THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: WHY UNDERMINING THE ICC UNDERCUTS U.S. INTERESTS

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I. INTRODUCTION

The U.S. relationship with the International Criminal Court (ICC) has been complicated from the very start. I have seen this first-hand serving as a U.S. government official in several administrations—first just after the Rome Statute was adopted, and most recently in the Obama Administration's small-but-mighty Office of Global Criminal Justice at the State Department.

Yet, even so, it is fair to say the U.S.-ICC relationship is currently at a new low point, with John Bolton's September 2018 speech attacking the Court and threatening its personnel as the most visible manifestation.[1] Bolton, of course, has been a repeat protagonist in this story. He led earlier U.S. efforts to undercut the ICC in the first George W. Bush Administration—that is, until President Bush himself changed course and decided the ICC offered the best prospect for justice for atrocity victims in Darfur, Sudan, a situation which the UN Security Council referred to the ICC.[2] Indeed, President Bush's second term saw a greater recognition of ways in which aspects of the ICC's work could be consistent with U.S. interests.[3]

This trend continued and intensified in the Obama Administration, which decided to constructively and pragmatically engage with the ICC and support its work, on a case-by-case basis, consistent with U.S. law and interests.[4] In so doing, the Administration supported the UN Security Council's referral of

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[1] *Bolton's Remarks on the International Criminal Court*, JUST SECURITY (Sept. 10, 2018), https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/ [hereinafter Bolton's Remarks].

[2] Michael Abramowitz & Colin Lynch, *Darfur Killings Soften Bush's Opposition to International Court*, WASH. POST (Oct. 12, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101101964.html; Nora Boustany, *Official Floats Possibility of Assistance to Hague Court*, WASH. POST (June 12, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/11/AR2007061102347_pf.html.

[3] Jess Bravin, *U.S. Accepts International Criminal Court*, WALL STREET J. (Apr. 26, 2008), https://www.wsj.com/articles/SB120917156494046579; John B. Bellinger, III, Legal Advisor, U.S. Dep't of State, The United States and the International Criminal Court: Where We've Been and Where We're Going (Apr. 25, 2008); John B. Bellinger, III, *Congress Should Review Policy Toward War Crimes Court*, WASH. POST (June 21, 2012), https://www.washingtonpost.com/opinions/congress-should-review-policies-toward-war-crimes-court/2012/06/21/gJQAN9RgtV_story.html?. The American Service-Members' Protection Act of 2002 places statutory limits on various forms of U.S. support to the ICC. American Service-Members' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (2002).

[4] Ambassador Stephen Rapp, U.S. Statement to the Assembly of States Parties of the International Criminal Court (Dec. 14, 2011); OBAMA ADMINISTRATION, NATIONAL SECURITY STRATEGY 1, 22 (Feb. 2015) ("We will work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent with U.S. law and our commitment to protecting our personnel. Moreover, we will continue to mobilize allies and partners to strengthen our collective efforts to prevent and respond to mass atrocities using all our instruments of national power.").

the situation in Libya to the ICC and assisted in turning over major ICC indictees to the Court, including Lord's Resistance Army commander Dominique Ongwen and Congolese warlord Bosco Ntaganda, both of whom are on trial before the ICC.[5] The United States also expanded and offered rewards through its War Crimes Rewards Program for information contributing to the arrest and surrender of designated foreign nationals wanted by the ICC and other international tribunals.[6]

The Obama Administration also engaged diplomatically with the ICC to express U.S. views and advance U.S. interests. American officials participated at the Kampala negotiations over the crime of aggression, securing a result that protected non-parties to the ICC from the Court's jurisdiction over the crime of aggression.[7] The United States also attended the annual ICC Assembly of States Parties meetings as an observer delegation.[8] The Obama Administration expressed support for each of the cases before the Court, while also actively supporting a range of domestic and hybrid courts whose work was complementary to the ICC in bringing perpetrators of atrocity crimes to justice.[9]

Notwithstanding these important trends and developments across both Democratic and Republican administrations, the possibility that the ICC might commence an investigation concerning the situation in Afghanistan was always a challenging issue looming on the horizon. Both the Bush and Obama

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[5] Julia Crawford, *We Have Helped the ICC, Says Departing US War Crimes Ambassador*, JUSTICEINFO.NET (Aug. 6, 2015), https://www.justiceinfo.net/en/tribunals/mixed-tribunals/1511-we-have-helped-the-icc-says-departing-us-war-crimes-ambassador.html.

[6] The U.S. War Crimes Rewards Program offers rewards of up to five million dollars for information leading to the arrest, transfer, or conviction of designated foreign nationals charged with crimes against humanity, genocide, or war crimes by international, mixed, or hybrid criminal tribunals. *Key Topics – Office of Global Criminal Justice*, U.S. DEP'T OF STATE, https://www.state.gov/key-topics-office-of-global-criminal-justice/#rewards (last visited Sept. 8, 2019). This program has been instrumental in apprehending fugitives accused of atrocity crimes committed in Rwanda and the former Yugoslavia. Designated individuals include Joseph Kony, leader of the Lord's Resistance Army, and Sylvestre Mudacumura of the Democratic Forces for the Liberation of Rwanda (FDLR), among others. *Fugitives from Justice (Submit a Tip)*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/j/gcj/wcrp/c56848.htm (last visited Sept. 8, 2019).

[7] International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Res. RC/Res.6, Art. 15 *bis*, para. 5 (June 11, 2010) ("In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.").

[8] David Clarke, *U.S. to Attend Hague Court Meeting as Observer*, REUTERS (Nov. 16, 2009), https://www.reuters.com/article/us-usa-icc/u-s-to-attend-hague-court-meeting-as-observer-idUSTRE5AF30A20091116.

[9] Jane Stromseth, *Why the U.S. Needs the Office of Global Criminal Justice Led by a Senate-Confirmed Ambassador-at-Large*, JUST SECURITY (July 26, 2017), https://www.justsecurity.org/43554/u-s-office-global-criminal-justice-led-senate-confirmed-ambassador-at-large/.

Administrations sought to protect nationals of the United States—a non-party to the ICC—from exposure to the jurisdiction of the Court in the absence of U.S. consent, while also recognizing the value in other aspects of the Court's work. Moreover, navigating the complex and evolving U.S.-ICC relationship required calm, careful and astute diplomacy.

Yet Bolton's shrill attack on the ICC as a Trump Administration official was none of those things. Indeed, it was even more extreme than his earlier efforts—in the nature of the threats against ICC personnel, in the scope of those potentially covered, and in the many exaggerated and false claims about the ICC.[10] And his hostile posture towards the Court has been reinforced by others, including Secretary of State Pompeo and President Trump himself, and reflects a larger stance by the Trump Administration of skepticism and indeed often hostility toward multilateral institutions.[11]

II. BOLTON'S ATTACK ON THE ICC

Bolton claimed that the Trump Administration's ICC policy "put[s] the interests of the American people FIRST."[12] But is this really true? Is this aggressive stance and attack on the ICC the best way to advance U.S. interests? That is the central question I will address. I argue it is not, for three main reasons. First, Bolton's attack rests on an unduly narrow conception of the interests of the United States and the American people. This conception takes insufficient account of the importance of standing up against atrocity crimes. Second, Bolton's attack ignores and undercuts important ICC contributions to the pursuit of justice and accountability—including encouraging national efforts the U.S. has long supported. Third, it disregards the more effective ways to navigate issues growing out of the ICC's decade-long examination of the situation in Afghanistan and the more constructive ways to address U.S. concerns about the ICC. In short, Bolton's approach is neither

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[10] Alex Whiting, *Why John Bolton vs. Int'l Criminal Court 2.0 is Different from Version 1.0*, JUST SECURITY (Sept. 10, 2018), https://www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture/.

[11] Michael R. Pompeo, Sec'y of State, Remarks to the Press (Mar. 15, 2019), https://www.youtube.com/watch?v=oQPUBo6Dy8k; Michael R. Pompeo, Sec'y of State, Remarks at the German Marshall Fund (Dec. 4, 2018); Gardiner Harris, *Pompeo Questions the Value of International Groups Like U.N. and E.U.*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/world/europe/pompeo-brussels-speech.html; Donald Trump, President, Remarks to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018); Chimène Keitner, *Sovereignty on Steroids: International Institutions and the Trump Administration's "Ideology of Patriotism"*, LAWFARE (Sept. 28, 2018), https://www.lawfareblog.com/sovereignty-steroids-international-institutions-and-trump-administrations-ideology-patriotism.

[12] Bolton's Remarks, *supra* note 1.

the best way to support an affirmative agenda of accountability, nor is it the best defensive strategy.

First, Bolton is so focused on attacking the ICC that he fails to acknowledge or adequately appreciate the deep and longstanding stake the United States has in affirmatively supporting justice and accountability for mass atrocity crimes. Indeed, the United States—on a largely bipartisan basis—has long supported advancing justice for international atrocity crimes—including genocide, forced recruitment of child soldiers, mass rape, and other egregious crimes—recognizing that standing up against these atrocities advances both U.S. interests and values. This includes both advancing a norm that such atrocities are unacceptable and a tangible legacy of supporting a range of tribunals—national, hybrid, and international—to bring perpetrators to account. Let us call this the affirmative agenda.

Examples include American leadership in establishing the Nuremberg and Tokyo tribunals after World War II and helping to build the vital framework of international humanitarian law. Examples also include U.S. support for the Security Council's creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR) as well as U.S. support for numerous hybrid courts such as in Cambodia, Sierra Leone, Senegal, the Central African Republic, and elsewhere, and for domestic processes such as the mobile courts in the Democratic Republic of the Congo that have brought to justice perpetrators of atrocity crimes.[13]

Why does this advance U.S. interests? It does so for both normative and pragmatic reasons. Normatively, these efforts affirm the most fundamental standards of human conduct. The prohibitions against mass atrocities reflect legal rules the United States has sought to advance on a bipartisan basis along with many other countries for decades, aiming to protect civilians from harm and to protect combatants from unnecessary suffering. And better enforcement not only brings some measure of justice to victims; it also helps build an architecture of accountability—at the national, regional, and international levels—that, over time, can help to strengthen prospects for prevention of these atrocities.

There are also very pragmatic reasons why strengthening enforcement of this body of law is in the interest of the United States. These include conflict resolution: Atrocities can fuel an ongoing cycle of grievance and inflame conflicts—with profound security consequences—including desperate populations fleeing across borders and regional instability. This often puts the United States and its allies and partners in the challenging position of facing options, such as military intervention, that are far more costly and difficult

[13] Stromseth, *supra* note 9; Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Office of Glob. Criminal Justice, Intervention of the United States Observer Delegation (Dec. 15, 2014).

than earlier efforts aimed at structural prevention.[14] And failure to seek any credible measure of accountability can fuel pressures for retributive violence, making prospects for rebuilding after conflict all the more difficult.

Another pragmatic issue concerns coalitions and partnerships. American commitment to these rules and their enforcement helps to reinforce the legitimacy of military operations and aids in coalition-building with allies and friends, whose support is often critical for success.[15] Furthermore, the United States often works with and through partners in foreign militaries, providing forms of support other than direct combat operations and thus has a strong stake in how those partners conduct themselves. If the United States is to help build professional and accountable partners, who are seen as protectors and not predators, the law prohibiting atrocity crimes (and meaningful enforcement) is a vital part of training and education.

In John Bolton's account, however, we hear about virtually none of this. Nowhere does the long history of U.S. contributions to international justice appear. The positive agenda is hardly acknowledged. Never mentioned are the contributions of leading American lawyers—including Supreme Court Justice Robert Jackson, Judge Patricia Wald and many others—who have served as prosecutors, judges, or defense attorneys in international and hybrid criminal courts that have held perpetrators of atrocity crimes to account.[16]

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[14] Exec. Order No. 13729 (May 18, 2016), available at https://www.govinfo.gov/content/pkg/DCPD-201600329/html/DCPD-201600329.htm ("governmental engagement on mass atrocities and genocide too often arrives too late, when opportunities for prevention or low-cost, low-risk action have been missed").

[15] For these and additional reasons, it is crucial that the United States continues to hold our own forces accountable for violations of the law of armed conflict through fair and credible domestic processes, and not (as President Trump is reportedly considering) offering pardons that threaten to undercut the U.S. system of military justice (over the strong opposition of U.S. military leaders). David S. Cloud, *Senior Military Officers Rebel Against Trump Plan to Pardon Troops Accused of War Crimes*, L.A. TIMES (May 22, 2019), https://www.latimes.com/politics/la-na-pol-pentagon-oppose-trump-pardon-murder-warcrimes-20190522-story.html; Dave Philipps, *Trump May Be Preparing Pardons for Servicemen Accused of War Crimes*, N.Y. TIMES (May 18, 2019), https://www.nytimes.com/2019/05/18/us/trump-pardons-war-crimes.html. As senior U.S. officers emphasize, "adherence to the law of armed conflict greatly contributes to combat success, reduces overall suffering, maintains our military members' moral integrity, aligns with American values, and gains American allies around the world." Donald J. Guter, Real Admiral, JAGC, USN (Ret.), John D. Hutson, Rear Admiral, JAGC, USN (Ret.), and Rachel VanLandingham, Lt. Col, USAF (Ret.), *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SECURITY (May 24, 2019), https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code/. In contrast, "impunity for violations corrodes confidence in leadership; challenges the moral foundation of the men and women put under arms; increases the enemy's will to resist; and undermines the broader legitimacy of military action." *Id.*

[16] For a recent discussion of the contributions of Justice Robert Jackson and other Americans to international criminal justice, *see* Chile Eboe-Osuji, President, International

Also invisible from Bolton's narrative is the work of U.S. lawyers and diplomats to ensure the ICC is based on the primacy of *national* accountability for the most egregious atrocity crimes.

There is a second fundamental reason why Bolton's strident attack on the ICC does not effectively advance U.S. interests. Namely, it ignores and undercuts important contributions the ICC is making to the pursuit of justice and accountability—including its role in encouraging the national efforts that the U.S. has long supported.

To be sure, the ICC is an imperfect institution facing many acute problems, particularly today. The Court is struggling not only with longstanding challenges (concerning expectations, institutional capacity, and critiques about its legitimacy) but also with new ones. These include high-level acquittals that have raised questions about prosecutorial choices and ability to present sufficient evidence to meet its burden of proof; deeply divided and sometimes poorly reasoned judicial decisions in a number of cases; two recent state withdrawals; and preliminary examinations and investigations that bring the Prosecutor's focus to non-state parties, who are likely to strenuously resist the Court's work. So, the ICC's ability to make progress in building a track record of successful prosecutions in fair proceedings, to catalyze national accountability proceedings, and to contribute to prevention of atrocity crimes is at a particularly challenging moment.

Yet, despite its limitations and many challenges, the ICC also has some important things going for it. It is based fundamentally on the principle of complementarity and the primacy of *national* accountability processes—an idea the United States strongly supports.[17] Deliberately designed to be a court of last resort, the ICC's complementarity principle encourages justice to be pursued nationally in directly affected communities when possible, aiming to reinforce efforts to build genuine domestic justice processes.[18] The hope is domestic rule of law capacity as the first line of defense against atrocities will be strengthened as a result.

Hurling a "wrecking ball"[19] at the ICC undermines crucial efforts to strengthen legal accountability in the national courts of many of the countries

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Criminal Court, A Tribute to Robert H. Jackson – Recalling America's Contributions to International Criminal Justice (Mar. 29, 2019).

[17] The United States has provided support over many years to a wide range of national and hybrid accountability processes to investigate and prosecute atrocity crimes. For discussion of some of these efforts, *see* Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Office of Glob. Criminal Justice, Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (Nov. 21, 2013).

[18] For an analysis of the aims and many challenges of complementarity, *see Pressure Point: The ICC's Impact on National Justice, Lessons from Colombia, Georgia, Guinea, and the United Kingdom*, HUM. RTS. WATCH (2018), https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf.

[19] Whiting, *supra* note 10.

emerging from conflict—the very processes Bolton claims to support.[20] Indeed, in a number of countries—including Guinea and the Central African Republic (CAR)—the ICC is working to actively encourage[21] and even assist domestic accountability efforts. So, too, in Colombia, the ICC's ongoing preliminary examination since 2004 helped influence the inclusion of justice provisions in the peace agreement, with the implementation of that agreement still very much a work in progress.[22]

At the domestic level, the ICC has also helped empower civil society advocates for justice as they press their own governments for better accountability.[23] These efforts are consistent with longstanding U.S. support for civil society human rights defenders and justice advocates under Republican and Democratic administrations alike.[24]

The ICC should be encouraged in its efforts to catalyze domestic accountability, such as in Guinea, CAR, and Colombia. It is counterproductive to undercut this work by a broadside assault on the ICC—an assault that fails to take account of its important catalyzing impacts in promising situations and ignores the considerable support the Court continues to enjoy among many victims and advocates for justice in countries around the world.

What if reliance on purely domestic action in conflict-ridden societies is not possible or sufficient? In a number of such cases, prior Republican and Democratic administrations have looked to the ICC and found the Court's involvement to be consonant with U.S. interests, concluding that the ICC offered the best or even the only realistic option for accountability and justice for victims.[25] Such situations no doubt will continue to present themselves, and the ICC's availability in such circumstances may offer an important option for justice and a source of hope for victims of egregious atrocities. Working to build stronger accountability for mass atrocities—in national courts

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[20] Bolton Remarks, *supra* note 1 ("perpetrators should face legitimate, effective, and accountable prosecution for their crimes, by sovereign national governments.").

[21] Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017), https://www.justsecurity.org/47717/icc-making-difference/.

[22] Marina Aksenova, *The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice*, in Morten Bergsmo & Carsten Stahn eds., *Quality Control in Preliminary Examination: Volume I*, TORKEL OPSAHL ACADEMIC EPUBLISHER (Sept. 6, 2018), http://www.legal-tools.org/doc/5b3704/pdf/; Rene Uruena, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017,* 111 AJIL 104 (2017).

[23] Stromseth, *supra* note 21.

[24] *Id.*

[25] Examples include the Bush Administration's support for ICC action regarding Darfur, Sudan, Boustany, *supra* note 2, and the Obama administration's support for ICC action in Mali. Press Release, Mark C. Toner, Deputy Dep't Spokesperson, ICC Judgment in Mali Cultural Destruction Case (Sept. 27, 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/09/262507.htm. The United States has also supported combined efforts by both the ICC and hybrid or national courts, as in the Central African Republic and the Democratic Republic of the Congo. Rapp, *supra* note 13.

when possible, in hybrid courts, and before the ICC—together can reinforce the fundamental prohibitions against atrocity crimes, chip away at impunity, and help bolster prospects for prevention.

All of these reasons underscore why the U.S. government—over the last decade—generally sought to respond carefully and prudently to the prospect of an ICC investigation concerning Afghanistan, while not undercutting the larger system of accountability of which the ICC is a part.

This brings me to my third reason why Bolton's aggressive attack on the ICC and continuing threats against ICC personnel is not in the interest of the United States. Namely, this approach disregards more constructive ways to navigate the complex issues growing out of the ICC's decade-long examination of the situation in Afghanistan and overlooks more effective ways to address U.S. concerns about the ICC more generally.

To be sure, the U.S. government has articulated a number of concerns about the ICC from the beginning. These include a strong preference for national accountability (reflected to a significant degree in the complementarity principles in the Rome Statute) and a resistance to an international court that could subject nationals of non-parties to its jurisdiction in the absence of UN Security Council referral or state consent.[26] Rooted in confidence in the U.S. domestic constitutional system and in concerns that the United States' significant global role and military deployments abroad would make it an attractive target for ICC investigations, the U.S. posture also reflects a longstanding historical reluctance to subject itself to international courts without its consent.[27]

At the same time, the United States, as noted earlier, has been a strong supporter of international and hybrid justice mechanisms in the post-WWII period. Some of these mechanisms were created through the UN Security Council (in the case of the ICTY and ICTR), or with state consent and international or regional support in the case of hybrids.

In short, the U.S. posture toward the ICC has always been an amalgam of competing dynamics—including affirmative support for accountability through various mechanisms (the positive agenda) but also a defensive agenda regarding any potential ICC assertion of jurisdiction over U.S. nationals. Prior to the Trump Administration, the challenge for those serving in government was navigating these dynamics—these two strands—astutely and calmly: advancing the positive agenda as effectively as possible while also clearly conveying U.S. concerns regarding the ICC.

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[26] William J. Clinton, President, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000); Marc Grossman, Under Sec'y of State for Political Affairs, American Foreign Policy and the International Criminal Court (May 6, 2002).

[27] *Id.* For analysis of the often-ambivalent U.S. relationship to the United Nations and various UN agencies, *see* EDWARD C. LUCK, MIXED MESSAGES: AMERICAN POLITICS AND INTERNATIONAL ORGANIZATIONS 1919-1999 (1999).

Major U.S. policy statements sought to make sure that affirmative U.S. support for accountability through a variety of mechanisms was not drowned out by expressed concerns about the ICC. The exceptions were the tirades against the ICC by John Bolton then and now. During the Bush Administration, for example, the Under Secretary of State for Political Affairs, Marc Grossman, affirmed U.S. support for the important work of the ICTY, ICTR, and the hybrid courts in Cambodia, Sierra Leone, and elsewhere to bring perpetrators of grave crimes to account.[28] The Ambassador-at-Large for War Crimes Issues, Stephen Rapp, spoke eloquently during the Obama Administration at the annual ICC Assembly of States Parties meeting about U.S. support for justice for victims of mass atrocities at the national and international levels.[29] He and the dedicated team in the State Department's Office of Global Criminal Justice worked tirelessly to pursue justice for victims, including those in Syria, the Democratic Republic of the Congo, Sudan, South Sudan, and many other places.[30]

Yet the U.S. defensive concerns were always there, brought into increasingly sharp focus in the Afghanistan situation. After Afghanistan became a party to the ICC treaty in 2003, and the Office of the Prosecutor (OTP) commenced a preliminary examination in 2006, the possibility that the ICC might open an investigation hovered over the evolving U.S. relationship with the ICC.[31] Because the United States is not a party to the ICC, the clear policy of successive U.S. administrations, both Republican and Democratic, has been to protect U.S. personnel from exposure to the ICC's exercise of jurisdiction.[32] But the key question was how best to do this, and also how best to grapple *domestically* with the awful reality of the post-9/11 torture and abuse of a number of detainees in U.S. custody—abuse documented by the U.S. Senate Select Committee on Intelligence in its public report and by other reports and studies.[33]

As the ICC Prosecutor's annual reports on preliminary examinations increasingly made clear, an Afghanistan investigation—if authorized by the

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[28] Grossman, *supra* note 26.

[29] For examples, *see* Ambassador Stephen Rapp, United States Statement, Assembly of States Parties of the ICC (Dec. 14, 2011); Stephen Rapp, Ambassador-at-Large for Glob. Criminal Justice, Intervention of the United States Observer Delegation, 13th Assembly of States Parties (Dec. 11, 2014).

[30] Stromseth, *supra* note 9.

[31] Stephen Pomper, *The Int'l Criminal Court's Case Against the United States in Afghanistan: How it Happened and What the Future Holds*, JUST SECURITY (Nov. 13, 2017), https://www.justsecurity.org/46990/international-criminal-courts-case-u-s-afghanistan-happened-future-holds/.

[32] *Id.*

[33] S. REP. NO. 113-288 (2014); S. REP. NO. 110-54 (2008); *The Report of The Constitution Project's Task Force on Detainee Treatment*, THE CONSTITUTION PROJECT (2013), https://www.opensocietyfoundations.org/sites/default/files/constitution-project-report-on-detainee-treatment_0.pdf.

ICC Pre-Trial Chamber—would likely not be limited to an investigation of the ongoing Taliban atrocity crimes, including deliberate attacks against civilians and persecution of women and girls, and the allegations of detainee abuse by Afghan government forces.[34] An investigation was also likely to include scrutiny of allegations of mistreatment and torture of detainees by U.S. forces and CIA personnel in Afghanistan, and on the territory of other ICC state parties following the 9/11 attacks, particularly between 2003 and 2004.[35] Such an investigation would no doubt be fraught with challenges for both the United States and the ICC.

But there are calmer and far more constructive ways for the United States to respond to these challenges than Bolton's frontal attack on the ICC and threats to ban, sanction, and even potentially prosecute ICC personnel.

First of all, there was time to navigate the situation more carefully. For one thing, because the United States is not a party to the treaty that created the ICC, it is not legally obligated to cooperate in such an investigation and indeed is restricted by U.S. statute from doing so.[36] Moreover, any investigation, had it been authorized, would likely take years.[37] Thus, there was time for the United States to calmly assess how to navigate adroitly through this terrain with careful consideration of all that was at stake.

Second, instead of bullying tactics, the United States could have focused on arguments that could carry persuasive traction. These include arguments invoking the OTP's Policy Papers on Case Selection and Prioritization[38] and on Sexual and Gender-Based Crimes[39] and emphasizing that *ongoing* Taliban crimes warrant a priority focus, including Taliban attacks directed against

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[34] Office of the Prosecutor, *Report on Preliminary Examination Activities*, INT'L CRIMINAL COURT ¶¶ 246-55 (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf; Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, INT'L CRIMINAL COURT ¶¶ 205-13 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

[35] Public Redacted Version of "Request for Authorization of an Investigation Pursuant to Article 15" Regarding Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-7, ¶187-252 (Nov. 20, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.

[36] American Service-Members' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (2002).

[37] Alex Whiting, *An ICC Investigation of the U.S. in Afghanistan: What Does it Mean?*, JUST SECURITY (Nov. 3, 2017), https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/.

[38] Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, INT'L CRIMINAL COURT (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[39] Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, INT'L CRIMINAL COURT (June 2014), https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

civilian populations and sexual and gender-based crimes directed against women and girls.

Moreover, because the ICC is a court of last resort that is *complementary* to national justice proceedings—with genuine domestic processes as the first line of defense and of justice—the United States could and should have examined more systematically and transparently[40] both what it has done domestically in response to allegations of mistreatment and torture of detainees after 9/11 and what more it can do credibly to advance accountability domestically.[41]

Indeed, the United States should be more transparent and forthcoming—first and foremost to the American people—about what steps it has taken *domestically* to come to terms with the post-9/11 mistreatment and torture of detainees documented in the U.S. Senate Select Committee on Intelligence Report (conduct opposed by many military officers[42] and civilian officials at the time). The American people deserve to know more about what has been done domestically to advance accountability and what more realistically could be done.

Fourth and relatedly, the Trump Administration should have strongly and explicitly affirmed that it unequivocally opposes torture and that it will abide by U.S. treaty and statutory obligations against torture, just as the Obama Administration did.[43] This is the right and lawful thing to do. These steps would help reinforce and solidify that the U.S. system has self-corrected. Such domestic steps could strengthen U.S. complementarity arguments. They could have also encouraged an ICC prosecutorial focus on *ongoing* Taliban crimes as a matter of prioritization under the Prosecutor's own policy.[44]

In short, the United States could have taken meaningful steps to protect U.S. interests and U.S. personnel effectively without undermining the

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[40] Pomper, *supra* note 31.

[41] David Bosco, *A Former U.S. Envoy's Thoughts on ICC Scrutiny of the United States*, LAWFARE (Nov. 1, 2016), https://www.lawfareblog.com/former-us-envoys-thoughts-icc-scrutiny-united-states (citing and quoting Ambassador Stephen Rapp).

[42] Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES (July 28, 2005), https://www.nytimes.com/2005/07/28/politics/militarys-opposition-to-harsh-interrogation-is-outlined.html.

[43] Exec. Order No. 13491, 74 C.F.R. 4893 (Jan. 22, 2009); Tom Malinowski, Assistant Secretary of State for Democracy Human Rights and Labor before the UN Committee Against Torture (Nov. 12-13, 2014) (affirming that "torture, and cruel, inhuman and degrading treatment and punishment are forbidden in all places, at all times, with no exceptions"). Former Secretary of Defense, Jim Mattis, likewise made clear his strong opposition to torture under any circumstances. *See* Sheri Fink & Helene Cooper, *Inside Trump Defense Secretary Pick's Efforts to Halt Torture*, N.Y. TIMES (Jan. 2, 2017), https://www.nytimes.com/2017/01/02/us/politics/james-mattis-defense-secretary-trump.html?_r=2.

[44] Alex Whiting, *No Winners: How the Int'l Criminal Court Should Avoid Confronting the United States*, JUST SECURITY (Dec. 15, 2017), https://www.justsecurity.org/49680/winners-intl-criminal-court-avoid-confronting-united-states/.

possibilities of justice for victims of mass atrocities that the ICC can offer and without undercutting its work to catalyze national accountability—the primary and most important foundation for justice and the rule of law.

III. THE PATH NOT TAKEN

Unfortunately, this was not the path taken by the Trump Administration. Instead of pursuing such an approach, the Administration opted for a "deep strike" version of a defensive agenda replete with bullying threats against ICC personnel—threatening visa bans, sanctions, and even prosecution—if the ICC proceeded to open an investigation against the United States.[45] A week after the United States confirmed that it had revoked the ICC Prosecutor's visa,[46] the ICC Pre-Trial Chamber (before whom the matter had been pending for months) issued its decision denying the Prosecutor's request to open an investigation into the Afghanistan situation, saying that it was not in the "interests of justice" to do so "at this stage" because "the prospects for a successful investigation and prosecution [were] extremely limited" in light of a number of considerations, including uncertain "meaningful cooperation from relevant authorities . . . whether in respect of investigations or of surrender of suspects."[47]

John Bolton and the White House proceeded to declare "victory."[48] Bolton proudly claimed success for his strident opposition to the ICC and jubilantly re-read the portion of his September 2018 speech, declaring that "the ICC is already dead to us."[49] We may never know exactly what influence the aggressive U.S. threats may have had on the Court's deliberations, but the result—shutting down a possible Afghanistan investigation—was exactly what Bolton and the Trump Administration wanted.

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[45] Bolton Remarks, *supra* note 1.

[46] Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html.

[47] ICC Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, ¶ 94 (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF (hereinafter "ICC Pre-Trial Chamber Decision").

[48] Press Release, Donald Trump, President, Statement from the President (Apr. 12, 2019), https://www.whitehouse.gov/briefings-statements/statement-from-the-president-8/; Marlise Simons, Rick Gladstone & Carol Rosenberg, *Hague Court Abandons Afghanistan War Crimes Inquiry*, N.Y. TIMES (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/world/asia/icc-afghanistan-.html.

[49] Carole Morello, *Trump Administration Applauds International Court's Decision to Abandon Afghan War Crimes Probe*, WASH. POST (Apr. 12, 2019), https://www.washingtonpost.com/world/national-security/trump-administration-applauds-international-courts-decision-to-abandon-afghan-war-crimes-probe/2019/04/12/610fd2b6-5d4a-11e9-a00e-050dc7b82693_story.html?utm_term=.6e7d7b8a46aa.

But what kind of "victory" is this? Is it a pyrrhic victory? Although the Pre-Trial Chamber's unexpected and controversial judgment yielded the Trump Administration's desired outcome, the Court's decision came at a very high cost—even for the United States. Some of these costs flow from the Administration's aggressive approach: the U.S. bullying tactics set a deeply problematic example of disrespect for the personnel and judicial processes of the ICC. These tactics also undercut U.S. credibility and stature in advocating for accountability for atrocity crimes more generally. Moreover, within Afghanistan itself—a state party to the ICC—the Pre-Trial Chamber decision prevents the ICC Prosecutor from investigating grave, widespread, and ongoing atrocities committed by the Taliban—atrocities that U.S. forces, U.S. government agencies, and U.S. civil society groups have worked tirelessly to counter over many years.

Additional costs flow from the thinly reasoned decision of the Pre-Trial Chamber itself. The opinion offers a surprisingly brief discussion of complementarity and gravity. Also surprising is the Pre-Trial Chamber's unexpected "interests of justice" analysis that runs the risk of incentivizing state *non-cooperation* by making it a central factor in its decision declining to open an investigation.[50]

Just as the United States had other options in its strategy, so too did the Pre-Trial Chamber in its reasoning and judgment. The Chamber could have considered the issues of complementarity and gravity more fully. It could have offered a deeper analysis of the "interests of justice" and sought full briefing on this crucial issue that could have contributed to a far more nuanced assessment. Given the lack of clear statutory guidance, there is merit in looking at the broader purposes of the Rome Statute;[51] but one can reasonably question whether the "prevention" of grave atrocity crimes or combating "impunity" will be advanced—or rather undercut—by the Chamber's analysis.

Moreover, while the Office of the Prosecutor's relatively narrow interpretation of the "interests of justice" set out in its policy paper[52] is certainly open to critique, the Pre-Trial Chamber could have sent the matter back to the OTP

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[50] Christian De Vos, *No ICC Investigation in Afghanistan: A Bad Decision with Big Implications*, INT'L JUST. MONITOR (Apr. 15, 2019), https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/. Presiding Judge Antoine Kesia-Mbe Mindua subsequently issued a concurring separate opinion, joining in the Chamber's unanimous decision to deny the Prosecutor's request to open an investigation in the Afghanistan situation and elaborating his views on the "interests of justice"—but disagreeing with his colleagues concerning the scope of a potential authorization. Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, Case No. ICC-02/17-33-Anx (May 31, 2019), https://www.icc-cpi.int/RelatedRecords/CR2019_02989.PDF.

[51] ICC Pre-Trial Chamber Decision, *supra* note 47, at ¶ 89.

[52] Office of the Prosecutor, *Policy Paper on the Interests of Justice*, INT'L CRIMINAL COURT (Sept. 2007), https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

asking it to consider interests of justice in a fuller manner. Alternatively, the Pre-Trial Chamber could have authorized an investigation, noting concerns about cooperation but encouraging the OTP itself to give careful consideration to issues of cooperation and prospects for success (which the OTP's own policy paper on prioritization clearly addresses).[53] These alternative approaches would have recognized the inevitable need for prioritization and consideration of practical constraints by the OTP rather than presenting judicial reasoning and criteria that risk rewarding lack of cooperation. Furthermore, in stressing the length of time that the preliminary examination was open as a key factor in its decision, the Pre-Trial Chamber also undercuts the OTP's ability to encourage and seek to catalyze domestic accountability through preliminary examinations—which may well take time to bear fruit.

In any event, the story is not over on the Afghanistan situation. On June 7, 2019, the Prosecution sought leave to appeal the Pre-Trial Chamber decision.[54] Three months later, the Pre-Trial Chamber granted the OTP leave to appeal its decision on the "interests of justice" issues.[55] In the meantime, as egregious Taliban atrocities continue in Afghanistan, many victims of these crimes—deeply disappointed by the Chamber's initial decision—no doubt will continue to argue, with strong support, that the "interests of justice" require some meaningful accountability.[56] Civil society organizations will

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[53] This could have enabled the OTP to prioritize cases, likely against the Taliban, where possibilities for success in gathering evidence and building cases might have been greater. Kevin Jon Heller, *One Word for the PTC on the Interests of Justice: Taliban*, OPINIOJURIS (Apr. 13, 2019), http://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/.

[54] Office of the Prosecutor, Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan," Case No. ICC-02/17 (June 7, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF.

[55] ICC Pre-Trial Chamber II, Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan,' Case No. ICC-02/17, ¶¶ 34-39 (Sept. 17, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05649.PDF.

[56] As Kevin Jon Heller poignantly asks regarding Taliban atrocities: "How could it not be in the interests of justice for the OTP to investigate the gravest and most numerous crimes in the Afghanistan situation?" Heller, *supra* note 53. The Afghan Independent Human Rights Commission (AIHRC), in its statement responding to the Pre-Trial Chamber's decision, expressed regret and argued "this decision does not serve the interests of justice, actually, it contributes to culture of impunity." Press Release, AIHRC, Press Release on the Rejection of the International Criminal Court Prosecutor's Request to Investigate into the Situation in Afghanistan (Apr. 13, 2019). *See also* Huma Saeed, *A Slap in the Face of Justice: The ICC and Afghanistan*, SECURITYPRAXIS (May 8, 2019), https://securitypraxis.eu/afghanistan-icc/ ("Let war survivors decide what they think is best for themselves and their interests about justice. They wanted an investigation and the Pre-Trial Chamber rejected it. Suggesting that it was for their own good amounts to the Afghan popular saying of putting salt to one's wound.").

continue to document ongoing atrocities in Afghanistan and press for justice even if the ICC is not at the center of those efforts.

If there is any silver lining, it is that the Pre-Trial Chamber's judgment—on top of other ICC developments over the last year or so—is triggering far more searching and candid assessments regarding the challenges and future of the ICC and the need to combine ambition with greater realism.[57] Recent developments—including fractured and sometimes poorly reasoned judicial decisions; prosecutorial challenges in presenting evidence sufficient to meet its burden of proof; and judicial squabbling over pay increases, among others—have exposed deep internal issues and dysfunctions at the ICC. On top of this is insufficient state support in terms of arrest warrants or funding; opposition from powerful non-party states; insufficient assistance from the UN Security Council; lack of cooperation from a number of states; and several withdrawals. Together these are formidable challenges to the ICC's capacity to fulfill the objectives set for it by the drafters of the Rome Statute. Houston, we do indeed have a problem.[58]

Deeply important in finding a constructive path forward for the ICC is the need for a more honest assessment of the large gap between the mission given to the Court and its current performance and of what it would take to begin to close that gap both in terms of internal reforms and external support. Expectations of what the ICC can actually contribute—through its own proceedings and track record and its larger catalyzing effects—need to be realistic and well-informed. The ICC's internal institutional capacity and processes need to be strengthened and its work bolstered by appropriate and more effective state support.

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[57] Some recent examples include: Todd Buchwald, *The International Criminal Court Decision on Afghanistan: Time to Start a New Conversation*, JUST SECURITY (April 13, 2019), https://www.justsecurity.org/63622/the-international-criminal-court-decision-on-afghanistan-time-to-start-a-new-conversation/; Mark Kersten, *Whither the Aspirational ICC, Welcome the 'Practical' Court?*, EJIL: TALK! (May 22, 2019), https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/; Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser & Tiina Intelman, *The International Criminal Court Needs Fixing*, ATL. COUNCIL (Apr. 24, 2019), https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing; Douglas Guilfoyle, *Reforming the International Criminal Court: Is it Time for the Assembly of States Parties to be the Adults in the Room?*, EJIL: TALK! (May 8, 2019), https://www.ejiltalk.org/author/dguilfoyle/.

[58] For thoughtful analysis, *see* Douglas Guilfoyle's three-part series in EJIL: Talk!. Douglas Guilfoyle, *Part I – This is Not Fine: The ICC in Trouble*, EJIL: TALK! (Mar. 21, 2019), https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/; Douglas Guilfoyle, *Part II - This is Not Fine: The ICC in Trouble*, EJIL: TALK! (Mar. 22, 2019), https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/; Douglas Guilfoyle, *Part III – This is Not Fine: The ICC in Trouble*, EJIL: TALK! (Mar. 25, 2019), https://www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/.

None of this will be easy or straightforward, especially given disagreements and lack of clarity on many of the key principles that are supposed to guide the Court's work, including complementarity, gravity, and interests of justice. Some mid-course corrections may be forged through internal reforms and strategy adjustments—such as the OTP's latest draft strategic plan, which indicates a willingness to place greater emphasis on mid-level defendants where the prospects for building successful cases may be greater.[59] Other matters may require adjustment and greater guidance from the Assembly of States Parties.

In all of this, it is crucially important to remember that the ICC is designed to be a court of last resort. Perhaps setting more modest expectations for the Court—while reaffirming the primacy and importance of strengthening justice on the ground—would be a helpful place to start. Far greater attention and support by states and civil society organizations to domestically-based courts in promising circumstances, including innovative hybrid arrangements—with the ICC truly as a last resort in those unique circumstances where it is vitally needed and likely to be supported and effective—may not be the clarion call or vision of justice that many at Rome had in mind. But it may be more likely to lead there over time.

In any path ahead, what is absolutely crucial is clearly affirming the legal prohibitions against atrocities, preventing these horrific crimes, and seeking meaningful justice for victims even if the mechanisms of enforcement and accountability need to be both stronger and more varied. The unacceptability of atrocities—as a normative matter—should not be obscured by disagreement over particular enforcement mechanisms, as Saira Mohamed thoughtfully argues.[60] Yet, too often this is what happens.

IV. IS THERE A CONSTRUCTIVE WAY AHEAD?

For the rest of the Trump Administration, the U.S.-ICC relationship will continue to be fraught and marked by tensions. It is hard to imagine John Bolton or Secretary of State Pompeo having anything positive to say about any aspect of the ICC's work. Indeed, Bolton's fervently stated and longstanding desire is to kill the ICC.[61]

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[59] Alex Whiting, *ICC Prosecutor Signals Important Strategy Shift in New Policy Document*, JUST SECURITY (May 17, 2019), https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/; Office of the Prosecutor, *Strategic Plan*, INT'L CRIMINAL COURT (July 17, 2019), https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf.

[60] Saira Mohamed, *States Parties, Non-States Parties, and the Idea of International Community*, 47 GA. J. INT'L & COMP. L. 635 (2019).

[61] John Bolton, *The Hague Aims for U.S. Soldiers*: *A 'War Crimes' Inquiry in Afghanistan Shows the Danger of the International Criminal Court*, Op. Ed., WALL STREET J. (Nov. 20, 2017), https://www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-15112171-

But what might be possible in a new administration? That is not an easy question. It will certainly take a long time to overcome the damage inflicted by Bolton's shrill attacks, threats and exaggerated critiques. A future administration might opt for some degree of careful reengagement and could, like the Obama Administration and the second George W. Bush Administration, recognize the valuable role the ICC can sometimes play, finding a more constructive way to pursue an affirmative agenda—and support important aspects of the ICC's work—while astutely navigating defensive concerns. Hopefully, the United States will look for ways to advance justice and accountability for atrocity crimes through a variety of mechanisms—domestic, hybrid, regional, and international. And in so doing, the United States must affirm and reinforce its own domestic willingness and ability to hold its own personnel accountable.[62]

The one thing the United States should not do is waver in its commitment to seek accountability for egregious international crimes. Indeed, it is vital to keep in mind the deep U.S. interests and long-term stakes in continuing to advance justice for mass atrocities. Bipartisan outrage over the Assad regime's use of chemical weapons against innocent civilians in Syria and over widespread torture and murder in its prisons, documented by the Caesar photos;[63] condemnation of ISIS's horrific atrocities, including summary executions, sexual slavery, and genocide;[64] outrage over the brutal atrocities against the Rohingya at the hands of Myanmar military forces;[65] and revulsion over widespread rape in many conflicts around the world, has motivated Americans across the political spectrum to stand up and say this must stop.

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36 ("America should welcome the opportunity . . . to strangle the ICC in its cradle."); Bolton Remarks, *supra* note 1 ("We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own. For all intents and purposes, the ICC is already dead to us.").

[62] President Trump's reported interest in pardoning U.S. service members convicted of or on trial for war crimes in the U.S. military justice system is strenuously opposed by top U.S. military leaders and would clearly be a step in the wrong direction. *See* Cloud, *supra* note 15; Guter, Hutson & VanLandingham, *supra* note 15.

[63] Ben Taub, *The Assad Files: Capturing the Top-Secret Documents that Tie the Syrian Regime to Mass Torture and Killings*, THE NEW YORKER (Apr. 18, 2016), https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed.

[64] Elise Labott and Tal Kopan, *John Kerry: ISIS Responsible for Genocide*, CNN POLITICS (Mar. 18, 2016), https://www.cnn.com/2016/03/17/politics/us-iraq-syria-genocide/index.html; *"Our Generation is Gone": The Islamic State's Targeting of Iraqi Minorities in Ninewa*, UNITED STATES HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf.

[65] *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State, Factual Findings and Legal Analysis Report*, PUB. INT'L LAW & POLICY GRP. (Dec. 2018), https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/5c058268c2241b5f71a0535e/1543864941782/PILPG+-+ROHINGYA+REPORT+-+Factual+Findings+and+Legal+Analysis+-+3+Dec+2018+%281%29.pdf.

In short, as the U.S. government navigates any current or future challenges with the ICC, it can and should do so in ways that support justice and accountability for horrific mass atrocity crimes. To be sure, seeking credible justice is extraordinarily difficult work, yet some things are clear. The need for more effective prevention and accountability is as urgent as ever, as egregious atrocities devastate victims and communities in so many conflicts across the globe. Expectations of justice and accountability for such crimes are increasing, and victims and affected communities—as well as civil society organizations and states—will look for ways to mobilize to achieve that goal.

Sometimes the ICC will be able to provide justice, and even if not, it will often be a galvanizing and tangible symbol of the importance of the struggle. At the same time, the ICC is only a part of a larger terrain of ways to seek justice, and those other ways—most notably credible national processes, when possible, as well as innovative hybrids, among others—will often be crucial to pursuing a fuller measure of justice and accountability for atrocity crimes, ensuring fair processes, and potentially helping to strengthen deterrence and prevention.

The quest for justice may be daunting, but the need is so enormous, and the demand is growing, and even small steps and achievements can provide a "ripple of hope"[66] that together can help build a stronger "current" of accountability and prevention. U.S. policy should contribute to, and not undercut, those ripples of hope, affirming that the norms against egregious atrocities are universal, even if modes of enforcement will vary. Advancing justice and prevention more effectively should be an objective that enjoys common ground.

[66] As the late Robert F. Kennedy said in his speech in Cape Town, South Africa in 1966: "Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance." Robert F. Kennedy, Day of Affirmation Speech at the University of Cape Town, South Africa (June 6, 1966).