prisoners of war."⁷² Nonetheless, after considering the gravity requirement of the Rome Statute, the Prosecutor concluded:

The Office [of the Prosecutor] considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful [sic] killing or rape.⁷³ The number of potential victims of crimes within the jurisdiction of the Court in this situation—4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment—was of a different order than the number of victims of wilful killing found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.⁷⁴

As a result of his determination that the gravity threshold had not been satisfied, the Prosecutor declined to proceed with a formal investigation of the accused British nationals.⁷⁴

70. *Id.*

71. Article 12(1) of the Rome Statute provides that "[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5." Rome Statute, *supra* note 22, art. 12(1).

72. Smith, *supra* note 6, at 169 (quoting Moreno-Ocampo, *infra* note 73, at 8).

73. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC 8-9 (Feb. 9, 2006), available at http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

74. *Id.* at 9.

One also suspects that the satisfaction of the U.S. government with the results of the Review Conference has also helped to greatly lessen any concern that the United States has had that its nationals might be subject to the jurisdiction of the Court.⁷⁵ In short, although it remains theoretically possible that the Prosecutor and the ICC could launch a politically motivated prosecution of U.S. nationals, the current prospect of that happening is so slim as to have led the U.S. government to conclude that cooperation rather than conflict with the Court is the best policy. Moreover, it has decided that “positive engagement” with the Court is the best policy to serve both U.S. interests and those of the ICC.

B. HOW MIGHT U.S. “POSITIVE ENGAGEMENT” ENHANCE PROSPECTS FOR FUTURE ICC SUCCESS?

As of October 12, 2010, 114 countries were States Parties to the Rome Statute.⁷⁶ In their capacity as States Parties, these states are under various obligations to support the Court, including, most crucially, support in apprehending suspects.⁷⁷ Since it is not a State Party, and there is little prospect of it becoming one, the United States has no obligation to render support to the Court, and any support it may give will be on a purely voluntary basis.⁷⁸

Under the Rome Statute, the Prosecutor can initiate an investigation on the basis of a referral from any State Party⁷⁹ or from the United Nations Security Council.⁸⁰ In addition, the Prosecutor can initiate investigations *proprio motu* on the basis of information within the jurisdiction of the Court received from individuals or organizations.⁸¹ To date, three States Parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, and the Central African Republic—have referred situations occurring on their territories to the Court.⁸² Also, the Security Council has referred the situation in Darfur, Sudan (a non-State Party).⁸³ On March 31, 2010, Pre-Trial Chamber II granted the Prosecution authorization to open an investigation *proprio motu* in the situation of Kenya.⁸⁴

75. Consider the comment of Harold Hongju Koh during the Special Briefing at the U.S. Department of State following the Review Conference: “After 12 years, I think we have reset the default on the U.S. relationship with the court from hostility to positive engagement. In this case, principled engagement worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill. As one delegate put it to me, the U.S. was once again seen, with respect to the ICC, as part of the solution and not the problem. The outcome in Kampala demonstrates again principled engagement can protect and advance our interests, it can help the states parties to find better solutions, and make for a better court, better protection of our interests, and a better relationship going forward between the U.S. and the ICC.” Special Briefing, *supra* note 61, at 2.

76. *The States Parties to the Rome Statute*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/statesParties/> (last visited Jan. 15, 2011).

77. Rome Statute, *supra* note 22, art. 59(1).

78. See *The States Parties to the Rome Statute*, *supra* note 76.

79. Rome Statute, *supra* note 22, arts. 13(a), 14(1).

80. *Id.* art. 13(b).

81. *Id.* art. 15(1).

82. *Referrals and Communications*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications/> (last visited Jan. 16, 2011).

83. *Id.*

84. See Press Release, ICC, Judges Grant Prosecutor’s Request to Launch Investigation on Crimes Against Humanity With Regard to the Situation in Kenya (Mar. 31, 2010), available at <http://www.icc-cpi.int/NR/exeres/D81AA5AF-CD76-4B3C-A4FC-AA7819569B44.htm>.

Two years ago, election related violence in Kenya left more than 1,200 people dead and half of a million people forced from their homes.⁸⁵ On December 15, 2010, the Prosecutor announced he will pursue cases against six Kenyan leaders involved in the violence, three allies of the president and three from the main opposition party, for crimes against humanity.⁸⁶

No trial has yet been completed. Fifteen people have been indicted, four people are in the custody of the Court, one other person is in French custody pending their consideration of an ICC request for surrender of the suspect, and nine cases are pending before the Court.⁸⁷

These proceedings have faced various challenges. For example, in the very first case referred to the Court by a State Party (Uganda),⁸⁸ the Court issued four arrest warrants against leaders of the rebel Lord's Resistance Army (LRA), accusing them of crimes against humanity and other grave offenses, but these leaders remain at large, and the Ugandan government has sought withdrawal of the warrants if the accused will agree to undergo a traditional tribal justice ritual that requires a public confession and an apology without threat of incarceration.⁸⁹ The Prosecutor has resisted withdrawal of the warrants, and no resolution of this issue appears imminent.⁹⁰ In *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I issued an oral decision on July 15, 2010, to release Mr. Lubanga Dyilo, but the Appeals Chamber, although agreeing with the Trial Chamber that there had been errors made in the proceedings below, reversed the decision to release Mr. Lubanga on October 8, 2010.⁹¹

By far the greatest challenge facing the ICC is its inability to bring fugitive defendants within its custody. In its sharpest form, this problem is illustrated by the inability of the Court to implement two arrest warrants issued by the Court against Omar Hassan Al-Bashir, the president of Sudan.⁹² The first, issued on March 4, 2009, was for five counts of crimes against humanity and two counts of war crimes, and the second, issued on July 12, 2010, for three counts of genocide.⁹³

On August 27, 2010, Pre-Trial Chamber I issued two decisions informing the Security Council and the Assembly of States Parties to the Rome Statute about Mr. Bashir's visits

85. See Parselelo Kantai, *Top Kenyans Named in Election Violence Case*, FIN. TIMES, Dec. 16, 2010, <http://www.ft.com/cms/s/0/162925f4-087b-11e0-80d9-00144feabdc0.html#axzz1BECWKeUx>.

86. See Sarah Childress, *Kenyan Violence Probed by Court*, WALL ST. J., Dec. 16, 2010, at A17; see also Press Release, ICC, Kenya's Post-Election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity (Dec. 15, 2010), available at <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>.

87. See *All Cases*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/> (last visited Jan. 16, 2011).

88. See Uganda ICC-02/04-01/05 The Case Prosecutor v. Kony, Vincent Oti, Okot Odhiambo and Dominic Ongwen, <http://www.icccpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Uganda.htm> (last visited Feb. 4, 2011).

89. See Alexander K.A. Greenwalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 111-121 (2009).

90. See *id.* (for an extensive analysis of the Uganda case).

91. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Hearing (Oct. 8, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc948677.pdf>.

92. See *ICC Weekly Update #58*, INT'L CRIM. CT., 2 (Dec. 6, 2010), <http://www.icc-cpi.int/NR/rdonlyres/A9879553-10E7-4794-BD9D-6BE0AA390F36/282757/Ed58Eng.pdf>.

93. *Id.*

to the Republic of Kenya and the Republic of Chad, both States Parties to the Rome Statute, "in order for them to take any measure they may deem appropriate."⁹⁴ No such measure was taken by either the Security Council or the Assembly of States Parties.

More significantly, the first arrest warrant issued against Mr. Bashir resulted in a firestorm of protest against the ICC by the Arab League and the African Union, as well as by individual African and Arab States.⁹⁵ They have called on the ICC and the Security Council to delay implementation of the arrest warrants for at least a year to avoid jeopardizing the peace process.⁹⁶ The Security Council could act under Article 16 of the Rome Statute to accede to this request, but the threat of a U.S. and British veto has so far blocked such an action.⁹⁷ It is unclear whether the ICC's issuance of an arrest warrant for three counts of genocide will bring the president of Sudan any closer to trial in the Court. Some have suggested that the crime-of-all-crimes status accorded to genocide may further complicate his international dealings and travels.⁹⁸ Even before the ICC issued its arrest warrant for genocide, although many Arab and some African countries continued to meet with Bashir, others warded off visits by warning that as court members they are legally bound to arrest him.⁹⁹ The result was that he avoided a number of conferences and celebrations in Africa, Europe, and the United States in the last two years.¹⁰⁰

It is important to keep in mind that an "estimated 300,000 people have died and more than two million have been uprooted in Darfur by almost a decade of fighting between the government and the rebels."¹⁰¹ Such monstrous atrocities call out for punishment of the perpetrators, and especially of the perpetrators in charge. Proposals for an alternative approach to prosecution by the ICC have emanated from various sources, including the African Union.¹⁰² None of these alternative approaches, however, provide any prospect that Mr. Bashir would suffer incarceration as a punishment, which the enormity of his crimes would seem to demand. Hence, one may hope that U.S. "positive engagement" with the ICC will include active diplomatic efforts to induce states, both states parties to the Rome Statute and non-states parties, to lend their support to efforts to apprehend Bashir and bring him to The Hague.

Parenthetically, it should be noted that in Kenya, Kofi Annan, the former U.N. Secretary-General, brokered an agreement between the government and its opposition that ended the violence that followed the disputed election. In that agreement, both sides agreed that perpetrators of atrocities would face justice, either in Kenya, or, if this proved

94. *Id.*

95. See, e.g., David Charter, *World Court Under Threat as President Al-Bashir of Sudan Defies Warrant*, TIMES (U.K.), Apr. 2, 2009, <http://www.timesonline.co.uk/tol/news/world/africa/article6018508.ece>.

96. *Id.*

97. Article 16 of the Rome Statute provides: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." See Rome Statute, *supra* note 22, art. 16.

98. See, e.g., Marlise Simons, *International Court Adds Genocide to Charges Against Leader*, N.Y. TIMES, July 12, 2010, <http://www.nytimes.com/2010/07/13/world/africa/13hague.html>.

99. *Id.*

100. *Id.*

101. *Id.*

102. See, e.g., Richard Burchill, *Regional Approaches to International Humanitarian Law*, 41 VICTORIA U. WELLINGTON L. REV. 205, 206-07 (2010).

impossible, at the ICC.¹⁰³ Since the conclusion of the agreement there were many attempts to undermine it, but they all failed, including a last minute motion introduced in parliament to remove Kenya as a party to the Rome Statute.¹⁰⁴ When Luis Moreno-Ocampo announced his intent to pursue prosecutions against the six Kenyan leaders, this prompted “hopes of a fundamental transformation in the country’s politics.”¹⁰⁵ Several of the named defendants pledged to cooperate with the Court while pleading their innocence.¹⁰⁶ Significantly, President Obama issued a statement praising the developments in Kenya and suggesting that “Kenya is turning a page in its history, moving away from impunity and divisionism toward an era of accountability and equal opportunity.”¹⁰⁷

Perhaps what is needed is for the Obama administration to go beyond a policy of positive engagement with the ICC and adopt steps toward an active positive engagement with other actors whose support the ICC greatly needs. For instance, the Obama administration might sponsor legislation in the U.S. Congress that would allow the United States to prosecute the crimes covered by the Rome Statute to the extent they are not already covered by domestic legislation.¹⁰⁸ The United States currently has federal legislation authorizing (in certain circumstances) the prosecution in U.S. federal courts of genocide¹⁰⁹ and war crimes.¹¹⁰ But it has no legislation on the books authorizing the prosecution of crimes against humanity, although draft legislation to this end has been introduced.¹¹¹ Since the United States has called for the strengthening of national legal systems so that they can prosecute genocide, war crimes, and crimes against humanity, in keeping with the principle of complementarity,¹¹² it would seem to follow that the United States should set a good example.

The Obama administration might also consider a major diplomatic demarche, directed especially, although not exclusively, at key countries in Africa and the Middle East, in an effort to enhance support for the ICC and its two arrest warrants issued against Bashir. As part of this effort, it should attempt to refute allegations that the Court is biased against African and perhaps Muslim countries. To this end it might note that in three of the situations before the Court—Uganda, the Democratic Republic of the Congo, and the Central African Republic—the cases were referred to the Court by African country governments. In the case of Kenya, the U.S. government should note that in the agreement mediated by Kofi Annan, the parties agreed to the jurisdiction of the ICC in the event that it proved impossible to deal with the atrocities committed in Kenya courts, a condition that came to pass. As to the referral of the situation in Darfur, the evidence is obvious that there is no other available forum that can render justice in that case.

103. See Kantai, *supra* note 85.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See Letter from Jennifer Trahan, Chairperson, Am. Branch of the Int’l L. Ass’n–Comm. on the ICC, to Stephen J. Rapp, War Crimes Ambassador, and Harold Koh, Legal Advisor (Mar. 12, 2010), *available at* http://ila-americanbranch.org/reports/2010-03-12_ICC_Letter.pdf (setting forth this suggestion as well as other recommendations for future U.S. policy towards the ICC).

109. See 18 U.S.C. § 1091 (2006).

110. See War Crimes Act of 1996, 18 U.S.C. § 2441 (2006).

111. See Crimes Against Humanity Act, S. 1346, 111th Cong. (2009).

112. See Special Briefing, *supra* note 61, at 2 (remarks of Ambassador J. Rapp).

Last, but by no means least, the Obama administration might positively engage more effectively with the U.N. Security Council and with the U.S. General Assembly to improve the United Nations record on maintaining international peace and security.¹¹³ Both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal were in part created because of failures of the United Nations and the world community to prevent the atrocities in Yugoslavia and Rwanda.¹¹⁴ Moreover, it is fair to speculate that a major reason the Security Council referred the situation in Darfur to the ICC is that other efforts to stop the slaughter in Darfur had proved fruitless.¹¹⁵

A major reason the Obama administration should consider an active positive engagement in the General Assembly as well as in the Security Council is that both of these bodies affirmed the so-called responsibility to protect. The U.N. Summit Declaration of 2005, adopted by the General Assembly, affirmed that the United Nations has the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, stating:

We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.¹¹⁶

For its part, the Security Council, on April 28, 2006, adopted Resolution 1674, which affirmed this statement.¹¹⁷ But the Council has yet to fulfill this responsibility by taking the necessary action in concrete cases.

Worse yet, on July 23, 2009, the General Assembly engaged in a debate on the responsibility to protect that featured claims that the responsibility to protect was “redecorated colonialism” and “a Trojan horse for foreign meddling in . . . domestic affairs.”¹¹⁸ These claims are, of course, nonsense. But they nonetheless resonate well among too many member states of the General Assembly and need to be refuted.

In closing, we should remember that the only reason for creating an international criminal court is that the crimes of genocide, war crimes, and crimes against humanity are not being prevented and punished in other forums. This is certainly the case at present. To be sure, Luis Moreno-Ocampo, the current Prosecutor of the ICC, and others have stated that the ICC, under its doctrine of complementarity jurisdiction, is a court of last resort,

113. See generally JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 103-160 (2010) (for an extensive discussion of some of the challenges facing the United Nations in fulfilling its primary responsibility).

114. See *id.* at 78-80 (Yugoslavia); see also *id.* at 80-83 (Rwanda), for discussion.

115. See *id.* at 86, 133-135.

116. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

117. See S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

118. Neil MacFarquhar, *When to Step in to Stop War Crimes Causes Fissures*, N.Y. TIMES, July 29, 2009, <http://www.nytimes.com/2009/07/23/world/23nation.html>.

designed to intervene only when national legal systems fail.¹¹⁹ But the record so far indicates that states are still reluctant to prosecute these crimes in domestic forums. Hence the need for U.S. “positive engagement” to strengthen the ICC’s capacity to fill the gap.

119. *See, e.g.*, Luis Moreno-Ocampo, Prosecutor, Int’l Crim. Ct., Address at Nuremberg: Building a Future on Peace and Justice (June 24-25, 2007), *available at* http://www.iccnw.org/documents/LMO_nuremberg_26jun07_eng.pdf.