In November 2012, the U.N. General Assembly voted "to accord to Palestine non-member observer *State* status in the United Nations." G.A. Res. 67/19 (Dec. 4, 2012) (emphasis added). Thereafter, Palestine acceded to the Rome Statute in January 2015 (effective at the beginning of April 2015) and at the same time filed a declaration under Article 12(3) of the Statute to accept I.C.C. jurisdiction over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." In May 2018 Palestine made a referral under Articles 13(a) and 14 of the Rome Statute of the situation in Palestine since June 13, 2014, with no end date, and on July 13, 2018, Pre-Trial Chamber I ordered the Registry to establish a system of public information and outreach activities for the benefit of affected communities. The Office of the Prosecutor, in its Report on Preliminary Examination Activities (2018), has summarized relevant background and legal questions of jurisdiction and admissibility and has expressed the intention of completing the preliminary examination as soon as possible.

Israel, a non-party to the Rome Statute, maintains that the legal standards for jurisdiction and admissibility are not satisfied. Do you think the matter should move forward? Why or why not?

3. *U.S. Exposure in Afghanistan?* The situation in Afghanistan was under preliminary examination between 2007 and 2017. In November 2017, the Office of the Prosecutor sought authorization from the pre-trial chamber to proceed with an investigation, involving alleged crimes committed on the territory of Afghanistan since 2003 when it became a state party, and related crimes allegedly committed on the territories of other states parties, namely Lithuania, Poland, and Romania. Certain of the allegations include conduct of U.S. armed forces and members of the U.S. Central Intelligence Agency on the territories of those states parties, primarily in the period 2003–2004. With respect to complementarity, the prosecutor has stated that under the information available to her, "no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed" by U.S. personnel. The pre-trial chamber had not yet ruled on the prosecutor's application for authorization of the investigation as of late 2018. The United States, a non-party, maintains that the I.C.C. is without any authority to investigate its nationals on any allegations whatsoever. What do you think?

4. *Further Reading.* On the Rome Conference and its outcome, see generally The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results (Lee ed. 1999); Kirsch & Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, 93 A.J.I.L. 2 (1999); Arsanjani, The Rome Statute of the International Criminal Court, 93 A.J.I.L. 22 (1999). For a collection of documents, see The Statute of the International Criminal Court and Related Instruments: Legislative History 1994–2000 (Bassiouni ed. 2005) (3 vols.). See also Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals (2012).

B. CASE STUDY: WAR CRIMES IN DARFUR, SUDAN

SECURITY COUNCIL RESOLUTION 1593

S.C. Res. 1593 (Mar. 31, 2005)

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98(2) of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby

reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

[The resolution was adopted by a vote of 11 in favor and 4 abstentions (Algeria, Brazil, China, United States).]

WARRANT OF ARREST FOR OMAR HASSAN AHMAD AL BASHIR

No. ICC-02/05-01/09 (Mar. 4, 2009), http://www.icc-cpi.int (footnotes omitted).

Pre-trial Chamber I of the International Criminal Court ("the Chamber" and "the Court" respectively);

Having Examined the "Prosecution's Application under Article 58" ("the Prosecution Application"), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan ("the Darfur situation") requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as "Omar Al Bashir") for genocide, crimes against humanity and war crimes;

Having Examined the supporting material and other information submitted by the Prosecution;

Noting the "Decision on the Prosecution's Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" in which the Chamber held that it was satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for war crimes and

crimes against humanity and that his arrest appears to be necessary under article 58(1)(b) of the Rome Statute ("the Statute");

Noting articles 19 and 58 of the Statute;

Considering that, on the basis of the material provided by the Prosecution in support of the Prosecution Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;

Considering that, on the basis of the material provided by the Prosecution in support of the Prosecution Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;

Considering that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character within the meaning of article 8(2)(f) of the Statute existed in Darfur between the Government of Sudan ("the GoS") and several organised armed groups, in particular the Sudanese Liberation Movement/Army ("the SLM/A") and the Justice and Equality Movement ("the JEM");

Considering that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counterinsurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

Considering that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that, as part of this core component of the counter-insurgency campaign, GoS forces systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks;

Considering, therefore, that there are reasonable grounds to believe that from soon after the April 2003 attack in El Fasher airport until 14

July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, as part of the abovementioned GoS counter-insurgency campaign;

Considering, further, that there are reasonable grounds to believe that, insofar as it was a core component of the GoS counter-insurgency campaign, there was a GoS policy to unlawfully attack that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur;

Considering that there are reasonable grounds to believe that the unlawful attack on the above-mentioned part of the civilian population of Darfur was (i) widespread, as it affected, at least, hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region; and (ii) systematic, as the acts of violence involved followed, to a considerable extent, a similar pattern;

Considering that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;

Considering that there are also reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer; (ii) thousands of civilian women, belonging primarily to these groups, to acts of rape; and (iii) civilians, belonging primarily to the same groups, to acts of torture;

Considering therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport until 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed crimes against humanity consisting of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region;

Considering that there are reasonable grounds to believe that Omar Al Bashir has been the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military

President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Beshir.

Done in English, Arabic and French, the English version being authoritative.

Judge Akua Kuenyehia, Presiding Judge
Anita Usarka
Judge Sylvia Steiner

NOTES

1. *Indictments of Past, Present, or Future Heads of State.* The indictment and warrant issued against President Al Bashir was the first issued by the International Criminal Court against a sitting head of state, but not the first by an international criminal tribunal. Recall that the I.C.T.Y. indicted President Slobodan Milošević of the Federal Republic of Yugoslavia in 1999 for atrocities relating to Kosovo. Further, the Special Court for Sierra Leone indicted Liberia's President Charles Taylor in 2003. Both of the latter two presidents were ultimately arrested and brought to trial, but only after they had fallen from power. Should international criminal tribunals indict sitting heads of state? What peril or promise lies in such a course of action?

2. *Al Bashir's Reaction.* The *New York Times* reported that in the wake of the warrant for his arrest, President Al Bashir denounced the International Criminal Court as "a hangover from the worst days of colonialism and its indictment of him a naked grab for Sudanese resources like oil." Moreover, the Sudanese government shut down numerous relief agencies that were providing aid to millions of Sudanese, because Sudan accused them of conspiring in the I.C.C. case. See MacFarquhar & Simons, Bashir Defies War Crimes Arrest Order, N.Y. Times, Mar. 5, 2009, at A1.

3. *Have Arrest Warrant, Will Travel?* Article 59 of the Rome Statute provides that all parties "shall immediately take steps to arrest the person in question in accordance with [their] laws * * *." In the aftermath of his indictment, President Al Bashir traveled to Egypt, Eritrea, and Libya, none of which are parties to the Rome Statute. Moreover, President Al Bashir attended an Arab League summit in Qatar (also not a party). See Unity of a Kind, Economist, Apr. 2, 2009 ("Delegates denounced the court for picking on Arab and Muslim leaders while ignoring the alleged crimes of Israel. Syria's president, Bashar Assad, said the court had no right to interfere in countries' sovereign affairs—an understandable complaint, as a UN tribunal is investigating Syria's likely involvement in a series of political murders in Lebanon.").

As of 2018, issues concerning non-enforcement of the Al Bashir arrest warrant had arisen in respect of multiple states parties, in several national

courts and in several rulings by I.C.C. pre-trial chambers which had generally rejected arguments that Al Bashir enjoyed any form of head-of-state immunity (see Chapter 12) and had endorsed obligations to cooperate in his arrest. However, these rulings were based on a striking variety of legal rationales concerning the interaction of Articles 27 and 98 of the Rome Statute and the effects of Security Council Resolution 1593, among other issues; regardless of their conflicting reasoning, the decisions had not in any event resulted in his arrest. In December 2018 the prosecutor presented the twenty-eighth semi-annual report to the U.N. Security Council, lamenting once again the lack of progress in securing the presence of Al Bashir and other accused persons for trial, as well as the general lack of cooperation by Sudan and other states with the investigation and lack of follow-up by the Council. At the same time, the Appeals Chamber was considering an appeal by Jordan of a ruling from a pre-trial chamber that Jordan had failed to comply with its obligations under the Rome Statute by failing to arrest and surrender Al Bashir during his visit to Jordan in March 2017.

4. *Complicating Peace Efforts.* One difficulty with indicting a sitting head of state is that it may complicate ongoing political efforts to bring about a peaceful resolution to an ongoing conflict. In the wake of President Al Bashir's indictment, the African Union decided to lobby for the Security Council to request a one-year suspension (pursuant to Rome Statute, Article 16) of the case against President Al Bashir, on grounds that a trial at the I.C.C. could threaten Sudan's fledgling peace processes, both with respect to Darfur and with respect to southern Sudan. No such suspension was issued and the latter peace process was successfully concluded with the creation of the new state of South Sudan. How would you weigh the values of pursuing international criminal justice and pursuing the restoration of peace?

5. *Effects on Bad Behavior?* More than two decades beyond the Rome Conference, is there reason to believe that the existence of the I.C.C. actually deters the commission of serious crimes? For at least some affirmative evidence, see Jo & Simmons, Can the International Criminal Court Deter Atrocity?, 70 Int'l Org. 443 (2016) (finding that the I.C.C. can deter some governments and those rebel groups that seek legitimacy). Are you persuaded?

C. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

The United States voted against the adoption of the Rome Statute in 1998. Nevertheless, the United States signed the Rome Statute in December 2000, during the last few days that it was open for signature and just days before the end of the Clinton administration. Even President Clinton, however, expressed concerns about the Rome Statute, indicating that he would not submit it to the U.S. Senate for advice and consent unless further changes were made. See Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 Weekly Comp. Pres. Doc. 4 (Jan. 8, 2001).

Under President George W. Bush, the United States in 2002 notified the Secretary-General of the United Nations (as depositary of the treaty) that the United States would not pursue steps to ratify the Rome Statute. See Chapter 3, Section 2(C). Further, the United States took various steps to insulate U.S. personnel from the jurisdiction of the Court. During the last several years of the Bush administration, the United States adopted a more favorable stance toward the Court (for example, allowing adoption of the Security Council referral for the Darfur situation in 2005 as indicated above); and the Obama administration cooperated with the Court in various ways. The Trump administration, however, has reverted to a rejectionist posture.

Do you think the United States should ratify the Rome Statute? Even if the United States does not ratify, should it take steps to support the work of the Court? What constitutional or statutory impediments are there to U.S. ratification or cooperation?

The following extract is from a report of a task force that included former Supreme Court Justice Sandra Day O'Connor, former State Department Legal Adviser William H. Taft, IV, and former I.C.T.Y. Judge (and D.C. Circuit Court of Appeals Judge) Patricia Wald.

U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT

Report of an Independent Task Force Convened by the American Society of International Law, at 29–46 (March 2009) (footnotes omitted)

LEGAL ISSUES AFFECTING U.S. COOPERATION WITH THE COURT

The Task Force finds that short of joining the Court, there is much that the United States can do to support this institution in its pursuit of accountability for the worst offenders against the laws of nations. It is consistent with longstanding U.S. interests that it engage the Court in this manner, and the Task Force recommends that a number of legal issues be addressed to clear the way for such engagement.

Legal Effect of the U.S. Signature and the 2002 Letter to the U.N. Secretary General

Upon signing the Rome Statute on December 31, 2000—though with singular qualifications—the United States became eligible to consent to the Treaty by ratification. Signature ordinarily obligates the Signatory State "to refrain from acts which would defeat the object and purpose of [the] treaty." However, in his signing statement President Clinton expressed continuing concerns about the Court and recommended that the Treaty not be submitted for ratification until these concerns are satisfied. Two years later, the United States submitted a letter to Kofi Annan, U.N. Secretary General, declaring:

> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

This letter, inaccurately characterized as "unsigning," raised questions about the current state of U.S. rights and obligations vis-à-vis the Court, the Treaty's object and purpose, and whether the United States remains capable of joining through ratification.

Article 18 of the Vienna Convention on the Law of Treaties (VCLT), establishes the obligations of a Signatory State to a treaty. It provides:

> A State is obliged to refrain from acts which would defeat the object and purpose when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Although the 2002 letter of the United States to the U.N. Secretary General does not mention Article 18, it is cast in Article 18's terms, giving direct notification of the U.S. intention not to become a party and thereby relieving the United States of its Article 18 obligations to refrain from acts that defeat the Rome Statute's object and purpose.

The letter relieved the United States of its Signatory obligations, but contrary to popular understanding, the letter did not result in the United States "unsigning" the Rome Statute. Neither the VCLT nor State practice provides any support for such a possibility. This is not a case where the U.S. signatory lacked authority to sign for the United States. Nor do the provisions for invalidating treaties or withdrawing ratification instruments apply; these only operate with respect to a State's consent to be bound by the treaty. And Article 18 itself speaks in terms of indications of intent not to ratify; it says nothing about a State's original signature. Indeed, there appears to exist no support for the proposition that declaring an intent not to ratify voids or otherwise undoes a State's earlier signature. On the contrary, the practice of depositaries—who are charged by VCLT Article 77 with receiving treaty signatures and related texts—favors continuing Signatory status even after a State indicates an intent not to ratify. The International Committee of the Red Cross still lists the United States as a Signatory to Protocol I to the Geneva Conventions

notwithstanding President Reagan's disavowal of that treaty. Similarly, the United Nations Treaty Collection continues to list the United States as a Signatory to the Rome Statute, albeit with a footnote reproducing the text of the 2002 letter.

Thus, although the United States no longer has any obligation to refrain from acts that would defeat the Rome Statute's object and purpose, it remains a Signatory to that treaty. As a Signatory, the United States could proceed to ratify the treaty, if it so decided. Reembracing Signatory rights and responsibilities requires only that the United States make a clear articulation of its current policy. The Task Force accordingly believes that, as part of its articulation of a policy of positive engagement with the Court, the President should announce the U.S. Government's intention, notwithstanding its prior letter of May 6, 2002 to the U.N. Secretary-General, to support the object and purpose of the Rome Statute of the Court.

Constraints of the American Service-Members' Protection Act on U.S. Policy Toward the Court

The American Service-Members' Protection Act of 2002 (ASPA)[, P.L. 107–206, 16 Stat. 899 (2002) (codified at 22 U.S.C. §§ 7421 et seq. (2012)),] places restrictions on U.S. interaction with the ICC. ASPA prohibits cooperation with the ICC and mandates that funds not be used to support, directly or indirectly, the ICC. ASPA prohibits cooperation by any U.S. court or agency—federal, state or local—with the ICC. Forms of prohibited cooperation include responding to requests of cooperation from the Court, provision of support, extraditing any person from the United States to the ICC or transferring any U.S. citizen or permanent resident alien to the ICC, restrictions on funds to assist the Court, and permitting ICC investigations on U.S. territory. ASPA also prohibits direct or indirect transfer of classified national security information and law enforcement information to the Court. Finally, ASPA authorizes the President to use "all means necessary and appropriate" to free its service-members and others, including "allied persons," detained or imprisoned by or on behalf of the ICC.

Section 2003(c) of ASPA provides for the possibility of presidential waiver of these restrictions and prohibitions established under the Act "to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a *named* individual by the International Criminal Court." ASPA also explicitly reiterates that it does not apply to actions taken by the President under his authority as Commander in Chief of the Armed Forces with regard to cooperation with the Court and providing information to the Court, in specific instances. Finally, Section 2015, the so-called Dodd Amendment, appears to grant leeway for cooperation with the Court; it states that

"*[n]othing in this title shall prohibit the United States from rendering assistance to international efforts* to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, *and other foreign nationals* accused of genocide, war crimes or crimes against humanity."

The 2006 and 2008 amendments to ASPA only addressed restrictions on aid to States Parties. They left in place the broad ASPA prohibitions and restrictions on cooperation with and support to the Court.

Particularly with regard to Darfur, the United States has indicated that it will review requests by the Court to cooperate with it. If it decides to cooperate, the President will have to provide a waiver under Section 2003(c) or employ section 2015 in order do so. While both options appear to grant significant latitude—at least in relation to "named individuals"—the extent of this latitude is, as yet, untested. Even if the waiver authority under ASPA permits cooperation with the ICC in specific cases, ASPA remains an impediment to a more systematic or institutionalized program of cooperation with or support of the Court. The development of U.S. relations with the Court along these lines would thus require further amendment or repeal of ASPA.

It would also appear that the United States could not become a State Party to the Rome Statute without significant amendment or repeal of ASPA, given States Parties obligations to cooperate with and provide judicial assistance to the Court. Even if the United States could become party to the treaty, ASPA restrictions would hinder it from fulfilling its obligations as a State Party, particularly to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Also ASPA required "Article 98 agreements," but, as discussed below, the overbreadth of some them may also be contrary to a State Party's obligations under the Rome Statute, as well as a Signatory's obligations under the Vienna Convention on the Law of Treaties.

Thus, the Task Force recommends that in furtherance of a policy of continued positive engagement with the ICC, the President issue any presidential waivers in the interests of the United States that address restrictions on assistance to and cooperation with the Court contained in the American Service-Members' Protection Act of 2002 and advise the Congress on the need for further amendments or repeal of ASPA. To the fullest extent possible the President should make use of waivers permitted by ASPA to by-pass its restrictions. However, to enable the development of more systematic institutional ties to and cooperation with the Court, rather than addressing discreet cases individually, the President should propose amendment or repeal of ASPA eliminating these restrictions. Elimination of these prohibitions and restrictions would also ensure that, if at a later date the United States decides to become a Party to the Statute, ASPA

would not prevent it from carrying out its obligations under the Statute. For the reasons mentioned above, it is further recommended that Congress pursue a legislative agenda on the Court that includes amendment or repeal of the American Service-Members' Protection Act and other applicable laws to the extent necessary to enhance flexibility in the U.S. Government's engagement with the Court and allies that are State Parties to the Rome Statute.

"Article 98 Agreements"

In 2002, the United States began concluding agreements with States to protect U.S. nationals from the assertion of ICC jurisdiction by prohibiting the Signatory State from surrendering U.S. nationals to the ICC. These agreements are often referred to as "Article 98 agreements," as they made use of Article 98(2) of the Rome Statute. Article 98(2) states:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent of the surrender.

The U.S. Government's "Article 98 agreements" have been assailed as contrary to the Rome Statute and as evidence of an effort to undermine the ICC. Opposition to the U.S. agreements became particularly acute when pursuant to ASPA and the Nethercutt Amendment the United States conditioned military and economic assistance on conclusion of "Article 98 agreements."

These "Article 98 agreements" have been considered by some to be inconsistent in two ways with the text of Article 98(2). Some have declared "Article 98 agreements" *per se* contrary to the Rome Statute and, thus, inconsistent with States Parties' obligations under the Statute. Others have accepted "Article 98 agreements" but only under limited conditions.

First, it is disputed that Article 98(2) of the Rome Statute permits the conclusion of *new* agreements. Rather, opponents of the U.S. Government's "Article 98 agreements" argue that Article 98(2) was included in the Statute to avoid possible legal conflicts that might arise with agreements existing at the time the Statute came into force or renewals of them; critics contend that reading this Article to permit new agreements insulating individuals from ICC jurisdiction would place it in direct contradiction to Article 27 of the Rome Statute which stipulates that no one is immune from crimes under the ICC's jurisdiction. The Task Force does not find this argument persuasive. In 2002, the nineteen-member International Security Assistance Force (ISAF)—consisting of numerous European States party to the Rome Statute—proceeded to conclude such an

agreement with the Interim Administration of Afghanistan. The Military Technical Agreement provided that "ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation."

A second objection to the U.S. "Article 98 agreements" rests on the use of the term "sending State" in Article 98(2). It is argued on this basis that Article 98 is only intended to cover agreements, such as the fairly routine status-of-forces-agreements (SOFAs) concluded with States where the United States stations troops. These SOFAs reallocate jurisdiction for U.S. service-members from foreign to U.S. courts. Some of the U.S. Government's "Article 98 agreements" generated the criticism that they go beyond the typical SOFA, which covers a limited class of persons deliberately sent from one country to another. The scope of some "Article 98 agreements" extends not only to U.S. nationals on official business but also to U.S. citizens present in that State for business or personal reasons, as well as employees, including contractors regardless of nationality. Guidelines issued by the European Union to its member countries on acceptable terms for "Article 98 agreements" set parameters in order to "preserve the integrity of the Rome Statute . . . and . . . ensure respect for the obligations of States Parties under the Statute." The guidelines provide that the scope be limited to government representatives on official business; that they do not contain a reciprocal promise to prevent the surrender of nationals of an ICC State Party; and that the United States expressly pledge to investigate, and, where appropriate, prosecute its nationals for ICC crimes.

The President should examine U.S. policy concerning the scope, applicability, and implementation of "Article 98 Agreements" concerning the protections afforded to U.S. personnel and others in the territory of States that have joined the Court. As opposition to "Article 98 agreements" arose in large part due to the connection between concluding "Article 98 agreements" and a State's receipt of certain U.S. assistance (as per ASPA and the Nethercutt Amendment), the receipt of such assistance should be further de-linked from any such agreements.

Domestic Primacy—Safeguarding State Sovereignty Through Complementarity

The complementary jurisdiction established by the Rome Statute affords domestic courts the primary authority to try the crimes under the jurisdiction of the ICC. The relevant provision of the Rome Statute provides:

> An International Criminal Court . . . is hereby established, it shall be a permanent institution and shall have the power to exercise

its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, *and shall be complementary to national criminal jurisdictions.*

Coupled with the Rome Statute's other jurisdictional and admissibility requirements (particularly the gravity threshold), complementarity is intended to place a check on the power of the ICC and the prosecutor and protect the sovereignty of States—whether party or not to the Treaty.

The complementarity principle is layered throughout the procedural structure of the Rome Statute, including provisions on jurisdictional competence. However, Article 17 "provides the most direct implementation of the complementarity principle in the Rome Statute" by stipulating the criteria for evaluating whether domestic authority over a particular case limits ICC authority over the same. These provisions indicate that the ICC is a court of last resort. The Court has no jurisdiction to act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, due to the State's unwillingness or inability to carry out the investigation or prosecution, for example, if proceedings were undertaken only to shield a person from criminal responsibility.

The Statute's procedures to obtain preliminary rulings on admissibility and to challenge the prosecutorial assertions of admissibility provide the means to enforce the complementarity principle. The Rules of Procedure contain explicit guidance for the Court on implementing complementarity, albeit they are "subordinate in all cases" to the Rome Statute. The Court's role vis-à-vis national proceedings is also limited by the *ne bis in idem* principle, "which protects perpetrators from repetitive trials, with some caveats based on the complementarity principle."

While the Rome Statute and Rules of Procedure provide significant guidance, how the Court functions in practice will determine the effectiveness of its complementarity regime in ensuring domestic primacy of jurisdiction, as interpretation and application of these provisions is left solely to the ICC. The prosecutor is accountable to the trial chambers and to the appeals chamber, but "any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." The one exception, of course, is the Security Council's authority under Article 16 of the Rome Statute to defer an investigation or prosecution for twelve months. To implement complementarity, the Rome Statute requires a Court decision on, for example, a State's "unwillingness" to carry out an investigation or prosecution. How the prosecutor and Court address amnesties and pardons, interpret the law of armed conflict (*inter alia,* such issues as the definition of military objective, proportionality, and military necessity), and evaluate differences in charges for particular conduct between domestic law and the ICC will also affect the extent of the Court's jurisdiction in the face of complementary domestic proceedings. As noted

above, these issues have not been tested yet in the Court's jurisprudence. It should be noted, however, that the current Prosecutor has generally exercised his authority judiciously, with his stated policy, at this initial phase of operations, being "to take action only where there is a clear case of failure to take national action."

Of course, as a preliminary manner, States must have in place the appropriate domestic implementing legislation, in order to take advantage of the complementarity regime of the Rome Statute. Therefore, the United States must be able to try the crimes within the Court's jurisdiction—genocide, crimes against humanity, and war crimes. Concern has been raised that current U.S. criminal and military law is not sufficient to ensure, in all cases, the primacy of U.S. jurisdiction. That is, as the United States does not have the criminal laws on the books that parallel ICC crimes, the ICC could find U.S. domestic proceedings inadequate to bar ICC proceedings. Regardless of whether the United States eventually decides to join the Court, it makes sense to review the law in order to ensure that the United States is able to investigate and try the criminal acts that have been described in the Rome Statute. * * *

The Genocide Accountability Act of 2007[, Pub. L. No. 110–151, 121 Stat. 1821 (2007,)] closed a key jurisdictional loophole in the Genocide Implementation Act of 1987 by granting the United States authority to prosecute alleged perpetrators of genocide committed anywhere in the world, so long as the suspect is physically present in the United States. The Child Soldiers Accountability Act of 2008[, Pub. L. No. 110–340, 122 Stat. 3735 (2008),] makes it a federal crime to recruit knowingly or to use soldiers under the age of fifteen and permits the United States to prosecute any individual on U.S. soil for the offense, even if the children were recruited or served as soldiers outside the United States. However, without appropriate domestic criminal law on all ICC crimes, the United States cannot benefit in all cases from the complementarity regime, regardless of the Court's implementation of it.

Congress should consider amendments to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of U.S. jurisdiction over the Court's jurisdiction under the complementarity regime. The Genocide Accountability Act of 2007 and The Child Soldiers Accountability Act of 2008 were important steps, and Congress should continue its efforts to close any gaps in U.S. criminal and military law with regard to ICC crimes. No doubt should remain as to whether U.S. federal or military courts can exercise subject matter jurisdiction over these crimes. * * *

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U.S. CONSTITUTIONAL ISSUES RAISED WITH RESPECT TO JOINING THE COURT

* * * [T]he Task Force does not recommend U.S. ratification of the ICC Statute at this time. Rather, it suggests that both the executive and legislative branches monitor closely developments at the ICC to inform future consideration of whether the United States should join, particularly in light of developments at the 2010 Review Conference. In that connection, policy makers will want to consider compatibility of the ICC Statute with the U.S. Constitution. While the Task Force's initial analysis suggests that these concerns do not present any insurmountable obstacles to joining the Court, such concerns should be further analyzed if the United States were to consider becoming a member of the Court in the future. They certainly do not prevent the United States from cooperating with or supporting the Court today.

It has been asked whether U.S. ratification of the Rome Statute would be consistent with the requirements of the U.S. Constitution. Two main objections are raised: 1) the ICC does not offer the same due process rights, particularly trial by jury and protection against double jeopardy, guaranteed under the U.S. Constitution; and 2) ratification would contravene Article 1, Section 8 and Article III, Section 1 of the Constitution, dealing with the establishment of domestic courts.

Some legal experts assert that the Rome Statute contains "the most comprehensive list of due process protections which has so far been promulgated." Others maintain that the procedures still fall short of U.S. constitutional standards of due process. The due process rights found in the Rome Statute and implemented through the Rules of Procedure and Evidence are: the right to remain silent and the guarantee against compulsory self-incrimination, the presumption of innocence, the right to confront accusers and cross-examine witnesses, the right to have compulsory process to obtain witnesses, the obligation on the prosecutor to disclose exculpatory evidence, the right to a speedy and public trial, the right to assistance of counsel of one's own choosing, the right to a written statement of charges, the prohibition of *ex post facto* crimes, protection against double jeopardy, freedom from warrantless arrests and searches, the right to be present at trial and the prohibition of trials *in absentia*, exclusion of illegally obtained evidence, and the right to a "Miranda" warning. [See Rome Statute, Articles 20, 22, 54–55, 57–58, 61, 63, 66–67, & 69.]

Given that the due process rights in the Rome Statute significantly parallel those in the U.S. Constitution, concern has focused on the lack of a jury trial before the ICC. The ICC follows the tradition of many countries as well as the International Tribunals for the former Yugoslavia and Rwanda, as well as those at Nuremberg and Tokyo, empanelling judges to

decide questions of law and fact. A second area of concern has been the ICC's divergence from a common-law understanding of protection against double jeopardy.

The U.S. constitutional right to trial by jury is not unlimited. The United States extradites Americans, who committed crimes outside U.S. territory, to non-jury criminal trials before foreign courts in situations analogous to those where the ICC would likely claim jurisdiction. And, with regard to international courts, the United States has already participated, without raising concerns about constitutionality, in courts that could try—without jury—American citizens, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda. It must not be forgotten that a properly functioning complementarity regime ensures that the ICC only has jurisdiction to try Americans if the United States does not or cannot exercise its primary jurisdiction.

The Rome Statute explicitly provides for the protection against double jeopardy, prohibiting trying a person before the ICC for conduct for which the person has been convicted or acquitted by the ICC or by another court. [Rome Statute, Article 20.] As in the case of other international tribunals and many other countries, the understanding of when the ICC has reached a final judgment for purposes of double jeopardy differs from that in U.S. jurisprudence. In the ICC and other international tribunals as well as other countries, evidence may be adduced during the appellate proceedings, and the judgment at trial is not viewed as an end to the criminal proceedings. Thus, appeals by the prosecution are allowed, as they are simply seen as another step in the criminal proceedings, not as a challenge to a final judgment. Once a final judgment has been rendered (generally by the Appeals Chamber), the person cannot be tried again for crimes for which he/she has been charged.

The question has been raised as to whether this approach is inconsistent with the U.S. interpretation of the scope of the protection against double jeopardy. However, as noted above, the legal regime of the ICC, as well as the other international tribunals, differs significantly from that of the United States, as the Appeals Chamber can consider new evidence, including hearing testimony. Thus, it can be argued that, if the verdict is appealed, the criminal proceeding is not complete until the Appeals Chamber issues a judgment and, therefore, that the prohibition of double jeopardy does not come into play until that judgment is rendered. Moreover, the United States frequently extradites its citizens to countries, such as Germany, that take the same approach to the principle of double jeopardy as that taken by the ICC, and this has passed constitutional muster.

The important issue is whether the fundamental principles of a fair trial are present. The Task Force concludes that the ICC is compliant with

the fundamental elements in established international norms, such as those set out in the International Covenant on Civil and Political Rights to which the United States is party.

In addition to the right to a jury trial and double jeopardy, a further constitutional objection has been made to the ICC that, since Congress neither created the ICC nor promulgated its rules, ratification of the Rome Statute would be inconsistent with the provisions of the Constitution vesting in Congress the sole role of establishing federal courts. The Constitutional provisions at issue here are Article I, Section 8, empowering Congress with the authority to "constitute tribunals inferior to the Supreme Court," and Article III, Section 1, which states that "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." This concern is based on a conception of the ICC as an extension of U.S. jurisdiction, requiring the ICC to be established in a manner consistent with the jurisdiction contemplated under the U.S. Constitution. However, the ICC is an independent international court separate from U.S. courts and exercises jurisdiction distinct from that enjoyed by U.S. courts.

In practice, the existence of constitutional concerns need not necessarily preclude ratification of a treaty. For example, the Senate gave its advice and consent to ratification of the International Covenant on Civil and Political Rights subject to the *proviso* that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The United States could employ such a *proviso* accompanying ratification to underscore that in joining the Court it does not undertake any obligations contrary to the Constitution. Although the Rome Statute does not permit reservations to the treaty, other States have relied on such declarations. The Task Force recommends that the executive and legislative branches consider *provisos*, understandings, and declarations similar to those adopted by other States Parties that may be deemed necessary, in connection with any future consideration of whether to join the Court.

NOTES

1. *Nethercutt Amendment.* The excerpt above refers to the "Nethercutt Amendment" to the U.S. Department of State operations appropriations law. That amendment was introduced starting in 2004 by Representative George Nethercutt as a means of suspending U.S. economic support funds (ESF) to parties of the Rome Statute who did not conclude bilateral immunity agreements (BIAs) with the United States. See, e.g., Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, § 574, 118 Stat. 2809, 3037–38 (2004). The amendment was dropped in the omnibus appropriations law adopted in early 2009.

2. *Exposure of U.S. Nationals.* If U.S. military personnel involved in a mission abroad were accused of committing a crime covered by the Rome Statute in a state that is party to the Statute, under what circumstances, if any, could those personnel be prosecuted before the I.C.C.? Of what relevance is it that the United States is not a party to the Statute? Under Article 12 of the Rome Statute, the I.C.C. may exercise jurisdiction over anyone (even nationals of a non-party) if the state in which the crime was committed is a party to the Rome Statute. Do you think this contravenes general treaty law?

A key principle of international law is that only states that are party to a treaty should be bound by its terms. See Vienna Convention on the Law of Treaties, arts. 34–38 1155 U.N.T.S. 331; see also Scheffer, The United States and the International Criminal Court, 93 A.J.I.L. 12, 16 (1999). Since the United States is not a party to the Rome Statute, some critics object that U.S. nationals cannot lawfully be tried before the I.C.C. But others note that U.S. nationals that travel abroad do become exposed to the criminal laws of the state in which they commit crimes. As such, if that state can proceed to prosecute the U.S. national in its local courts, why can it not alternatively render the person to an international criminal court for prosecution, especially since the latter is likely a more neutral forum?

As indicated above, in 2017–2018 the Office of the Prosecutor was seeking authorization from a pre-trial chamber of the I.C.C. to proceed with an investigation of the situation in Afghanistan (a state party) concerning crimes allegedly committed in the territory of that state and in three other states parties where torture and other crimes allegedly falling within the jurisdiction of the I.C.C. may have been committed by U.S. personnel. The United States government has vigorously rejected the competence of the I.C.C. to undertake any such investigation. How do you assess the U.S. objections?

3. *Security Council Deferral?* To the extent that exposure of U.S. nationals to I.C.C. jurisdiction is a concern, might a deferral from the Security Council be possible? During the negotiations at the Rome Conference, the United States pressed hard to make prosecution before the I.C.C. contingent on a referral to the Court by the U.N. Security Council (where the United States wields the veto), but failed to persuade other states. Nevertheless, Rome Statute Article 16 allows the Security Council to obtain a one-year, renewable delay of any investigation or prosecution. In Resolution 1422 (July 12, 2002), the Security Council unanimously requested

> consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized [peacekeeping] operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

The United States had threatened to veto the renewal of all U.N. peacekeeping missions unless this resolution was adopted. In 2003, the resolution was renewed for an additional twelve months. See S.C. Res. 1487 (June 12, 2003). Yet in 2004, the Security Council declined to renew the resolution, after photographs emerged of U.S. troops abusing Iraqi prisoners in Abu Ghraib Prison, Iraq. See Murphy, United States Practice in International Law: 2002–2004, at 312–17 (2005).

4. *Thinking Through Due Process Objections.* As indicated in the report of the Task Force, some opponents of the I.C.C. argue that the Rome Statute contains inadequate safeguards for defendants' rights, in comparison to the U.S. Bill of Rights. One example is the absence of provisions for jury trial; another is the fact that the prosecution as well as the defense could appeal from adverse rulings. Supporters point out, however, that although there may be some differences between U.S. procedural protections and those embodied in the Rome Statute, the latter fully satisfies modern human rights standards and is at least as protective of defendants' rights as the U.S. Constitution. See, e.g., Leigh, The United States and the Statute of Rome, 95 A.J.I.L. 124, 130–31 (2001) ("the list of due-process rights guaranteed by the Rome Statute is, if anything, somewhat more detailed and comprehensive than those in the American Bill of Rights. Not better, but more detailed."); Scheffer & Cox, The Constitutionality of the Rome Statute of the International Criminal Court, 98 J. Crim. L. and Criminology 983 (2008).