

THE US-ICC RELATIONSHIP: A HISTORICAL VIGNETTE OF AMERICA’S SUPPORT FOR INTERNATIONAL LAW

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*IT IS a just and not a new observation, that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed Constitution in the aggregate, and treat with severity some of the most unexceptionable articles in it. – John Jay, ‘Federalist Paper No 64’, from *The Independent Journal*, Wednesday, March 5, 1788*

I. THE US AS THE PRINCIPAL ARCHITECT OF THE MODERN INTERNATIONAL ORDER

The United Nations was the brainchild of a preeminent American statesman, President Franklin D Roosevelt. But, he died just short of two weeks ahead of the global conference of plenipotentiaries convened by him in San Francisco to negotiate and adopt the Charter of the proposed United Nations. It was then up to his Vice-President Harry Truman to delay, postpone or cancel the Conference. Immediately upon his swearing in as the next President in the evening of 12 April 1945, two and half hours after the death of his predecessor, President Truman’s very first decision in the White House was to give the green light to the conference.¹ And he gave the effort his maximum support.

Truman’s fervent support for the creation of the UN was not surprising. He was a true admirer of President Woodrow Wilson’s unsuccessful League of Nations efforts.² It was telling that Truman was known to carry in his wallet a copy of Alfred, Lord Tennyson’s *Locksley Hall*,³ the mini epic poem of 97 couplets that include the following 10:

Yearning for the large excitement that the coming years would yield,
Eager-hearted as a boy when first he leaves his father’s field,
And at night along the dusky highway near and nearer drawn,
Sees in heaven the light of London flaring like a dreary dawn;
And his spirit leaps within him to be gone before him then,
Underneath the light he looks at, in among the throngs of men:
Men, my brothers, men the workers, ever reaping something new:
That which they have done but earnest of the things that they shall do:
For I dipt into the future, far as human eye could see,
Saw the Vision of the world, and all the wonder that would be;
Saw the heavens fill with commerce, argosies of magic sails,

¹ See STANLEY MEISLER, *UNITED NATIONS – A HISTORY* 2 (rev. ed. 2011).

² See STEPHEN C. SCHLESINGER, *ACT OF CREATION – THE FOUNDING OF THE UNITED NATIONS* 6 (2003).

³ See PAUL KENNEDY, *THE PARLIAMENT OF MAN – THE UNITED NATIONS AND THE QUEST FOR WORLD GOVERNMENT* ix-x (2006); see also SCHLESINGER, *supra* note 2, at 5.

Pilots of the purple twilight dropping down with costly bales;
Heard the heavens fill with shouting, and there rain'd a ghastly dew
From the nations' airy navies grappling in the central blue;
Far along the world-wide whisper of the south-wind rushing warm,
With the standards of the peoples plunging thro' the thunder-storm;
Till the war-drum throb'd no longer, and the battle-flags were furl'd
In the Parliament of man, the Federation of the world.
There the common sense of most shall hold a fretful realm in awe,
And the kindly earth shall slumber, lapt in universal law.

In throwing his full weight behind the creation of the UN, President Truman had simply seized an opportunity that fell onto his lap unsolicited, to realise that dream of 'build[ing] a new world – a far better world,' as he was to put it in his address to the delegates gathered in San Francisco on 25 April 1945 to negotiate and adopt the UN Charter.⁴ And when it was finally adopted, Truman brimmed with glee. 'If we had had this Charter a few years ago – and above all, the will to use it,' he enthused, 'millions now dead would be alive. If we should falter in the future in our will to use it, millions now living will surely die.'⁵

*

Half a century later – in 1998 – another monumental multilateral treaty was adopted in Rome, under the auspices of the UN. In adopting the Rome Statute to create the International Criminal Court, those who negotiated the text declared their mind-set in memorable words that included the following:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity
Recognizing that such grave crimes threaten the peace, security and well-being of the world.⁶

Just as Truman had observed for the UN Charter 53 years earlier, it is not too strained a proposition to say this. Had the ICC been in existence immediately after the First World War, when a tribunal like it was first broached in the Treaty of

⁴ U.S. President Harry S. Truman, Address at the Opening Session of the United Nations Conference on International Organisation in San Francisco (Apr. 25, 1945) (hereinafter Truman, Opening Address).

⁵ U.S. President Harry S. Truman, Address at the Closing Session of the United Nations Conference on International Organisation in San Francisco (June 26, 1945) (hereinafter Truman, Closing Address).

⁶ Rome Statute of the International Criminal Court preamble, July 17, 1998, 2187 U.N.T.S. 90.

Versailles⁷ – as a countermeasure to the rampant impunity that was to come – ‘*and above all [had there been] the will to use it*’ – it might have been more difficult to murder six million human beings in a European genocide in the 1940s; 800 000 human beings in an African genocide that occurred in Rwanda in 1994; and more than 7 000 men and boys massacred in Srebrenica in 1995 in an act of genocide. It might have been more difficult to commit the mass atrocities of a similar nature in Latin America during the frenzy of the Cold War era. Granted, the Rome Statute system would not have prevented all of these crimes – just as human beings have continued to commit murders, rapes and other crimes in national jurisdictions notwithstanding their much more robust judicial systems.⁸ Still, the prior existence of the ICC might have – at the barest minimum – confused the temerity of those who committed these historic atrocities on the scales that they did.

*

The linkage of the ICC’s creation to the global organisation that President Truman and President Roosevelt fathered is not hard to see. It is direct and immediate. As a matter of history, the following propositions are true: (1) the United Nations inseminated and fertilised the idea of the ICC, and midwifed its delivery; (2) the idea of the ICC resulted directly from the composite incidence of World War II and the Holocaust upon the conscience of world leaders in the immediate aftermath of that catastrophic epoch; and, (3) the idea of ‘utiliz[ing] the experience of Nürnberg in the development of those permanent procedures and institutions upon which the effective enforcement of international law ultimately depends’ was a very American idea⁹ that caught on at the UN, culminating eventually in the creation of the ICC.

In the outline, the story may begin with the events of 11 December 1946, during the resumed first session of the newly established UN. It was on that day that the General Assembly adopted resolution 95(I) ‘affirm[ing] the principles of

⁷ See Treaty of Versailles art. 227, Jun. 28, 1919, 225 Consol. T.S. 188. (Referring to the potential prosecution of the former German Emperor “A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence . . . In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.”)

⁸ For instance, according to the United Nations Surveys on Crime Trends and Operations of Criminal Justice Systems, in 2017, there were 660 murders in Canada; 803 in the UK; 813 in Germany; 824 in France, and 17,284 in the US.

⁹ See *Prosecution of Major Nazi War Criminals: Report From Francis Biddle to President Truman*, 15 DEP’T. ST. BULL. 925, 956 (1946).

international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal’. In the same resolution, the General Assembly directed the ‘Committee on the codification of international law’ – the predecessor to the body now known as the International Law Commission (ILC) – ‘to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal’.

For present purposes, it is necessary to recall the important history of Resolution 95(I). It was an initiative of the United States,¹⁰ traceable to President Truman,¹¹ tracked back to his response to Judge Francis Biddle (the US Judge on the Nuremberg Tribunal) who had submitted a report to the President – at the President’s request – making precisely the recommendations that were eventually reflected in General Assembly resolution 95(I). It may be emphasised that Judge Biddle’s report is particularly revealing of Truman’s own desire for a new world order according to international law and justice. We will study Judge Biddle’s report a little later. But, it may be more convenient, for now, to consider the key messages of President Truman’s letter to Judge Biddle responding to that report. President wrote as follows, amongst other things:

When the Nurnberg Tribunal was set up, all thoughtful persons realized that we were taking a step that marked a departure from the past. ... An undisputed gain coming out of Nurnberg is the formal recognition that there are crimes against humanity ... I hope we have established for all time the proposition that aggressive war is criminal and will be so treated. ... *That tendency [toward global peace] will be fostered if the nations can establish a code of international criminal law to deal with all who wage aggressive war. The setting up of such a code as that which you recommend is indeed an enormous undertaking, but it deserves to be studied and weighed by the best legal minds the world over. It is a fitting task to be undertaken by the governments of the United Nations. I hope that the United Nations, in line with your proposal, will reaffirm the principles of the Nurnberg*

¹⁰ See Antonio Cassese, *Introduction to the Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, UNITED NATIONS AUDIO VISUAL LIBRARY OF INTERNATIONAL LAW (2009), https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf; see also *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal Procedural History*, UNITED NATIONS AUDIO VISUAL LIBRARY OF INTERNATIONAL LAW (last visited Feb. 5, 2021), https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf.

¹¹ See Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. OF INT’L. L. 37, 41 n.11 (1950).

Charter in the context of a general codification of offenses against the peace and security of mankind ... [the Nuremberg proceeding was] a judicial proceeding which has blazed a new trail in international jurisprudence and may change the course of history.¹²

In those observations, President Truman was largely echoing the sentiments that Judge Biddle had expressed in his report. Biddle's report was not spontaneous. When Biddle, on returning from Nuremberg, conferred with Truman, the two men could have exchanged ideas and interesting musings – verbally – about a new world order and left it at that. But, no. President Truman specifically asked Biddle to submit to him not only a report on the work of the Nuremberg Tribunal, but also to 'make recommendations for further action.'¹³ Biddle obliged and submitted a report, including recommendations the relevant excerpts of which are set out in this footnote.¹⁴ Notably, Judge Biddle did more than recommend the affirmation of the

¹² Letter from U.S. President Harry S. Truman to Judge Francis Biddle, U.S. Member, Int'l. Military Tribunal (Nov. 12, 1946) (on file with the Harry S. Truman Library) (emphasis added).

¹³ See DEP'T. ST. BULL., *supra* note 9, at 954.

¹⁴ In his report, Biddle informs that Truman had 'expressed abiding interest' in the work of the Nuremberg Tribunal, when he appointed Biddle as the American Member of the Tribunal. (*Id.*) On that occasion, Biddle recalled, Truman was 'particularly anxious ... that no disagreement should arise among the four great nations who on August 7, 1945, had signed the London Agreement and Charter providing for the trial, formulating the law and establishing the practice, a disagreement which might prevent or obstruct this significant experiment in the field of international justice.' (*Id.* at 955). Biddle recalled Truman's 'hope that Nurnberg might serve as a working example for the world of how four nations could achieve results in a specific field of endeavour.' According to Biddle, Truman 'recalled the failures in trying war criminals after the first World War, and [was] fully aware of the difficulties that would be encountered.' (*Id.*) But, Biddle reported that 'the unity of action' that Truman hoped for among the four nations represented on the Nuremberg Tribunal was 'well realized'. He reported, in that regard, that '[t]he fundamental principles of international law enunciated by the Judgement of Nurnberg were stated unanimously in the opinion of the Tribunal by the four-member nations, the United States, United Kingdom, Republic of France, and the USSR.' (*Id.*) Biddle's distillation of the principles of law that emerged from Nuremberg are particularly instructive, even for present day purposes. As he put it, looking past the details of the Nuremberg experience in certain aspects, he continued as follows:

'of greater importance for a world that longs for peace is this: the [Nuremberg] Judgment has formulated, judicially for the first time, the proposition that aggressive war is criminal, and will be so treated. I do not mean that because of this interpretation men with lust for conquest will abandon war simply because the theory of sovereign immunity cannot be invoked to protect them when they gamble and lose; or that men will ever be discouraged from enlisting in armies and fighting for their country, because military orders no longer can justify violations of established international law. Such a conclusion would be naive. But the Judgement of Nurnberg does add another factor to those which tend towards peace. War is not outlawed by such pronouncements, but men learn a little better to detest it when as here, its horrors are told

Nuremberg principles of international law and a draft code of international crimes: he also broached the idea of a permanent international institution to enforce those principles. He did so in the following words:

In short, I suggest that the time has come to set about drafting a code of international criminal law. ... I suggest ... that immediate consideration be given to drafting such a code, to be adopted, after the most careful study and consideration, by the governments of the United Nations.

day after day, and its aggressive savagery is thus branded criminal. Aggressive war was once romantic; now it is criminal. For nations have come to realize that it means the death not only of individual human beings, but of whole nations, not only with defeat, but in the slow degradation of decay of civilized life that follows that defeat.

‘The conclusions of Nurnberg may be ephemeral or may be significant. That depends on whether we now take the next step. It is not enough to set one great precedent that brands as criminal aggressive wars between nations. Clearer definition is needed. That this accepted law was not spelled out in legislation did not preclude its existence or prevent its application, as we pointed out in some detail in the judgment. But now that it has been so clearly recognized and largely accepted, the time has come to make its scope and incidence more precise. ...

‘In short, I suggest that the time has come to set about drafting a code of international criminal law. To what extent aggressive war should be defined, further methods of waging war outlawed, penalties fixed, procedure established for the punishment of offenders I do not consider here. Much thought would have to be given to such matters. But certain salutary principles have been set forth in the Charter, executed by four great powers, and adhered to, in accordance with Article 5 of the Agreement by 19 other governments of the United Nations. Aggressive war is made a crime—“planning, preparation, initiation or waging of a war of aggression.” The official position of defendants in their government is barred as a defense. And orders of the government or of a superior do not free men from responsibility, though they may be considered in mitigation.

‘For, as we have pointed out in the Judgment, criminal acts are committed by individuals, not by those fictitious bodies known as nations, and law, to be effective must be applied to individuals.

‘I suggest therefore that immediate consideration be given to drafting such a code, to be adopted, after the most careful study and consideration, by the governments of the United Nations.

‘The Charter of the United Nations provides in Article 13 that “the General Assembly shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.” Pursuant to this article the United States has already taken the initiative in placing upon the Agenda of the General Assembly meeting in New York the question of appropriate action. The time is therefore opportune for advancing the proposal that the United Nations as a whole (*Id.* at 956) reaffirm the principles of the Nurnberg Charter in the context of a general codification of offences against the peace and security of mankind. Such action would perpetuate the vital principle that war of aggression is the supreme crime. It would, in addition, afford an opportunity to strengthen the sanctions against lesser violations of international law and utilize the experience of Nurnberg in the development of those permanent procedures and institutions upon which the effective enforcement of international law ultimately depends. ...’ (*Id.* at 955-57).

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Shortly before the declarations in his response letter to Judge Biddle, President Truman had foreshadowed the value that the Nuremberg proceedings held for the world, in charting a ‘path along which agreement may be sought’ in securing global peace. He did so in his first address to the General Assembly of the newly formed United Nations, delivered on 23 October 1946. He began by observing that ‘[n]o nation wants war. Every nation needs peace.’ He insisted that ‘peoples of all countries must not only cherish peace as an ideal but they must develop means of settling conflicts between nations in accordance with the principles of law and justice.’ He recognised, however, that ‘[t]he difficulty is that it is easier to get people to agree upon peace as an ideal than to agree upon principles of law and justice or to agree to subject their own acts to the collective judgment of mankind.’ He insisted, nevertheless, ‘that the path along which agreement may be sought is clearly defined. We expect to follow that path with success.’ In that regard, he observed that many ‘members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as states *shall be tried before the bar of international justice.*’¹⁶

On 24 October 1946, the day after President Truman’s speech, Mr Trygve Lie, the first UN Secretary General, presented to the General Assembly a Supplementary Report on the Work of the Organisation. In it, he stressed the

¹⁵ *Id.* at 957.

¹⁶ See U.S. President Harry S. Truman, Address at the Opening Session of the United Nations General Assembly (Oct. 23, 1946).

‘decisive significance’ of crystallising the Nuremberg principles ‘as a permanent part of ... international law.’ As he put it:

Under the Charter, the United Nations is charged with the duty of encouraging the progressive development of International Law and its codification. ...

The Nuremberg trials have furnished a new lead in this field.

This is the first time in history that, as President Truman said yesterday, through co-operation between nations founded on democracy and the rule of their people, it has been possible to agree on the establishment of an international court to judge war criminals and the leaders of a people which have brought a war upon mankind.

Eleven of the most evil men in modern times have been judged according to international laws by an international court.

In the interests of peace and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were employed in the Nuremberg trials and according to which the German war-criminals were sentenced, made a permanent part of the body of international law as quickly as possible.

From now on the instigators of new wars must know that there exists both law and punishment for their crimes. Here we have a high inspiration to go forward and begin the task of working toward a revitalized system of international law.¹⁷

It was in those circumstances that the General Assembly adopted resolution 95(I) on 11 December 1946. The next year, on 21 November 1947, the General Assembly also adopted resolution 177(II): directing the ILC to ‘[p]repare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles [of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of that Tribunal]’.

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In addition to the pathway towards creation of the ICC, which was carved by General Assembly resolution 95(I) of December 1946 affirming the principles of

¹⁷ U.N. Secretary-General, *Supplementary Report on the Work of the Organization* 10-11, U.N. Doc. A/65/Add.1 (Oct. 24, 1946) (emphasis added).

international law derived from the Charter and judgment of the Nuremberg Tribunal, another major – and more direct – pathway towards creating the ICC was carved by yet another pair of General Assembly resolutions in the same vein: resolution 260 A (III) and resolution 260 B (III) both of which were adopted on 9 December 1948.

In resolution 260 A (III), the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide and proposed it for signature and ratification. And in resolution 260 B (III), the General Assembly ‘[i]nvite[d] the [ILC] to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.’ In connection to the last request, the General Assembly ‘[r]equest[ed] the [ILC], in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.’

Pursuant to that mandate, the ILC eventually submitted a report to the General Assembly in 1994, containing a Draft Statute of an International Criminal Court, with commentaries. In the report, the ILC also ‘recommend[ed] to the General Assembly to convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.’¹⁸ The General Assembly accepted that recommendation and convened the conference of plenipotentiaries in Rome in 1998, to negotiate the Statute of the new permanent international criminal court, on the basis of the draft Statute proposed by the ILC.

In the meantime, within the United States Senate, Senator Christopher Dodd and Senator Arlen Specter established themselves as eminent advocates for the creation of a permanent international criminal court.¹⁹ Their efforts culminated in section 517 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995. In section 517, the US Senate specifically declared its sense ‘that (1) the

¹⁸ *Draft Code of Crimes Against the Peace and Security of Mankind*, [1994] 2 Y.B. Int'l. L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/1994/Add.1; see also G.A. Res. 49/53, preamble ¶ 3 (Dec. 9, 1994).

¹⁹ See, e.g., S.J. Res. 32, 103d Cong. (1993) (a joint resolution calling for the United States to support efforts of the United Nations to conclude an international agreement to establish an international criminal court, introduced on Jan. 28, 1993 by Senator Dodd and co-sponsored by Senators Kennedy, Kerry, Pell, Moseley-Braun, Reid, Mitchell, Boxer and Feingold); S.J. Res. 93, 103d Cong. (1993) (a joint resolution calling on the President to support efforts by the United Nations to conclude an international agreement to establish an international criminal court, and to provide any assistance necessary to expedite the establishment of such a court, introduced on May 11, 1993 by Senator Specter).

establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law; (2) such a court would thereby serve the interests of the United States and the world community.’

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Against the foregoing background, it is much to be regretted that John Bolton gave a much publicised speech on 10 September 2018, at the Federalist Society in Washington DC. His purpose was to ‘make a major announcement on US policy toward the International Criminal Court’.²⁰ It was an incendiary speech. The sound bites were calibrated and calculated to arrest the imagination of American patriots and boil their blood. It was a cornucopia of emotive demonization of the ICC and sundry quips and slogans that served that end – in a generally unfair way. It is reminiscent of the ‘severity’ of the attacks directed at the new draft Constitution of the United States in the late 1780s, prompting John Jay – one of its framers – to observe as follows:

IT IS a just and not a new observation, that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed Constitution in the aggregate, and treat with severity some of the most unexceptionable articles in it.²¹

In that regard, Jay also reproached those inclined to ‘deceiv[e] by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle.’²²

Perhaps, one of the more memorable lines in Mr. Bolton’s speech was his characterisation of the ICC as American ‘founding fathers’ worst nightmare come to life’. Some may, of course, be forgiven to hope the world a better place if powerful nations trembled a little at the thought that their conduct might provoke a frown from international law and its institutions. Sadly enough, the reality of international law paints a very different picture. ICC arrest warrants have been

²⁰ See John Bolton, Nat’l. Sec. Advisor, U.S. Nat’l. Sec. Council, Remarks to Federalist Society on Protecting American Constitutionalism and Sovereignty from International Threats (Sept. 10, 2018); see also Guardian News, *John Bolton strongly criticises International Criminal Court*, YOUTUBE (Sept. 11, 2018), <https://www.youtube.com/watch?v=NWB6IUE0hJU>.

²¹ THE FEDERALIST No. 64 (John Jay).

²² *Id.*

ignored on many occasions by States Parties to the Rome Statute who had an immediate obligation to execute them. Similarly, judgments of the International Court of Justice²³ and those of the European Court of Human Rights²⁴ have gone unheeded. The point is not to hold up these conducts as condonable. They remain aberrant. It is rather to underscore the peculiar portrayal of the ICC as a ‘nightmare’ to the most powerful nation on earth, in a bid to justify the grotesquery of branding it a harbinger of ‘national emergency,’ warranting the imposition of ‘sanctions’²⁵ against an international court whose only offensive weapons are what Alexander Hamilton described as ‘merely judgments.’²⁶

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It is, of course, one thing for latter-day punditry to project feelings retroactively upon the US Founding Fathers [the ‘Founders’]. But, what the true historical record reveals is another matter. Indeed, those projected feelings, as in this case, are not always faithful to what the record and context of history show. In his famous Four Freedoms Speech (1941) that marked America’s formal entrance into World War II, President Franklin Roosevelt recalled the ‘*historical truth* that the United States as a nation has at all times maintained opposition to any attempt to lock us in behind an ancient Chinese wall while the process of civilisation went past.’²⁷ As mentioned

²³ Notably, on a number of occasions, convicts have been executed in the United States, in defiance of rulings from international law bodies including the International Court of Justice. *See Avena and Other Mexican Nationals (Mex. V. U.S.)*, Judgment, 2004 I.C.J. Reports 12 (Mar. 31); Press Release, Inter-Am. Comm’n. on H.R., IACHR Condemns Execution of Roberto Moreno Ramos in Texas, No. 244/18 (Nov. 16, 2018) (condemning the execution on Nov. 14, 2018 of Mr. Roberto Moreno Ramos in Texas, in defiance of the rulings of the Inter-American Commission on Human Rights); *see also Is a UN International Criminal Court in the US National Interest?: Hearing Before the Subcomm. on Int’l. Relations of the S. Comm. on Foreign Relations*, 105th Cong. 2 (1998) (hereinafter Subcomm. on Int’l. Relations) (statement of Sen. Rod Grams (R-Minn.), Chairman, Subcomm. on Int’l. Relations) (“A decision by the International Criminal Court to prosecute Americans for military action would not be the first time that an international court tried to undercut our pursuit of our national security interests. In 1984, the World Court ordered the U.S. to respect Nicaragua’s borders and to halt the mining of its harbors by the CIA. In 1986, the World Court found our country guilty of violations of international law through its support of the Contras and ordered the payment of reparation to Nicaragua. *Needless to say, we ignored both of those rulings.*” (emphasis added)).

²⁴ *See generally* Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights*, 66 INT’L. & COMPARATIVE L. Q. 467 (2017).

²⁵ *See* Blocking Property of Certain Persons Associated with the International Criminal Court, Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

²⁶ THE FEDERALIST No. 78 (Alexander Hamilton).

²⁷ U.S. President Franklin Delano Roosevelt, Annual Message (Four Freedoms) to Congress (Jan. 6, 1941) (emphasis added) (hereinafter Franklin Delano Roosevelt, Four Freedoms).

earlier, FDR went on to motivate the establishment of the United Nations;²⁸ having died, shortly before that dream came true for him, his successor, President Truman, stepped in and fully fulfilled the role of the true champion of the UN creation.²⁹ To that end, Truman's message to the delegates at the opening of the United Nations Conference on International Organisation, at San Francisco, requires a close examination. Throughout the address, he retained the theme that the world order must be organised along the path of *peace* and *justice* for all nations large and small – on equal terms.³⁰

Roosevelt's and Truman's successive roles in organising the world for the good of humanity, through the United Nations – along the lines outlined above – was very much a reprise of President Wilson's own visionary role in championing the creation of the less successful League of Nations. Speaking at the Paris Peace

²⁸ See Truman, Opening Address, *supra* note 4.

²⁹ See *id.*

³⁰ *Id.* President Truman's address appears as follows in the relevant parts:

'Franklin D. Roosevelt gave his life while trying to perpetuate these high ideals. This Conference owes its existence, in a large part, to the vision and foresight and determination of Franklin Roosevelt. ...

We must work and live to guarantee justice-for all. ...

If we should pay merely lip service to inspiring ideals, and later do violence to simple justice, we would draw down upon us the bitter wrath of generations yet unborn. ...

The sacrifices of our youth today must lead, through your efforts, to the building for tomorrow of a mighty combination of nations founded upon justice for peace.

Justice remains the greatest power on earth.

To that tremendous power alone will we submit. ...

"While these great states have a special responsibility to enforce the peace, their responsibility is based upon the obligations resting upon all states, large and small, not to use force in international relations except in the defense of law. The responsibility of the great states is to serve and not dominate the peoples of the world." ...

Man has learned long ago that it is impossible to live unto himself. This same basic principle applies today to nations. We were not isolated during the war. We dare not become isolated in peace.

All will concede that in order to have good neighbors we must also be good neighbors. That applies in every field of human endeavour.

For lasting security, men of good-will must unite and organize. ...

The essence of our problem here is to provide sensible machinery for the settlement of disputes among nations. Without this, peace cannot exist. We can no longer permit any nation, or group of nations, to attempt to settle their arguments with bombs and bayonets.

If we continue to abide by such decisions, we will be forced to accept the fundamental philosophy of our enemies, namely, that "Might Makes Right." To deny this premise, and we most certainly do, we are obliged to provide the necessary means to refute it. Words are not enough.

We must, once and for all, reverse the order, and prove by our acts conclusively that Right Has Might. ...

Conference, Wilson observed that the central object of the conference engaged ‘a solemn obligation’ of the international community ‘to make permanent arrangements that *justice shall be rendered* and peace maintained.’³¹ Wilson was careful to stress that the practical circumstances of America’s geographical remoteness from the easy reach of armed conflicts that had troubled European nations throughout their history should make her less interested in that project than the other States gathered at the Paris Peace Conference. Nevertheless, the United States retained ‘a very deep and genuine ardor – for the society of nations’; which ardour springs from the ideals of peace and the ‘cause of justice and of liberty for men of every kind and place’.³² He insisted that ‘[w]e would not dare to compromise upon any matter as the champion of this thing – this peace of the world, this attitude of justice’.³³

All of those efforts speak to the ‘historical truth’ of the United States’ traditional aspiration to be part of an international order whose purpose is the pursuit of ‘peace’ and ‘justice’ for humanity,³⁴ according to the principles of international law. Indeed, historical records reveal that ‘historical truth’ so palpably in the early predispositions of the US Founders.

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For present purposes, a careful review of and reflection on historical records will reveal the following mind-sets in the Founders. First, they had confidence in the wisdom and modulating influence of an independent judiciary. And they particularly reproached the suppression of judicial independence. That much is evident in the complaints made against King George III in the US Declaration of Independence. Notably, the Founders complained not only that he had ‘obstructed the administration of justice’,³⁵ but had also ‘made judges dependent on his will alone’.³⁶

³¹ U.S. President Woodrow Wilson, Address to the Peace Conference in Paris, France (Jan. 25, 1919) (emphasis added).

³² *Id.*

³³ *Id.*

³⁴ Franklin Delano Roosevelt, Four Freedoms, *supra* note 27 (“Just as our national policy in internal affairs has been based upon a decent respect for the rights and the dignity of all our fellow men within our gates, so our national policy in foreign affairs has been based on a decent respect for the rights and dignity of all nations, large and small. And the *justice* of morality must and will win in the end” (emphasis added)).

³⁵ THE DECLARATION OF INDEPENDENCE cl. 2 (U.S. 1776) (emphasis added).

³⁶ *Id.* cl. 13 (emphasis added).

The Founders' confidence in the modulating influence of the judiciary was evident during the Federal Convention in Philadelphia in the summer of 1787. It was markedly on display during the debate on James Wilson's unsuccessful attempt to revive a motion (defeated earlier) to amend Resolution 10, in order to confer upon the US Supreme Court the authority to give advisory opinions to the Executive concerning the advisability of specific pieces of legislation. Amongst other things, Wilson had argued that the judicial power to invalidate unconstitutional legislation after the fact was insufficient to address all the mischief of unjust legislation. As he put it:

Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.³⁷

James Madison agreed:³⁸ adding that the measure contemplated in the motion 'would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.'³⁹ Oliver Ellsworth 'approved heartily of the motion' – arguing, amongst other things, that the 'aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive cannot be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.'⁴⁰ Such confidence of the US Founders in the good sense of the judiciary is a good reason to expect them to feel no visceral hostility towards an international institution – such as the ICC – whose very mandate is defined by that judicial good sense.

Second, the US Founders detested the idea that soldiers of powerful nations should escape punishment for crimes they commit abroad. That much is evident from the complaints they levelled against King George III, justifying their termination of allegiance to him. Notably, they impugned him '[f]or quartering large bodies of armed troops among us',⁴¹ and '[f]or protecting them, by a mock trial, from punishment for any murders which they should commit on the

³⁷ See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 2 73 (Max Farrand, ed. 1911).

³⁸ *Id.*

³⁹ *Id.* at 74.

⁴⁰ *Id.* at 73-74.

⁴¹ THE DECLARATION OF INDEPENDENCE, *supra* note 35, cl. 18.

inhabitants of these states.’⁴² In essence, if the Founders’ sense of justice revolted at the idea of sham trials of British soldiers that resulted in acquittals or slaps on the wrist, complete failure to investigate or prosecute those soldiers surely would cause greater grievance to that sense of justice. This is yet another reason to expect the US Founders to feel affinity towards an international institution – such as the ICC – whose mandate is to insist, as a last resort, that war crimes, crimes against humanity and genocide do not escape punishment, even when committed by soldiers and citizens of powerful States against weaker ones.

And, finally, the Founders embraced the international order and the binding nature of international law on all nations – even their own – in equal measure. They particularly rejected the idea of American impunity for violations of international law. Notably, Edmund Randolph opened the business of the Federal Convention with a speech that reflected the shared concern that a strong federal government under a Constitution was necessary for the United States, for reasons that included the need to rein in the violations of international law that had become rampant amongst the states of the union during the era of Articles of Confederation.⁴³ In his own turn, James Madison echoed the same view in more urgent language: arguing that a ‘rupture with other powers is among the greatest of national calamities.’ He deserves quoting more fully:

The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities.⁴⁴

But just as importantly, the more prominent amongst the Founders were highly erudite and worldly-sophisticated minds – mostly lawyers – who had studied and embraced international law and in fact played leading roles in its evolution. In that regard, Francis Wharton (the great American legal publicist and chronicler of affairs of state) may be quoted at length, from the preliminary observations he made in his digest of the International Law of the United States, taken from documents issued by Presidents and Secretaries of State and from decisions of Federal Courts

⁴² *Id.* cl. 19.

⁴³ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 19 & 24-25.

⁴⁴ *Id.* at 316.

and opinions of Attorneys-General.⁴⁵

⁴⁵ FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, TAKEN FROM DOCUMENTS ISSUED BY PRESIDENTS AND SECRETARIES OF STATE AND FROM DECISIONS OF FEDERAL COURTS AND OPINIONS OF ATTORNEYS-GENERAL VOL. I iii–v (1886)

(. . . [w]e are told that ‘**one of the most eminent of British statesmen said in Parliament, while a minister of the Crown, “that if he wished for a guide in a system of neutrality, he should take that laid down by America in the days of Washington and the secretaryship of Jefferson”**’; and we see, in fact, that the act of Congress of 1818 was followed the succeeding year by an act of the Parliament of England substantially the same in its general provisions.’

Of the same period, Mr. Hall, in the second edition of his work on International Law (2d ed., 1884, § 213), thus speaks: ‘The United States had the merit of fixing it (the doctrine of neutrality) permanently. On the outbreak of war in Europe in 1793 a newly-appointed French minister, Mr. Genêt, on landing at Charleston, granted commissions to American citizens who fitted out privateers, and manned them with Americans, to cruise against English commerce. Immediate complaint was made by the English minister, who expressed his “persuasion that the Government of the United States would regard the act of fitting out those privateers in its ports as an insult offered to its sovereignty.” The view taken by the American Government was in fact broader, and Mr. Jefferson expressed it clearly and tersely in writing to Mr. Genêt. * * * Taking this language straightforwardly, without forcing into it all the meaning which a few phrases may bear, but keeping in mind the facts which were before the eyes of **Mr. Jefferson when he penned it, there can be no doubt that the duties which it acknowledges are the natural if not inevitable deductions from the general principles stated by Bynkershoek, Vattel, and De Martens**; and there can be as little doubt that they had not before been frankly fulfilled. * * * **The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals.** *But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however: it is identical with the standard of conduct which is now adopted by the community of nations.*’

‘**The United States of America,**’ says Sir Robert Phillimore (1 Int. Law, 3d ed., 1879, p. 555), ‘**began their career as an independent country under wise and great auspices, and it was the firm determination of those who guided their nascent energy to fulfill the obligations of international law as recognized and established in the Christian Commonwealth of which they had become a member.** They were sorely tried at the breaking out of the war of the first French Revolution, for they had been much indebted to France during their conflict with their mother country, and were much embarrassed by certain clauses relating to privateers in their treaty with France of 1778; but in 1793, **under the Presidency of Washington,** they put forth a proclamation of neutrality, and, resisting both the threats and the blandishments of their recent ally, **took their stand upon sound principles of international law,** and passed their first neutrality statute of 1794. The same spirit induced the Government of these States at that important crisis when the Spanish colonies in America threw off their allegiance to the mother country, to pass the amended foreign enlistment statute of 1818; *in accordance with which, during the next year, the British statute, after a severe struggle, and mainly by the great powers of Mr. Canning, was carried through Parliament.*’

Sir Robert Phillimore, in the passage last quoted, **assigns to the Government of the United States the credit of establishing liberal and humane principles of international**

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The foregoing historical background readily shows that US Supreme Court Justice Robert H Jackson was more in tune with the sentiment of the Founders when he gave a memorable speech on 13 April 1945 on the subject of the ‘Rule of Law Among Nations’ – the day after President Roosevelt died and President Truman took over, two American Presidents whose efforts inexorably corralled the world towards the creation of a new world order of the United Nations. In the mood of the times, Jackson felt constrained to observe that ‘Governments in emotional times are particularly susceptible to passionate attack in which this emotion is appealed

law at two great epochs :— that of the first French revolutionary war during the administration of Washington and the secretaryship of Jefferson, and that of the reconstitution of the relations of the great powers of the civilized world consequent upon the overthrow of the Spanish supremacy in South America, and the triumph which was then secured to liberal principles by the joint action of England and of the United States in their resistance to the projects of the Holy Alliance. As leader in the first of these epochs of American statesmanship Mr. Jefferson is entitled to the pre-eminence, though there is no question that he was greatly aided in coming to his conclusions by the calm wisdom of Washington. Mr. Monroe was President during the second of these epochs; and the private letters to and by him deposited in the Department of State show that he was aided in reaching the positions which were announced by his administration in this relation, not merely by his cabinet, including Mr. J. Q. Adams, Mr. Calhoun, Mr. Wirt, and Mr. Crawford, but by Mr. Jefferson and Mr. Madison, whom he freely and constantly consulted as to each step in the important action which he then took in the domain of international law.

But it is not in these two epochs alone that the statesmen of the United States showed commanding ability in this important department both of statesmanship and of jurisprudence. I do not desire to refer to Secretaries of State who are now living, or who, if recently dead, are still associated with immediate political affairs. **But when among those who filled the secretaryship in prior days** we look back on Madison, on Monroe, on John Quincy Adams, on Clay, on Van Buren, on Edward Livingston, on Forsyth, on Clayton, on Webster, on Calhoun, on Edward Everett, on Marcy, on Buchanan, on Cass, and on Seward, **it is impossible not to see that the continuous exposition of international law, so far as concerns this country; fell into the hands of men who were among the first statesmen and jurists of their age, singularly fitted to maintain in all relations,** what was maintained in the two relations just noticed, **the leadership in the formation, of a liberal and humane system of international jurisprudence. And they have ably done this work. I am not unfamiliar with the writings on international law of foreign statesmen and jurists; I have carefully studied not merely the messages of our Presidents, but the volumes, now nearly four hundred in number, in which are recorded** (with the exceptions to be presently noted) **the opinions of our Secretaries of State; and after a careful comparison of those two classes of documents I have no hesitation in saying not only that the leadership ascribed to our statesmen in the two great epochs above noticed is maintained in other important relations, but that the opinions of our Secretaries of State, coupled with those of our Presidents as to which they were naturally consulted, form a body of public law which will stand at least on a footing of equality with the state papers of those of foreign statesmen and jurists with which it has been my lot to be familiar.”** (bold emphasis added).

to, sometimes crudely and sometimes by more sophisticated formulae such as “impairment of sovereignty,” “submission to foreign control,” and like shibboleths.’⁴⁶ And very much in the same vein, he went on to say:

It is futile to think ... that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.⁴⁷

Thus, history does not support the thesis that the Founders would have found the ICC to be their ‘worst nightmare come to life.’ This theme will be elaborated more fully in due course. For now, however, it is enough to say that there is ample reason to consider that the Founders’ ‘worst nightmare come to life’ might have been the policy of incendiary hostility towards the ICC, for insisting on accountability for those who may have violated the law of nations in gross ways that debase our common humanity and threaten international peace and security. Perhaps, a more accurate modern reflection of the aptitude or policy of the Founders towards the ICC is to be found in President Clinton’s statement of 31 December 2000, when his Administration finally signed the Rome Statute, after much hesitation. Amongst other things, he said as follows:

The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the 31 December, 2000 deadline established in the Treaty. We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come. The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership.⁴⁸

⁴⁶ Robert H. Jackson, *The Rule of Law among Nations*, 19 TEMP. L.Q. 135, 137 (1946).

⁴⁷ *Id.* at 142-43.

⁴⁸ *Clinton's statement on war crimes court*, BBC (Dec. 31, 2000), <http://news.bbc.co.uk/1/hi/1095580.stm>.

Notably, the US Government of the day declared itself as ‘join[ing] more than 130 other countries’ that had signed the Rome Statute by the 31 December 2000 deadline. President Clinton’s statement reflected correctly the leading role that the United States has played in more modern times in the construction of a world order that permits no impunity for those who violate penal norms of international law.⁴⁹ But, in deciding to ‘join more than 130 other countries’ that had signed the Rome Statute as of 31 December 2000, President Clinton also reflected the desires of the Founders to be part of a world order in which rules of international law would bind all, without exception even for Americans.

Yet, an earlier modern presidential reflection of the inclination of the Founders to join other nations to create a better world, resonated in the sentiments expressed by President Truman at the creation of the United Nations, following the adoption of the UN Charter. As with his address at the opening of the UN Conference on International Organisation, his address at the closing was also a classic call to a world that must value peace and justice. The relevant excerpts also deserve quoting in some length, at the footnote below.⁵⁰

⁴⁹ See Chile Eboe-Osuji, President, International Criminal Court, Keynote Speech at the Annual Meeting of the American Society of International Law: A Tribute to Robert H. Jackson – Recalling America’s Contributions to International Criminal Justice (Mar. 29, 2019).

⁵⁰ *Address of President Truman at the Final Plenary Session of the United Nations Conference on International Organization*, 13 DEP’T. ST. BULL. 1, 3-6 (1945) (The relevant parts of President Truman’s address are as follows:

“I have asked for the privilege of coming today, to express on behalf of the people of the United States our thanks for what you have done here, and to wish you Godspeed on your journeys home. ...

All our people are glad and proud that this historic meeting and its accomplishments have taken place in our country. ...

You assembled in San Francisco nine weeks ago with the high hope and confidence of peace-loving people the world over.

Their confidence in you have been fulfilled.

Their hope for your success has been fulfilled.

The Charter of the United Nations which you have just signed is a solid structure upon which we can build a better world. History will honor you for it. ...

If we had had this Charter a few years ago – and above all, the will to use it – millions now dead would be alive. If we should falter in the future in our will to use it, millions now living will surely die.

The Constitution of my own country came from a Convention which – like this one – was made up of delegates with many different views. Like this Charter, our Constitution came from a free and sometimes bitter exchange of conflicting opinions. When it was adopted, no one

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Mr Bolton's Federalist Society speech – being the speech that launched the current Administration's attitude towards the ICC – requires a close look, for the correctness of its premises as Government policy. It is *factually* safe to say that the speech made no effort at all to respect the most elementary rules of polemic candour. Time and space will accommodate the refutation of all the characterisations and arguments made in that speech.

For present purposes, I shall review some of the more catchy characterisations and premises that underpinned the policy articulated in that speech – and other implied ones – that made the hostile policy seductive to those who may be unfamiliar with the reality being misrepresented. They include these: the ICC was created by 'self-styled global governance advocates'; the ICC is a 'flawed' institution; the ICC usurps national sovereignty; the ICC is America's worst nightmare; in defence of national sovereignty, the US does not allow that its nationals are to be tried by foreign courts; the ICC's existence entails an illegitimate constraint on the right of self-defence; at the ICC, the Judges are cohorts of the Prosecutor and a mere rubber stamp for the wishes and actions of the Prosecutor, such that the Prosecutor's commencement of investigations in a case means almost automatically that the Judges will convict the subject of the investigation; the Prosecutor and officials of the ICC are unaccountable; and, the standards of fair trial are inadequate at the ICC.

These allegations were always problematic on their own merit as truthful; let

regarded it as a perfect document. But, it grew and developed and expanded. And upon it there was built a bigger, a better, and a more perfect union.

This Charter, like our own Constitution, will be expanded and improved as time goes on. No one claims that it is now a final or a perfect instrument. It has not been poured into any fixed mold. Changing world conditions will require readjustments – but they will be the readjustments of peace and not war...

We all have to recognize – no matter how great our strength – that we must deny ourselves the licence to do always as we please. No one nation, no regional group, can or should expect any special privilege which harms any other nation. ...

Out of this conflict have come powerful military nations, now fully trained and equipped for war. But they have no right to dominate the world. It is rather the duty of these powerful nations to assume the responsibility of leadership toward a world of peace. That is why we have resolved that power and strength shall be used not to wage war, but to keep the world at peace, and free from the fear of war.

By their own example the strong nations of the world should lead the way to international justice. That principle of justice is the foundation stone of this Charter. That principle is the guiding spirit by which it must be carried out - not by words alone but by continued concrete acts of goodwill.")

alone as premises of policy in the logic of America's renowned respect for the rule of law and legal accountability. And the effective logic of that 'policy' is particularly tragic for helpless Afghans who have not benefitted from the dividends of justice in their own country for the rampant violence they have suffered in the hands of their fellows who have carried out beheadings, suicide bombings, and subjected their society to an unending reign of terror.

II. WAS THE ICC CREATED BY 'SELF-STYLED "GLOBAL GOVERNANCE" ADVOCATES'?

Mr Bolton's verbal blast against the ICC began with the following derision of all those involved in creating the Court: 'After years of effort by *self-styled "global governance" advocates*, the ICC, a supranational tribunal that could supersede national sovereignties and directly prosecute individuals for alleged war crimes, was agreed to in 1998.'⁵¹ It must be said immediately that the ICC does not 'supersede national sovereignties and directly prosecute' citizens of States. ICC is a court of last resort whose jurisdiction is contingent on the failure of national jurisdictions to investigate and prosecute suspects of the international crimes indicated in the Rome Statute. More on that later. For now, we may consider the correctness of the derisive allegation that the ICC was created due to the efforts of 'self-styled "global governance" advocates.'

It is not necessary to shy away from all meanings of the idea of 'global governance'. It is indeed possible to embrace it in a wholesome way as a civilising idea, and not a term of abuse. In that sense, what is wrong with an actionable scheme, beyond merely pleasing platitudes, to harness the collective efforts of nations and peoples of the world, along the path of shared ideals, for the purpose of organising the world to make it a better place for humanity? Employed in that sense, 'global governance' is a very American idea in more ways than one. On 5 November 1943, the United States Senate adopted the Connally Resolution, recognising 'the necessity of there being established at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.'⁵² Less than two months earlier, the United States House of Representatives had also adopted the

⁵¹ See John Bolton Remarks to Federalist Society, *supra* note 20.

⁵² S. Res. 192, 78th Cong. (1943).

Fulbright Resolution, ‘favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace among the nations of the world, and ... favouring participation by the United States therein through its constitutional processes.’⁵³

It was precisely in that vein that the idea of ‘international organisation’ was used in San Francisco in 1945, as regards the ‘United Nations Conference on *International Organization*’. [Emphasis added] President Franklin Roosevelt called that conference – and President Truman followed through with it – to create the United Nations. That was a more successful effort. It built upon the earlier efforts of President Wilson in creating the League of Nations. It is true that the League did not survive the test of time and the United States never joined it in spite of the best efforts of President Wilson. Still, the genius of the effort lies in the fact that it showed what was possible as a matter of ‘global governance’, and it provided an early template that could be improved upon.

So, we see the role that American Presidents have played in the project of ‘global governance’ of the kind that the whole world embraced as part of the new world order that dawned at the dusk of World War II. As regards the ICC, many respectable American citizens (like Ben Fenrencz and Whitney B Harris who represented the US in Nuremberg) were amongst the advocates for the creation of the ICC. And, quite notably, the American Bar Association was amongst the more prominent non-governmental organisations that had strongly pushed for the creation of the ICC – with an effort that went back to 1978. As the President of the ABA stated the matter in a 2019 statement:

Since 1978, the ABA has supported the creation of a permanent international criminal tribunal to eliminate impunity for perpetrators of genocide, war crimes, and crimes against humanity. The ABA participated in the negotiations that led to the creation of the ICC and its existence has strengthened the expectation of justice held by victims and states alike.⁵⁴

Perhaps, more significantly, the Federalist Society speech failed to mention that the United States Government played a very robust role in the creation of the ICC, fully appreciating its benefit for humanity. Notably, beyond the efforts of individual

⁵³ H.R. Con. Res. 25, 78th Cong. (1943).

⁵⁴ Press Release, American Bar Association, Statement of ABA President Bob Carlson Re: Restricting International Criminal Court officials’ visas (Apr. 9, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/statement-of-aba-president-bob-carlson-re--restricting-internati/>.

Senators, such as Senator Dodd⁵⁵ and Senator Specter,⁵⁶ who consistently advocated for the establishment of the ICC, the US Congress itself passed the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, section 517 of which expressed the Sense of Senate ‘that (1) the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law; (2) such a court would thereby serve the interests of the United States and the world community.’

It would be strange to deride the years of efforts of these well-meaning Americans and the US Congress as ‘years of effort by self-styled “global governance” advocates.’

Notably, Ambassador David Scheffer was the leader of the US delegation during the negotiation and adoption of the Rome Statute. Upon his return, he fully briefed the US Senate Sub-Committee on International Operations of the Senate Committee on Foreign Relations on the many important proposals on which the US delegation was able to obtain the agreement of other States and those that other States declined to go along with.⁵⁷ As Professor Michael Scharf testified before the Sub-Committee: ‘[R]eally, the United States bullied its way into getting the US stamp on almost every single provision in the International Criminal Court statute. It is really a US statute with just a couple of exceptions, a couple of things that we did not get.’⁵⁸ According to Professor Scharf, ‘the US got about 95 percent’ of what it asked for during the negotiation of the Rome Statute.⁵⁹

Perhaps, the best evidence of American cautious support for the ICC idea – and participation in the creation – is seen in President Clinton’s statement of 31 December 2000, on the occasion of his signing of the Rome Statute. In doing so, the US Government of the day declared itself as ‘join[ing] more than 130 other countries’ that had signed the Rome Statute by the 31 December 2000 deadline.

Given that circumstance and the efforts of the US Government in creating the Court, would the US then belong amongst those characterised as ‘self-styled “global governance” advocates’ whose efforts resulted in the creation of the ICC? Looking beyond the efforts that resulted in the creation of the ICC, cynical derision should not be deserving of efforts of people of goodwill whose efforts for a world

⁵⁵ See S.J. Res. 32, *supra* note 19.

⁵⁶ S.J. Res. 93, *supra* note 19.

⁵⁷ Subcomm. on Int’l. Relations, *supra* note 23, at 10 *et seq.*

⁵⁸ *Id.* at 38.

⁵⁹ *Id.*

organised along the path of peace and justice followed the visionary trail blazed by prominent American statesmen like President Wilson, President Franklin Roosevelt and President Truman, who spared no effort to create a multilateral mechanism to ensure peace and justice for humanity. Nor would such derision be deserving of Mrs Eleanor Roosevelt – the Mother of Human Rights – who enjoined her compatriots in the following sensible words: ‘Our own land and our own flag cannot be replaced by any other land or any other flag. But, you can join other nations, under a joint flag, to accomplish something good for the world that you cannot accomplish alone.’⁶⁰

III. A ‘FLAWED’ INTERNATIONAL LEGAL SYSTEM

In his speech, Mr Bolton repeatedly criticised the Rome Statute as having laid down a system that contained ‘significant flaws.’ It is necessary to insist here that the Rome Statute and the ICC are magnificent achievements indeed. There is, nevertheless, no shame in admitting that it is, of course, necessarily flawed in some parts and even seriously so in other parts. But to be flawed is to be human – and our human flaws necessarily attend our human creations. And in no area of endeavour are such flaws more familiar, yet accepted, as in the area of international law. In that connection, the seminal words of Justice Robert H Jackson must be recalled as follows: ‘Those who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace.’⁶¹

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Indeed, the US Founders would have been entirely understanding of the imperfections of the Rome Statute and the Court created under it. For, the Founders themselves had been there before. When they reconvened in 1787 – this time as the Framers of the Constitution that Americans revere today and much of the world admires – it was not a smooth sailing experience for them. Just as with the Rome Conference of 1998, the Philadelphia Convention of 1787 had also to contend with ‘jarring opinions.’⁶² And, just as with the Rome Statute, the draft Constitution that

⁶⁰ See Madeline Branch, *10 Inspiring Eleanor Roosevelt Quotes*, UNITED NATIONS FOUNDATION (Nov. 6, 2015), <https://unfoundation.org/blog/post/10-inspiring-eleanor-roosevelt-quotes/>.

⁶¹ Robert H. Jackson, *supra* note 46, at 135.

⁶² See Letter of Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, VOL. 3 542 (Max Farrand, ed. 1911).

resulted from the Philadelphia Convention had its own share of imperfections. It must be recalled that Edmund Randolph refused to sign the draft Constitution.⁶³ So, too, Elbridge Gerry⁶⁴ and George Mason⁶⁵ whose own objections were steeped in notable acrimony.⁶⁶ Gouverneur Morris also had objections to aspects of the draft Constitution. He relented in the end and signed, saying that he continued to have ‘objections,’ but ‘considering the present plan as the best that was to be attained,’ he ‘would take it with all its faults.’⁶⁷ For Morris and his fellow delegates, ‘it would have been foolish to fold their arms, and sink into despondency, because they could neither form nor establish the best of all possible systems.’⁶⁸ Benjamin Franklin’s famous, calming speech at the conclusion of the Convention was to the same effect. It deserves to be quoted in full, for its wisdom, maturity, compromise, and humility:

We have been long together. Every possible objection has been combated. *With so many different and contending interests, it is impossible that anyone can obtain every object of their wishes.* We have met to make mutual sacrifices for the general good, and we have at last come fully to understand each other, and settle the terms. Delay is as unnecessary as the adoption is important. *I confess it does not fully accord with my sentiments, but I have lived long enough to have often experienced that we ought not to rely too much on our own judgments. I have often found I was mistaken in my most favorite ideas.* I have upon the present occasion given up, upon mature reflection, many points which, at the beginning, I thought myself immoveably and decidedly in favor of. This renders me less tenacious of the remainder, *there is a possibility of my being mistaken.* The general principle which has presided over our deliberations now guides my sentiments. *I repeat, I do materially object to certain points, and have already stated my objections* but I do declare that these objections shall never escape me without doors; as, upon the whole, *I esteem the constitution to be the best possible, that could have been formed under present circumstances;* and that it ought to go abroad with one united signature, and receive every support and countenance from us. I trust none will refuse to sign it. If they do, they will put me in mind of the French girl who was always quarrelling and finding fault with everyone around her, and told her sister that she thought it very extraordinary, but that really she

⁶³ JAMES MADISON, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION VOL. 5 552 & 556 (Jonathan Elliot, ed. 1836).

⁶⁴ *Id.* at 553 & 557.

⁶⁵ *Id.* at 552-53.

⁶⁶ See James Madison’s Letter to Thomas Jefferson (Oct. 24, 1787) in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 3, at 209-10.

⁶⁷ James Madison, *supra* note 63, at 556.

⁶⁸ See Letter of Gouverneur Morris to Robert Walsh (Feb. 5, 1811) in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 3, at 540-41.

had never found a person who was always in the right but herself.⁶⁹

From his posting as Ambassador to Paris, Thomas Jefferson received a copy of the draft Constitution and immediately expressed mixed feelings in a letter to John Adams's son-in-law: 'There are very good articles in it; & *very bad*,' he observed, 'I do not know which preponderate.'⁷⁰ One of his criticisms was that the office of the President – which in the draft Constitution was unlimited in tenure – struck him as 'a bad edition of a Polish king.'⁷¹

Just as the US is one big and important nation State where the Rome Statute has faced caustic criticisms and a crisis of acceptance,⁷² one big and important municipal state at the time where the draft US Constitution had endured a similar experience was President Washington's own State of Virginia. Four out of its seven delegates refused to sign the draft Constitution upon its conclusion in 1787. A week after the Convention, Washington (who was one of the three Virginian delegates that signed the draft Constitution in Philadelphia upon its conclusion) wrote to three former governors of Virginia, urging them to support the draft. In that regard, he instructively wrote as follows: 'I wish the constitution which is offered had been made more perfect, but I sincerely believe it is the best that could be obtained at this time; and, as a constitutional door is opened for amendment hereafter, the adoption of it under the present circumstances of the union is, in my opinion desirable.'⁷³ And, even going into the federal Convention in the summer of 1787, Washington was under no illusion that the new plan of government under the Constitution would be acceptable to everyone. In a letter he wrote to David Stuart, a member of his extended family, on 1 July 1787, in the course of the Convention,

⁶⁹ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 3, *supra* note 62, at 182.

⁷⁰ Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787) in THOMAS JEFFERSON: DIPLOMATIC CORRESPONDENCE: PARIS 1784-1789 223 (Brett Woods, ed. 2016) (emphasis added).

⁷¹ MARTIN LARSON, THOMAS JEFFERSON – A MAGNIFICENT POPULIST 83 (1981).

⁷² It should, of course, be pointed out that there may be something of a red herring in the view that the Rome Statute was not immediately signed or ratified by the US soon after adoption and since. It must be accepted that the United States is habitually dilatory in ratifying multi-lateral international treaties – even those that do not involve fear of the ICC targeting US soldiers. For instance, it took over 40 years for the US to ratify the Convention for the Punishment and Prevention of the Crime of Genocide; the US still has not ratified the Convention on the Rights of the Child; nor have they ratified the Vienna Convention on the Law of Treaties. It would thus be wrong to suggest that the Rome Statute would easily have been ratified by the US had they even signed it upon completion in Rome.

⁷³ Letter from George Washington to Patrick Henry, Benjamin Harrison, and General Thomas Nelson Jr (Sept. 24, 1787) in DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870: LETTERS AND PAPERS RELATING TO THE CONSTITUTION, TO JULY 31, 1778 VOL. IV 294 (1905).

Washington wrote as follows: ‘To please all is impossible, and to attempt it would be vain. The only way, therefore, is ... to form such a government as will bear the scrutinizing eye of criticism, and trust it to the good sense and patriotism of the people to carry it into effect.’⁷⁴

So, yes, the Rome Statute system is not perfect in many ways. In crafting the Rome Statute, it would have been impossible ‘to please all’, as President Washington said of the US Constitution. It was not wrong ‘to attempt’ to accommodate the positions of the US – and achieving that end most of the way – even though they did not join the treaty in the end. But it was correct to proceed on the ICC construct on the basis of the Rome Statute that is now in place – notwithstanding its imperfections. In the words of George Washington, the only way, therefore, was to create an international criminal court ‘as will bear the scrutinizing eye of criticism, and trust it to the good sense and [humanitarian passion] of the people [of the world] to carry it into effect.’

Let the record show that, as the President of the Court, there are aspects of its design that drive me to intense distraction at times. But, as Gouverneur Morris said of the draft US Constitution in 1787, ‘considering the present plan as the best that was to be attained, I would take it with all its faults.’⁷⁵ The world could not have attained a better system of accountability in the prevailing geo-political circumstances of 1998 – and those geo-political circumstances have possibly worsened in the ensuing years. I am confident that none of the critics in America or elsewhere could offer let alone shepherd the attainment of a better system that everyone would accept. The choice presented in Rome was stark and remains so. It was to accept what was attained or leave humanity still without a permanent international mechanism that is in any way able to demand accountability, when crimes that shock the conscience of humanity are committed and national systems prove unable or unwilling to demand accountability. In the end, the choice was that clear indeed.

IV. IS THE ICC TRULY THE ‘WORST NIGHTMARE’ OF US FOUNDERS?

The US Administration’s policy of hostility towards the ICC, as evidently

⁷⁴ See Letter from George Washington to David Stuart (July 1, 1787) in WRITINGS OF GEORGE WASHINGTON – BEING HIS CORRESPONDENCES, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE Vol. IX 258-59 (Jared Sparks ed. 1835).

⁷⁵ James Madison, *supra* note 63, at 556.

inspired by the Federalist Speech, rests primarily on the hypothesis that the ICC is ‘outright dangerous’ – the American founding fathers’ ‘worst nightmare brought to life’. Thus, the thinking goes, an appropriate way to deal with such a ‘dangerous’ and nightmarish threat would be to declare it a ‘national emergency’ and impose coercive measures by way of the so-called ‘sanctions’⁷⁶: as is usually done to States, entities or persons accused of or known to grossly violate human rights, support terrorism, seek to acquire the nuclear weapon or deal in illicit narcotics.

As regards the hypothesis that the ICC is a ‘dangerous’ harbinger of ‘national emergency’, it is helpful to note that the ICC Prosecutor’s interest in investigating the conduct of US personnel in Afghanistan relates only to the allegations of torture as both a war crime and a crime against humanity. The US Senate Intelligence Committee inquired into those allegations and rendered their report in 2014. It was apparently not an exercise in plenary exoneration from allegations of wrongdoing.⁷⁷

But, to the extent that the allegations of wrongdoing are supported by the evidence, they necessarily engage the question whether prosecuting them in the last resort at the ICC is truly inconsistent with Title 18 of the United States Code § 2340A, which makes it an offence for any US national to commit torture outside the United States. Similarly, would prosecution at the ICC be inconsistent with the intendment of Appendix A to the US Army Field Manual on Intelligence Interrogations (FM34-52), which excerpts the provisions of the US Uniform Code of Military Justice that proscribe torture of detainees? Also to be noted is that the *Instructions for the Government of Armies of the United States in the Field*, generally known as the *Lieber Code* (1863) precluded ‘torture to extort confessions.’⁷⁸ Notably, in the 2016 edition of the US Department of Defense *Law of War Manual*, General Counsel Stephen W Preston observed as follows:

The law of war is a part of our military heritage, and obeying it is the right thing to do. But we also know that the law of war poses no obstacle to fighting well and prevailing. Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. For example, the self-control needed to refrain from violations of the law of war under the stresses of combat is the same good order and discipline necessary to operate cohesively and victoriously in battle. Similarly, the law of war’s prohibitions on torture and unnecessary destruction are consistent with the practical insight that

⁷⁶ See Exec. Order No. 13928, *supra* note 25.

⁷⁷ See S. REP. NO. 113–288, at xi (2014).

⁷⁸ See *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* art. 16 (Apr. 24, 1863) in *THE LAWS OF ARMED CONFLICTS* 3-23 (D. Schindler et. al., ed. 1988).

such actions ultimately frustrate rather than accomplish the mission.⁷⁹

And amongst other things, the Law of War Manual says this:

The United States is a Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention against Torture was not intended to supersede the prohibitions against torture already contained in customary international law and the 1949 Geneva Conventions or its Additional Protocols. The law of war is the controlling body of law with respect to the conduct of hostilities and the protection of war victims. Nevertheless, a time of war does not suspend operation of the Convention Against Torture. The Convention Against Torture continues to apply even when a State is engaged in armed conflict. For example, a state of war could not justify a State's torture of individuals during armed conflict. In addition, where the text of the Convention Against Torture provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman, or degrading treatment or punishment, extend to certain areas beyond the sovereign territory of the State Party, and more specifically to "all places that the State Party controls as a governmental authority."⁸⁰

What is more, article VI(2) of the US Constitution makes the torture proscription norms of the Geneva Conventions and the Convention against Torture 'part of the Supreme Law of the Land.'

Against the foregoing background, the essential question becomes this: Would prosecution at the ICC provoke 'national emergency' in the United States any more than would be the case if the US justice system itself conducted those prosecutions pursuant to the US law and policy against torture as indicated above? For now, however, the foregoing questions will be pursued no further. It is enough to note them as part of what would constitute 'national emergency' in the United States. And we may now return to the basic hypothesis whether the ICC is stuff of nightmare to the US Founders.

**

To be sure, the evocation of the US Founders, in the light of the tenor and substance of the 'nightmare' hypothesis leaves the distinct impression that the Founders were isolationists, hostile to the international order and deeply suspicious of international law as a source of limitation of their national sovereignty. But, does

⁷⁹ U.S. DEP'T OF DEF., LAW OF WAR MANUAL ii (2016).

⁸⁰ *Id.* at 25; *see also id.* at 514, 518, 528, 555, 556, 618, 657, 752, et seq.

American constitutional history bear out that picture? No. Not at all.

Back at the Supreme Court following his illustrious service at Nuremberg, Justice Jackson entered the following note of caution to those inclined to speculate about what the US Founders would do in modern conditions: ‘Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.’⁸¹ It would be foolish to disagree boldly. Nevertheless, the following analysis only demonstrates that the net evidence of the interpretable materials weighs against those who assert that the US Founders would have viewed the ICC with hostility.

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To start with, it must be noted that at the Founding, the sole preoccupation of the architects of the new republic was to ‘throw off’ the yoke of British colonial imperium – which they felt as ‘absolute despotism’ and ‘absolute tyranny’.⁸² Contrary to a stance of hostility towards the international order, their aspiration was to see their new nation belong to it as an equal member – especially with regard to Great Britain. This is all too evident in both the opening and concluding passages of the Declaration of Independence:

When, in the course of human events, it becomes necessary for one people to *dissolve the political bands which have connected them with another*, and to *assume, among the powers of the earth, the separate and equal station* to which the laws of nature and of nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. [Emphasis added.]

...

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by authority of the good people of these colonies, solemnly publish and declare, that *these United Colonies are, and of right ought to be free and independent states*; that they are *absolved from all allegiance to the British Crown*, and that all *political connection between them and the state of Great Britain is and ought to be totally dissolved*; and that, *as free*

⁸¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

⁸² See THE DECLARATION OF INDEPENDENCE, *supra* note 35, cl. 4.

and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. ... [Emphasis added.]

These two passages – marking the exordium and culmination of the document – contained the central message vexing the minds of its authors – a new nation that was independent from Great Britain.⁸³ And the urgency of that message is better appreciated in the precise historical context that in the year before, King George III had declared the colonists to be rebels.⁸⁴ There should be little doubt then that the Founders would have embraced an international institution like the ICC, not least for their own protection from war crimes in their vexed fight for freedom from the military might of the British Empire that the Founders saw as ‘absolute despotism’ and ‘absolute tyranny’.

Once more, it is helpful to recall the observations of Justice Jackson that ‘[t]hose who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace.’⁸⁵ There is every reason to believe that the Founders of the American republic generally belonged to the class of statesmen that Jackson had in mind. And rather than hold international law in deep suspicion as a source of limitation of their independence and sovereignty, they insisted that it applied to them in equal measure as it did to other nations.

*

Beyond the declaration of independence, historical records amply bear out that more genial predisposition of the Founders towards international law and the international order. The best evidence of their embrace of international law appears in article VI(2) of the US Constitution, which provides, amongst other things, that ‘all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land ...’. There are not many countries in which treaties are constitutionally recognised as part of the law of the land – let alone as ‘the Supreme Law of the Land.’ It only goes to show the extent to which the Founders were keen to show their embrace of the international order and international law. But, this worldly outlook was not surprising. Most of the Founders were learned men – even in the colloquial sense of ‘learned in the law’.

⁸³ David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY 39, 46 (2002).

⁸⁴ *Id.* at 47.

⁸⁵ Robert H. Jackson, *supra* note 46, at 136.

And the Swiss international lawyer, Emer de Vattel, was a leading author generally acknowledged as having influenced the thinking of the Founders, with his classical work on *The Law of Nations*.⁸⁶

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In December 1775, Benjamin Franklin considered that ‘the circumstances of a rising State make it necessary to consult the law of nations’, hence he distributed copies of Vattel’s *Law of Nations* not only to the Library of Philadelphia (where the Second Continental Congress for was holding for the Declaration of Independence) but also to the Congress itself.⁸⁷ He also gave John Adams ‘a printed volume of treaties’, which he annotated in pencil.⁸⁸ In the circumstances, ‘[t]he congressional committees thus had available to them the most up-to-date tools of contemporary diplomacy: Vattel’s ... law of nations (an instant classic on its publication in 1758) and one of the treaty collections that had become indispensable to diplomats and statesmen since they had first been compiled in the late seventeenth century.’⁸⁹

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John Jay, James Madison and Alexander Hamilton were amongst the more prominent of the US Founding Fathers. All three were lawyers. Jay, in particular, was well versed in the ways of international affairs. He served as diplomat to Spain and as Secretary of Foreign Affairs during the confederation era, and as Secretary of State of the United States. And he was the first Chief Justice of the United States. It is difficult to imagine Jay finding a mechanism of international law as his ‘worst nightmare brought to life.’ To the contrary, the record shows his belief that international law is a binding regime upon the United States and its citizens.

As the Constitutional Convention was in progress in 1787, John Jay, as the US Secretary for Foreign Affairs, received a protest from Pieter Johan van Berckel, a Dutch diplomat, who complained that the diplomatic immunity of his residence was violated when a New York City constable entered with a warrant of arrest for a

⁸⁶ See generally, Emer de Vattel, ONLINE LIBR. OF LIBERTY, <https://oll.libertyfund.org/people/3987> (last visited Feb. 5, 2021); see also Bradford R. Clark and Anthony J. Bellia Jr, *The Law of Nations as Constitutional Law*, 98 VIRGINIA L. REV. 729, 749 (2012); William Ossipow and Dominik Gerber, *The Reception of Vattel’s Law of Nations in the American Colonies: From James Otis and John Adams to the Declaration of Independence*, 57 AM. J. OF LEGAL HIST. 521-55 (2017); Tara Helfman, *The Law of Nations in The Federalist Papers*, 23 THE J. OF LEGAL HIST. 107-28 (2002).

⁸⁷ See Armitage, *supra* note 83, at 49.

⁸⁸ *Id.*

⁸⁹ *Id.*

member of the diplomat's household. Then under Articles of Confederation, the United States proved unable to provide effective redress. All that Jay could do was refer the incident to 'the Governor of the State of New York, to the End that such judicial Proceedings may be had on Complaint ... *as Justice and the Laws of Nations may require.*'⁹⁰ Merely leaving the matter with the Governor of New York was a solution that Jay and the other Founders found unsatisfactory, as the actions and omissions of an American state could jeopardise relations between a foreign nation and the entire United States.⁹¹

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Six years later, Jay found himself presiding over the famous *Henfield's case*,⁹² in his capacity as the Chief Justice of the United States. President Washington had issued a Proclamation of Neutrality of the United States and its citizens in the war between France, on the one part, and Great Britain, Austria, Prussia, Sardinia, Hungary, and the United Netherlands, on the other part.⁹³ According to the Proclamation, any citizen who violated the Proclamation would not only lose the protection of the United States, but would also face federal prosecution. In violation of the Proclamation, Gideon Henfield of Massachusetts, a prize-master, together with some French citizens and others sailed and cruised aboard the privateering man o'war, *The Citizen Genet*, 'to several maritime places within the jurisdiction of the United States ... by force and arms to take the ships, goods, and moneys of the King and people of Prussia, the King and people of Sardinia, the King of Hungary his subjects and people, the King and people of Great Britain, and especially of the said States General of the United Netherlands.'⁹⁴ Amongst their capture was the British vessel *The William*. Henfield was promptly arrested by US Marshals and brought before the Grand Jury.

Jay's charge to the Grand Jury, delivered on 22 May 1793, was a veritable public lecture on how international law – especially in its interaction with the American internal legal order – as understood at the time in the United States by the Government.⁹⁵ He opened his charge with the following overarching theme:

⁹⁰ See Clark and Bellia Jr, *supra* note 86, at 760.

⁹¹ *Id.*

⁹² FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49 (Carey and Hart) (1849).

⁹³ *Id.* at 66.

⁹⁴ *Id.* at 67.

⁹⁵ *Id.* at 49 (In that regard, the editors of the law report noted as follows: "The charges of Chief

GENTLEMEN OF THE GRAND JURY: *THAT citizens and nations should use their own as not to injure others, is an ancient and excellent maxim; and is one of those plain precepts of common justice, which it is the interest of all, and the duty of each to obey, and that not only in the use they may make of their property, but also of their liberty, their power and other blessings of every kind. To restrain men from violating the rights of society and of one another; and impartially to give security and protection to all, are among the most important objects of a free government.*⁹⁶

Moving on to the particular matter of law at hand, Jay's embrace of international law is inescapable in the following explanation of his understanding of the order and classification of American law:

That you may perceive more clearly the extent and objects of your inquiries, it may be proper to observe, that the laws of the United States admit of being classed under three heads of descriptions.

- 1st. All treaties made under the authority of the United States.
- 2d. The laws of nations.
- 3dly. The constitution, and statutes of the United States.⁹⁷

In explaining the significance of treaties, he took especial care to explain their binding nature, how they are to be interpreted by reference to principles of international law and the importance of fidelity to them – as he saw it. In particular, he stressed that fidelity to treaties does not depend on the importance of the co-contracting nations or their own sense of integrity. Perfidy may be chastised in other nations: it is not to be imitated. In his words:

Treaties between independent nations, are contracts or bargains which derive all their force and obligation from mutual consent and agreement; and consequently, when once fairly made and properly concluded, cannot be altered or annulled by one of the parties, without the consent and concurrence of the other. Wide is the difference between treaties and statutes—we may negotiate and make contracts with other nations, but we can neither legislate for them, nor they for us; *we may repeal or alter our statutes, but no nation can have authority to vacate or modify*

Justice Jay and Judge Wilson, it is true, were printed by the government for the purpose of explaining abroad the position of the United States, but they have never yet been presented to the professional eye.").

⁹⁶ *Id.* at 49.

⁹⁷ *Id.* at 52.

treaties at discretion. Treaties, therefore, necessarily become the supreme law of the land, and so they are very properly declared to be by the sixth article of the constitution.

Whenever doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations applicable to the case.

The peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their engagements; and every virtuous citizen (for every citizen is a party to them) will concur in observing and executing them with honour and good faith; and that, whether they be made with nations respectable and important, or with nations weak and inconsiderable, our obligation to keep our faith results from our having pledged it, and not from the character or description of the state or people, to whom, neither impunity nor the right of retaliation can sanctify perfidy; for although perfidy may deserve chastisement, yet it can never merit imitation.⁹⁸

Jay's discussion of the 'law of nations' – a notion understood at the time (and still) to encompass more than treaties – also shows a Founder who was not at all afraid of international law as a source of limitation, but one entirely at ease with international law as a valuable source of binding norms for his young nation as it is for every other nation. In his words:

As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, *and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us. We are with other nations, tenants in common of the sea—it is a highway for all, and all are bound to exercise that common right, and use that common highway in the manner which the laws of nations and treaties require.*

On this occasion, it is proper to observe to you, gentlemen, that various circumstances and considerations now unite in urging the people of the United States *to be particularly exact and circumspect in observing the obligation of treaties, and the laws of nations, which, as has been already remarked, form a very important part of the laws of our nation.* I allude to the facts and injunctions specified in the president's late proclamation

The proclamation is exactly consistent with and declaratory of the conduct enjoined by the law of nations. . . .

By the laws of nations, the United States, as a neutral power, are bound to observe

⁹⁸ *Id.* at 52-53.

*the line of conduct indicated by the proclamation towards all the belligerent powers, and that although we may have no treaties with them.*⁹⁹

There is every reason to suppose that Jay would not have been hostile to the norms of the Rome Statute, which forbid violating the proscriptions of international criminal law within the territory of foreign nations. Notably, article 12(2) entitles the ICC to exercise jurisdiction – as a court of last resort – where violations proscribed by the Rome Statute occur in the territory of a State that has accepted the jurisdiction of the ICC. The controlling idea remains that the primary jurisdiction remains that of the territorial State, failing which the ICC enjoys jurisdiction. The principle that States have an obligation to punish offences occurring within their jurisdiction is readily apparent in the following words of Chief Justice Jay:

[T]he nation or sovereign ought not to suffer the citizens to do any injury to the subjects of another state, much less to offend the state itself; and that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature which forbids all injuries, but also because nations ought to respect each other, to abstain from all abuse, from all injury, and, in a word, from everything that may be of prejudice to others. If a sovereign who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation than if he injured them himself. In short, the safety of the state and that of human society require this attention from every sovereign. If you let loose the reins of your subjects against foreign nations, these will be have in the same manner to you, and instead of that friendly intercourse which nature has established between all men we should see nothing but one nation robbing another.¹⁰⁰

Ultimately, Jay volunteered that the subject presented by the Proclamation of Neutrality appeared to him ‘to be highly interesting,’ and he ‘thought it useful to treat it with much plainness, as well as latitude.’ He was ‘aware that [he] was treading on delicate ground; but as the path of [his] duty led over it’, he felt it was incumbent upon him to proceed as he did.¹⁰¹ No doubt, some modern-day jurists may grumble that Jay may have proceeded with too ‘much plainness’ and ‘latitude’. That, of course, is beside the point. But, it is important that he, as a US Founding

⁹⁹ *Id.* at 53-54.

¹⁰⁰ *Id.* at 55.

¹⁰¹ *Id.* at 58.

Father evoked in Mr. Bolton's Federalist Society Speech, had amply revealed his mind-set towards international law and the international order. That mind-set would not have found the ICC a 'nightmare'.

If Jay treated the embrace of international law with latitude, his colleague, Judge Wilson, was epically effusive in his own turn. In his words:

The law of nature when applied to states or political societies, receives a new name, that of the law of nations. But though it receives a new appellation, it retains unimpaired its qualities and its powers. The law of nations as well as the law of nature, is of obligation indispensable. The law of nations as well as the law of nature is of "origin divine."

... The law of nations is the law of states and sovereigns. On states and sovereigns it is obligatory in the same manner and for the same reasons, as the law of nature is obligatory upon individuals. Universal and unchangeable is the obligation of both.

How great, how important, how interesting are these truths! They announce to a free people how solemn their duties are! If a practical knowledge and a just sense of those duties were diffused universally among the citizens, how beneficial and lasting would the fruits be!

It seems to have been thought that the law of nations respects and regulates their conduct only in their intercourse with each other.¹⁰²

Wilson displayed a very generous spirit toward the human race – as a matter of legal obligation. On any view, his was judicial homily flown on the wings of a jury charge.¹⁰³

¹⁰² *Id.* at 62.

¹⁰³ *Id.* at 62-63 (

"To love and to deserve an honest fame is another duty of a state as well as of a man. To a state as well as to a man, reputation is a valuable and an agreeable possession. It represses hostility and secures esteem.

In transactions with other nations, the dignity of a state should never be permitted to suffer the smallest diminution.

Need it be mentioned here, that happiness is the centre to which states as well as men are universally attracted! To consult its own happiness, therefore, is the duty of a nation.

When men have formed themselves into a political society, they may reciprocally enter into particular engagements and contract new obligations in favour of the community or of its members. But they cannot, by this union, discharge themselves from any duties which they previously owed to those who form a part of the political association. Under all the obligations due to the universal society of the human race, the citizens of a state still continue. To this universal society it is a duty that each nation should contribute to the welfare, the perfection and the happiness of the others.

If so, the first degree of this duty is to do no injury. Among states as well as among men,

Following the charges of Chief Justice Jay and Judge Wilson, the Grand Jury duly indicted Henfield on 27 July 1793.¹⁰⁴ But, in the ensuing trial, the jury eventually returned a verdict of ‘not guilty,’ after three rounds of inconclusive deliberations.¹⁰⁵ The Defence, led by Mr. Duponceau, had essentially argued that the indictment did not reveal a crime known to law as such; that the crime could not be created merely by the executive fiat of the President; and that even if the Proclamation had truly created a crime, such criminalisation had occurred after the conduct for which Henfield was indicted.¹⁰⁶

Notwithstanding his success in defending Gideon Henfield’s cause, Duponceau was – in keeping with the general understanding of the era – clear about the binding nature of international law on nations as a general proposition.¹⁰⁷

justice is a sacred law. This sacred law prohibits one state from exciting disturbances in another, from depriving it of its natural advantages, from calumniating its reputation, from seducing its citizens, from debauching the attachment of its allies, from fomenting or encouraging the hatred of its enemies. *Vatt.* 127.

But nations are not only prohibited from doing evil, they are also commanded to do good to one another. On states as well as individuals the duties of humanity are strictly incumbent; what each is obliged to perform for others, from others it is entitled to receive. Hence the advantage as well as the duty of humanity.

It may be uncommon, but it is unquestionably just to say, that nations ought to love one another. From the pure source of benevolence the offices of humanity ought to flow.

By a nation these enlarged and elevated virtues should be cultivated with peculiar assiduity and ardour; of an individual, however generous his disposition may be, the sphere of exertion is frequently narrow; but of a nation this sphere is comparatively boundless. By exhibiting a glorious example in her constitution, in her laws, and in the administration of her constitution and laws, she may diffuse instruction, she may diffuse reformation, she may diffuse happiness over the whole terrestrial globe.

These maxims of national law, though the sacred precepts of nature, and of nature’s God, have been too often unknown and unacknowledged by nations. Even where they have been known and acknowledged, their calm still voice has been drowned by the clamours of ambition and by the thunder of war.

Is it then unnecessary or improper here to say, peace should be deemed the basis of the happiness of nations, “peace on earth!” This is a patriotic as well as an angelic wish.

But with war and rumours of war our ears in this imperfect state of things are still assailed.”).

¹⁰⁴ *Id.* at 66.

¹⁰⁵ *Id.* at 88.

¹⁰⁶ *Id.* at 83.

¹⁰⁷ See Jordan J. Paust, *In Their Own Words: Affirmation of the Founders, Framers, and Early Judiciary concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS L. REV. 205, 212 (2008). (“The law of nations ... may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect

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A leading figure amongst the Founders of the American republic, James Madison, too, was not hostile to international law. He was particularly very alive to its weaknesses¹⁰⁸ and had been anxious to the strengthen respect for it in the United States. He accepted that ‘independent nations [are] subject to no law, but the law of nations.’¹⁰⁹ Yet, the advantages he saw in international law notwithstanding its legendary weaknesses, were a key reason he saw for seeking a strong federation under a constitution rather than to continue under Articles of Confederation. For him, one of the key deficiencies of confederation involved the violations of the law of nations and of treaties. He expressed the problem in the following words:

From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace – the treaty with France – the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.¹¹⁰

During the proceedings of the Federal Convention, Madison made a point of placing his alarm on record – noting that a ‘rupture with other powers is among the

at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio rigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects, this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.”).

¹⁰⁸ See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1 343 (Max Farrand, ed. 1911) (In this connection may be noted his rhetorical question during the Federal Convention: "What is the situation of the minor sovereigns in the great society of independent nations, in which the more powerful are under no control but the nominal authority of the law of Nations?").

¹⁰⁹ *Id.* at 449.

¹¹⁰ James Madison, *Deficiencies of the Constitution* (1962), https://press-pubs.uchicago.edu/founders/print_documents/v1ch5s16.html (last visited Feb. 5, 2021).

greatest of national calamities.’¹¹¹ The cause of Madison’s anxiety was well known. As the statesmen of the newly declared independent republic were anxiously pursuing recognition of their new nation from other countries, there were in many states of the Union ‘sundry instances’ of violations of rights that international law had recognised for other nations¹¹² – with the Continental Congress proving powerless to provide redress under the Articles of Confederation. In those days, such violations afforded a just cause for war, quite apart from hampering the project of international recognition of the newly independent United States¹¹³ – a matter of concern for the Founders anxious to ‘prevent[] the fulfilment of the prophecies of the American downfall.’¹¹⁴

Against such anxieties, when Edmund Randolph opened the deliberations at the Federal Convention, on Tuesday 29 May 1787, one of the principal deficiencies he impugned against the Confederation dispensation was its inability to address ‘infractions of treaties or of the law of nations.’¹¹⁵ In a similar vein, John Jay, in urging the people of New York to ratify the new draft constitution wrote about the need to respect international law in the relations with other nations, and he wrote as follows: ‘It is of high importance to the peace of America that she *observe the laws of nations* towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.’¹¹⁶ Just as Randolph did, Jay also considered it important to have a strong federal government which would be in a position to ‘prevent or punish’ American violations of international law.¹¹⁷

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It was their wish for respect for international law within the United States that led the Founders to enshrine in the Constitution not only the federal legislative

¹¹¹ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1, *supra* note 108, at 247 (As he put it: “The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities.”).

¹¹² *Id.*

¹¹³ See Clark and Bellia Jr, *supra* note 86, at 758-759.

¹¹⁴ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1, *supra* note 108, at 29.

¹¹⁵ *Id.*

¹¹⁶ THE FEDERALIST NO. 3 (John Jay).

¹¹⁷ *Id.*

power to define and punish ‘Offences against the Law of Nations,’¹¹⁸ but also to underscore that the supreme law of the land comprises treaties as well.¹¹⁹ Similarly consonant with the wish to provide ready recourse for the violation of the law of nations, the early Congress adopted what is now known as the Alien Tort Claims Act, as part of the federal Judiciary Act of 1789: providing that ‘the district courts ... shall ... have cognizance, concurrent with the courts of the several States, of the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.’¹²⁰

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As for Hamilton, it is truly difficult to sustain the claim that he would have considered a court of law – like the ICC – as a worst form of nightmares. Quite the contrary, he must have been responding to that fear in his robust insistence for judicial independence, as a cardinal American constitutional value. Notably, Hamilton had quite correctly portrayed the judiciary as the least dangerous of all the branches of the Government. As he put it in the Federalist Paper No 78: ‘[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.’ This is the reality of the ICC even in relation to States that have promised unflinching support for the Court. Nothing thus justifies the extremist nature of the manner of exactions that have been threatened against the Court.

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But, beyond the obstacle that Hamilton’s thesis of the judiciary’s weakness poses to the theory of the ICC as a nightmare to US Founders, we may also examine the specific reality of the ostensible prop of the nightmare claim. It was that the ICC Chief Prosecutor had requested judicial authorisation to investigate the Afghanistan situation for purposes of possible prosecution at the ICC. As Mr. Bolton put it, ‘the ICC Prosecutor requested authorization to investigate alleged war crimes committed by US service members and intelligence professionals during the war in Afghanistan’ Mr. Bolton claimed that such an investigation amounted to a dire threat to US national security. This is so, he claimed, because the investigation was part of what he feared to be an ‘objective [that] was not limited to targeting

¹¹⁸ U.S. CONST. art. I § 8, cl. 10.

¹¹⁹ *Id.* art. 6, cl. 2.

¹²⁰ Judiciary Act of 1789; see Anthony J. Bellia Jr and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. OF CHICAGO L. REV. 445, 448 (2011).

individual US service members, but rather America's senior political leadership, and its relentless determination to keep our country secure.' 'Any day now, the ICC may announce the start of a formal investigation against these American patriots, who voluntarily went into harm's way to protect our nation, our homes, and our families in the wake of the 9/11 attacks.'

Premised on his view that the ICC is 'America's worst nightmare,' Mr. Bolton thus considered it fully justifiable to threaten the Court, its staff and officials (including the judges) with consequences that should be unprintable in any proper book on the rule of law.

The political calculation is evidently to the effect that the surest way to pull at the heartstrings of American public sentiment – even across the domestic political divide – was to characterise the ICC as 'America's worst nightmare' borne out by a plot to 'target' US soldiers who had put their lives on the line, in defence of their country. Leaving them to be prosecuted and jailed by foreign courts is to discourage American patriots from similarly stepping forward to defend their countries in wars fought overseas.

Soon after the National Security Adviser announced the policy and the threats made to back it up, the US State Department publicly endorsed the 'policy' at the highest level. As a demonstration that the threats were meant, the Chief Prosecutor of the ICC was stripped of her standing visa status to the US. Subsequently, a panel of first instance ICC Judges denied the Prosecutor's request to authorise the Afghanistan investigation. Afghan victims and many observers protested the decision – and the Secretary of State celebrated it – as a direct consequence of the threat that was first made in September 2018.

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Subsequently, the Appeals Chamber of the ICC overturned the earlier decision at first instance, and authorised the Prosecutor to proceed with her Afghanistan investigation. Undoubtedly, those given to a view of life from the bellicose perspective would, of course, see the appellate judgment as a 'provocative' act intended to defy the most powerful nation on earth. It is the wrong approach. It is important to stress that proper judges neither defy nor mollify. The oath of judicial office binds them to discharge their functions according to their conscience guided by the law as they understand it. In doing so, judicial independence remains non-negotiable. The ICC appellate judges have done nothing more and nothing less than that.

It must be stressed at all times that Afghanistan *is* a State Party to the Rome

Statute. As such, the ICC has jurisdiction, as a court of last resort, to investigate and prosecute violations *in* Afghanistan which may amount to crimes within the Rome Statute – to the extent that such investigation or prosecution has not been done otherwise at the national level.

In this connection, it bears keeping in mind at all times that for more than 18 years, Afghani civilians have endured an armed conflict that no one would wish for their own country. During that period, the casualty counts (by some estimation) have put the death toll as high as 35,000¹²¹ or 43,000¹²² and 65,000 injured.¹²³ Those statistics implicate a level of suffering for Afghani civilians that has eclipsed by multiple times the situation of many a country in which the ICC has exercised jurisdiction. For instance, in Guinea, the conflict lasted one day, with a death toll of 150 - 200¹²⁴ and 1,000 wounded;¹²⁵ in Kenya, the conflict lasted two months, with less than 1,300 dead¹²⁶ and about 3,500 injured;¹²⁷ in Côte d'Ivoire, the conflict lasted four months, with 3,000 dead¹²⁸ and 150 raped;¹²⁹ in the Central African Republic, the conflict lasted two years, with 1,000 dead¹³⁰ and 1,000 injured;¹³¹ and, in the Democratic Republic of the Congo, the conflict lasted one year, with 5,000 dead¹³² and 2,000 wounded.¹³³ By all accounts, the relevant statistics in the Afghanistan situation dwarf these figures by far.

¹²¹ *Afghanistan Protection of Civilians in Armed Conflict 2019*, U.N. ASSISTANCE MISSION IN AFGHANISTAN 5 (Feb. 2019), <https://unama.unmissions.org/protection-of-civilians-reports>.

¹²² See WATSON INSTITUTE FOR INTERNATIONAL AND PUBLIC AFFAIRS, BROWN UNIVERSITY, *Costs of War: Afghan Civilians*, (Jan. 2020), <https://watson.brown.edu/costsofwar/costs/human/civilians/afghan> (last visited Feb. 5 2021).

¹²³ U.N. ASSISTANCE MISSION IN AFGHANISTAN, *supra* note 121.

¹²⁴ HUM. RTS. WATCH, *Guinea: September 28 Massacre was Premeditated, In Depth Investigation Also Documents Widespread Rape*, (Oct. 27, 2009), www.hrw.org/news/2009/10/27/guinea-september-28-massacre-was-premeditated.

¹²⁵ *Id.*

¹²⁶ Pre-Trial Chamber II, *Situation in the Republic of Kenya, 'Prosecutor's Request for Authorisation of an Investigation Pursuant to Article 15'*, 26 November 2009, ICC-01/09-3.

¹²⁷ *Id.*

¹²⁸ HUM. RTS. WATCH, *They Killed Them Like It Was Nothing: The Need for Justice for Côte d'Ivoire's Post Election Crisis*, (Oct. 5, 2011), www.hrw.org/report/2011/10/05/they-killed-them-it-was-nothing/need-justice-cote-divoires-post-election-crimes.

¹²⁹ *Id.*

¹³⁰ The Office of the Prosecutor, *Situation in the Central African Republic II, Article 53(1) Report*, 24 September 2014.

¹³¹ *Id.*

¹³² Dep't of State, *Country Reports on Human Rights Practices for 2005* (2006).

¹³³ United Nations Office for the Coordination of Humanitarian Affairs, *Humanitarian Situation in DRC Monthly Update May 2004*, (31 May 2004), <https://reliefweb.int/report/democratic-republic-congo/humanitarian-situation-drc-monthly-update-may-2004>.

As the vast majority of victims of the situation in Afghanistan are innocent Afghani civilians, their plight must then be the only compass for humanity's shared sense of justice in relation to that country. The needles and arrows of that compass must point to the following cardinal questions. What has been done all along to bring justice to innocent Afghani victims? How many more years must they wait for justice? How many more of them must die or suffer serious bodily harm, before questions of justice are asked in their behalf? Are all those who have claimed the privilege of opinion or position on this much vexed Afghanistan matter truly free to ignore these questions of justice? Those are the key questions. On no reasonable view could the controlling question be about who must enjoy immunity from such questions of justice, as a matter of their own prerogative or privilege, even before investigations have been undertaken to see who might be the real suspects of the violations in question.

From all indications, the violations that Afghani civilians have endured include suicide bombings, detonation of improvised explosive devices (IEDs), violations perpetrated against women for reasons of their sex, beheadings and sundry manner of terrorism. Those remain the central focus of the contemplated investigations. It must be considered that the Prosecutor's interest in conducting these investigations might not have arisen, had there been appreciable, credible efforts made to investigate and prosecute these violations at a forum other than at the ICC. That being the case, she must be commended – not condemned – for stepping up, in the last resort, to seek to investigate these violations.

Once more, it must be stressed that even in cases of grants of exclusive jurisdiction in status of forces agreements, such as the Afghanistan-US bilateral security agreement, the objective of that exclusive jurisdiction is to permit the authority concerned to *administer justice* in accordance with its own criminal justice system. The objective is never to enable the shielding of errant individuals from the dictates of justice, thus denying access to justice to victims of violation.

V. DOES THE ICC USURP NATIONAL SOVEREIGNTY?

A recurring theme in the Federalist Society speech is that the ICC threatens national sovereignty, when it purports to exercise jurisdiction. In responding to that concern, it helps to recall what President Clinton said in his statement of 31 December 2000, on the occasion of US signing of the Rome Statute. As he put it:

The treaty requires that the ICC not supersede or interfere with functioning national judicial systems; that is, the ICC prosecutor is authorised to take action against a suspect *only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national.* [Emphasis added.]

President Clinton was stating the primary conditionality for the ICC's exercise of jurisdiction. And he correctly observed that: 'The US delegation to the Rome Conference worked hard to achieve these limitations, which we believe are essential to the international credibility and success of the ICC.'

That limitation remains as valid for the Court in any case concerning US nationals, as it is for the national of any other State (party or not to the Rome Statute). The primary obligation and right to do justice remains that of the State on whose territory the crime was committed or the State whose national may be suspected of committing the crime. The right of first option to do justice belongs to the concerned State. The ICC's jurisdiction engages only when that State does not take up that option – due to unwillingness or inability. The ICC does not usurp national sovereignty. It is only a court of last resort. As such, the ICC only serves to underwrite the obligation of nations to do justice; in order that justice does not become an abandoned orphan in the province of national sovereignty.

VI. ARE THE US CITIZENS IMMUNE FROM THE JURISDICTIONS OF NON-US COURTS?

Afghanistan is a State Party to the Rome Statute. And the Afghanistan investigation concerns events occurring within Afghanistan or other States Parties to the Rome Statute. That investigation will not take place within the territory of the United States, without its consent. Yet, Mr. Bolton suggests that Americans may not be investigated or prosecuted for crimes they may have committed 'within' the territory of a foreign country. That proposition is stated as follows: 'Thus, American soldiers, politicians, civil servants, private citizens, and even all of you sitting in the room today, are purportedly subject to the Court's prosecution should a party to the Rome Statute or the Chief Prosecutor suspect you of committing a crime within a state or territory that has joined the treaty.' Not only is that complaint wholly inconsistent with common sense. It is also inconsistent with the notion of jurisdiction – articulated even by the US Supreme Court – as a principle of international law.

The suggestion is also wholly at odds with the territoriality principle of criminal

jurisdiction. According to that principle, every State has jurisdiction to administer justice within its own territory.¹³⁴ At the US Supreme Court, Chief Justice Marshall stated that rule of jurisdiction in the following way, in the *The Schooner Exchange* case:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is *necessarily exclusive and absolute*. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.¹³⁵

In the earlier case of *Henfield*, Chief Justice Jay had expressed the same principle of jurisdiction in the following words:

The respect which every nation owes to itself imposes a duty on its government to cause all its laws to be respected and obeyed, and that *not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories*. There is no principle better established than that all strangers admitted into a country, are, during their residence, subject to the laws of it; and if they violate the laws they are to be punished according to the laws; the design of pains and penalties being to render the laws respected and to maintain order and safety. Hence, it follows that the subjects of belligerent powers are bound, while in this country, to respect the neutrality of it, and are punishable in common with our own citizens for violations of it, within the limits and jurisdiction of the United States. It is to be remembered, that every nation is, and ought to be, *perfectly and absolutely* sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction, whether attempted by a foreign prince, or by his subjects, with or without his order.¹³⁶

The jurisdiction of the ICC derives from such ‘absolute’ and ‘exclusive’ jurisdictional right of a State Party to the Rome Statute to do justice within its own

¹³⁴ *SS Lotus* (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, 18-19 (Sept. 7) (According to the *SS Lotus* case, every State enjoys the discretion in international law to its exercise criminal jurisdiction within its territory).

¹³⁵ *The Exchange v. McFaddon*, 11 U.S. 116, 136 (1812) (emphasis added).

¹³⁶ *Henfield's Case*, at 55-56 (emphasis added).

territory. By acceding to the Rome Statute in its own terms, all States Parties have, to that extent, devolved their jurisdiction to the ICC for crimes that their citizens and foreigners present in their territories commit. It is to be stressed particularly that the famous object of the complementarity principle which makes the ICC a court of last resort holds especial value even in those circumstances where a foreigner commits within the territory of a State Party a crime proscribed in the Rome Statute. If the territorial State or the State of nationality of the suspect is unwilling or unable to investigate the crime, the jurisdiction of the ICC engages – as a Court of last resort. Membership of a State to the Rome Statute imports for the country concerned the complementary regime of the Rome Statute as an applicable regime of jurisdiction within that territory. That being the case, even Americans within that territory are bound by that regime of jurisdiction. The United States Supreme Court said so in terms in *Neely v Henkel*, subject to any applicable treaty regime between that country and the United States. In *Neely*, the US Supreme Court took care to note that the appellant was a US national. That notwithstanding, the Court observed as follows:

But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people unless a different mode be provided for by treaty stipulations between that country and the United States.¹³⁷

It would of course be proper in international law to take into account the incidence of any other dissonant treaty (bilateral or multilateral) that may impact upon the operation of the Rome Statute regime within a particular State. To be noted in this regard is article 13(1) of the Afghanistan-US Bilateral Security Agreement, which confers upon the United States exclusive jurisdiction over any crime that a US soldier is accused of committing in Afghanistan.¹³⁸ But, the incidence of competing

¹³⁷ *Neely v. Henkel*, 180 U.S. 109, 123 (1901).

¹³⁸ Security and Defense Cooperation Agreement Between The Islamic Republic of Afghanistan and The United States of America, Afg.-U.S., May 2, 2012, <http://staging.afghanembassy.us/contents/2016/04/documents/Bilateral-Security-Agreement.pdf> (In the relevant regard, Article 31 of the Afghanistan-US Bilateral Security Agreement provides as

treaties is a matter that will be resolved according to applicable rules of international law of treaties – especially taking into account the norms of international law reflected in article 30 of the Vienna Convention on the Law of Treaties.¹³⁹

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At any rate, the suggestion that it is improper to investigate or prosecute an

follows:

5. Afghanistan, while retaining its sovereignty, recognizes the particular importance of disciplinary control, including judicial and non-judicial measures, by United States forces authorities over members of the force and of the civilian component. Afghanistan therefore agrees that the United States shall have the exclusive right to exercise jurisdiction over such persons in respect of any criminal or civil offenses committed in the territory of Afghanistan. Afghanistan authorizes the United States to hold trial in such cases, or take other disciplinary action, as appropriate, in the territory of Afghanistan.
4. The United States recognizes the critical role that Afghan law enforcement officials play in the enforcement of Afghan law and order and the protection of the Afghan people. Relevant Afghan authorities shall immediately notify United States forces authorities if they suspect a member of the force or of the civilian component is engaged in the commission of a crime so that United States forces authorities can take immediate action. Members of the force and of the civilian component shall not be arrested or detained by Afghan authorities. Members of the force and of the civilian component arrested or detained by Afghan authorities for any reason, including by Afghan law enforcement authorities, shall be immediately handed over to United States forces authorities.
5. Afghanistan and the United States agree that members of the force and of the civilian component 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 United States.).
¹³⁹ Vienna Convention on the Law of Treaties art.30, May 23, 1969, 1155 U.N.T.S. 331 (Article 30 of the Vienna Convention on the Law of Treaties deals with *application of successive treaties relating to the same subject matter*. It provides as follows:
 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
 4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty (emphasis added)).

American citizen for a crime they may be suspected of committing in the territory of a foreign State is a proposition entirely inconsistent with common sense. For, it must mean that when '[foreign] soldiers, politicians, civil servants, private citizens, and even [persons sitting in a room in a foreign country]' are '[suspected] of committing a crime within [the United States]' it would be improper for the United States to propose to investigate or prosecute the suspected offence. Even Mr Bolton himself will not accept such an idea. As noted earlier, such assumptions of impunity were precisely amongst the reasons that the Founders gave in their Declaration of Independence from King George III.¹⁴⁰

It cannot then be correct to insist upon what may effectively amount to the same impunity, merely because the person suspected of committing crimes in the territory of a foreign state is an American soldier, official or citizen.

It is entirely misleading to inculcate that mind-set in American citizens. On the website of the US State Department, the following correct advice is sensibly given to Americans living or travelling abroad (as the first among 'Tips to Avoid Arrest Overseas'): 'Understand that you are subject to the local laws and regulations while visiting or living in the country – follow them.'¹⁴¹ And the US State Department provides information on what they can do and cannot do. 'We *can* ... Provide a list of local attorneys who speak English' and '[p]rovide a general overview of the local criminal justice process.' But, 'we *cannot* ... Get US citizens out of jail.' That advice is borne out by the reality that United States nationals are no more above the law in foreign countries as are foreign nationals above the law in the United States. There is indeed a long list of US citizens who have faced criminal proceedings in foreign countries.¹⁴²

¹⁴⁰ THE DECLARATION OF INDEPENDENCE, *supra* note 35, cl. 18-19.

¹⁴¹ See U.S. State Department, *Arrest or Detention of a US Citizen Abroad*,

<https://travel.state.gov/content/travel/en/international-travel/emergencies/arrest-detention.html>.

¹⁴² The more famous recent incidents including the following: Wikipedia, Amanda Knox, https://en.wikipedia.org/wiki/Amanda_Knox (last visited Feb. 6, 2021) (In 2007, Amanda Knox was charged with the murder of a fellow exchange student in Italy. She was convicted of murder and sentenced to 26 years in 2009, though she was acquitted on appeal on 3 October 2011. She spent 4 years in prison. On 26 March 2013 Italy's highest court set aside the acquittals and ordered a retrial. Knox was found guilty in the retrial on 30 January 2014, but was then definitively acquitted of murder on 27 March 2015); Wikipedia, Michael P. Fay, https://en.wikipedia.org/wiki/Michael_P._Fay (last visited Feb. 6, 2021) (On 3 March 1994, Michael Fay, 18, from Ohio was sentenced to four months in jail, 3,500 Singapore dollars, and six strokes of the cane. President Bill Clinton and other US senators requested clemency from the caning. Although clemency was not granted, the sentence was commuted from six strokes to four);

Indeed, to the surprise of those who assume that the US Constitution forbids extradition of US nationals to stand trial for offences that they allegedly committed on US territory, it is noted that precisely such an extradition occurred in *Austin v Healey*, a US national was extradited to the United Kingdom to stand trial for conspiring from New York to commit a murder in the UK.¹⁴³

Daniel Cassady, *Trial begins for US tourists accused of fatally stabbing cop in Rome*, N.Y. POST (Feb. 26, 2020 5:02 p.m.), <https://nypost.com/2020/02/26/trial-begins-for-us-tourists-accused-of-fatally-stabbing-cop-in-rome/> (last visited Feb. 6, 2021) (At the time of writing, Finnegan Lee Elder, 19, and Gabriel Christian Natale-Hjorth, 18, from San Francisco, are currently detained in Italy and awaiting trial for stabbing an Italian police officer on 25 July 2019); *American baseballer Timothy Cusick avoids jail over drug-induced carjacking in Adelaide's CBD*, PRESS FROM (Sept. 20, 2019), <https://pressfrom.info/au/news/australia/-149024-american-baseballer-timothy-cusick-avoids-jail-over-drug-induced-carjacking-in-adelaides-cbd.html> (last visited Feb. 6, 2021) (On 20 March 2019, Timothy William Cusick, an American baseball player, forcibly stole a car and then crashed it into a tree while high on LSD in Adelaide, Australia. He pleaded guilty. In September 2019 he was ordered to pay the carjacking victim \$6,551.25 in compensation and received a three-year-and-one-month suspended sentence); *California man sentenced to more than 9 years in prison in Indonesia*, L.A. TIMES (JAN. 13, 2020), <https://www.latimes.com/world-nation/story/2020-01-13/indonesia-sentences-american-man-to-9-1-3-years-for-drugs> (last visited Feb. 6, 2021) (On 13 January 2020, Ian Andrew Hernandez of California was sentenced by an Indonesian Court to nine years and four months in prison and fined 1 billion rupiah (\$72,885) for selling cocaine and marijuana in Bali); Christina Anderson & Alex Marshall, *ASAP Rocky Guilty of Assault in Sweden but Won't Face Prison Time*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/arts/music/asap-rocky-sweden-guilty.html> (last visited Feb. 6, 2021) (On 3 July 2019, American rapper A\$AP Rocky was arrested in Sweden for assault and detained for a little over a month. He was found guilty in August 2019, was ordered to pay a fine of 12,500 Swedish kronor (\$1,300) and a received a conditional sentence (i.e. as long as he committed no further crimes in the next two years, he would face no prison)); Anna Fifield et al, *North Korea sentences U-Va. student to 15 years of hard labor in prison*, WASH. POST (MAR. 16, 2016), https://www.washingtonpost.com/world/north-korea-sentences-u-va-student-to-15-years-of-hard-labor-in-prison/2016/03/16/87fc5538-eb8e-11e5-a6f3-21ccdbc5f74e_story.html (last visited Feb. 6, 2021) (In March 2016, Otto Warmbier was tried and convicted by North Korea for 'subversion' for attempting to steal a propaganda poster from a staff-only area of a hotel. He was sentenced to 15 years imprisonment, though he died shortly afterwards); *Two US tourists fined and awaiting deportation for graffiti*, THE THAIGER (JUNE 18, 2019), <https://thethaiger.com/hot-news/crime/two-us-tourists-fined-and-awaiting-deportation-for-graffiti> (last visited Feb. 6, 2021) (In June 2019, two American Nationals Sell Ternberg 28, and Nicole Gollen 24, were arrested and faced legal action for spray-painting graffiti. They were fined 5,000 baht and paid 10,000 baht in damages to the Thai victims. They could have faced three years in prison, but apologised and paid compensation. They were held in custody until they were deported); Carla Boonkong & Pranee O' Connor, *Patience running out for American in Chiang Mai who vandalised 3 cars but has no money to pay for damages*, THAI EXAMINER (Aug. 13, 2019), <https://www.thaiexaminer.com/thai-news-foreigners/2019/08/13/american-jesse-edward-lee-chiang-mai-cars-criminal-damage-thai-police/> (last visited Feb. 6, 2021) (On 31 July 2019, American Jesse Edward Lee was arrested for vandalizing cars, and was subsequently held in custody in Chiang Mai, Thailand. Under Thai legal procedure he could pay compensation to the victims, but if he does not, he may go to prison).

¹⁴³ *Austin v Healey*, 5 F.3d 598 (2d Cir. 1993).

Exercise of Jurisdiction under the US Status of Forces Agreements (SOFAs)
Even under US Status of Forces Agreements (SOFAs), local authorities may prosecute American soldiers who commit crimes outside US military bases. In a helpful Congressional Research Report on SOFAs, Chuck Mason correctly informed as follows:

SOFAs may include many provisions, but the most common issue addressed is which country may exercise criminal jurisdiction over U.S. personnel. *The United States has agreements where it maintains exclusive jurisdiction over its personnel, but more often the agreement calls for shared jurisdiction with the receiving country.*¹⁴⁴

He explained that relative to the United States, ‘exclusive jurisdiction’ is when the United States retains the sole authority to exercise all criminal and disciplinary jurisdiction for all violations of the law alleged against a US personnel while stationed overseas – even when the alleged violation is of the laws of receiving State.¹⁴⁵ An example of a SOFA of that kind is the Agreement on Military Exchanges and Visits between the Government of the United States of America and the Government of Mongolia (1996), which contains the following provision:

United States military authorities shall have the right to exercise within Mongolia all criminal and disciplinary jurisdiction over United States [p]ersonnel conferred on them by the military laws of the United States. *Any criminal offenses against the laws of Mongolia committed by a member of the U.S. forces shall be referred to appropriate United States authorities for investigation and disposition.*¹⁴⁶

By contrast, ‘shared jurisdiction’ – being the more usual arrangement – ‘occurs when each party to the agreement retains exclusive jurisdiction over certain offenses, but also allows the United States to request that the host country waive jurisdiction in favor of the United States exercising criminal and disciplinary jurisdiction.’¹⁴⁷ More particularly:

Under the shared jurisdiction framework, each of the respective countries is

¹⁴⁴ R C Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* (2012) (emphasis added), <https://fas.org/sgp/crs/natsec/RL34531.pdf>.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* at 4.

¹⁴⁷ *Id.* at 3.

provided exclusive jurisdiction in specific circumstances, generally when an offense is only punishable by one of the country's laws. In that case, the country whose law has been offended has exclusive jurisdiction over the offender. When the offense violates the laws of both countries, concurrent jurisdiction is present and additional qualifications are used to determine which country will be allowed to assert jurisdiction over the offender.¹⁴⁸

A classic shared jurisdiction provision is found in the NATO-SOFA.¹⁴⁹ It

¹⁴⁸ *Id.* at 5.

¹⁴⁹ Partnership for Peace Status of Force Agreement, art. VII, Jun. 19, 1951 (emphasis added), https://www.nato.int/cps/en/natohq/official_texts_17265.htm (Article VII of the NATO SOFA provides as follows:

1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

2.—(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) *The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over*

members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include:

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases *where the right to exercise jurisdiction is concurrent*, the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offenses solely against the property or security of that State, or offenses solely against the

person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offenses arising out of any act or omission in the performance of official duty.

(b) *In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.*

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the

potentially covers the 29 NATO members.¹⁵⁰ Beyond NATO, the United States entered into SOFAs with other countries as well, in which the primary jurisdiction to do justice rests with the receiving State in certain situations – notably with Australia,¹⁵¹ Japan,¹⁵² Republic of Korea and Iraq.¹⁵³ Amongst them is the US-Iraq SOFA. In that regard, article 12 provides as follows:

- (1) Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status.
- (2) Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.¹⁵⁴

While the United States will keep in custody any American personnel over whom Iraq is entitled to jurisdiction pursuant to the foregoing provisions, it was agreed

primary
right shall give sympathetic consideration to a request from the authorities of the other State for a
waiver of its right in cases where that other State considers such waiver to be of particular
importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

¹⁵⁰ In 1949, there were 12 founding members of the Alliance: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States. The other member countries are: Greece and Turkey (1952), Germany (1955), Spain (1982), the Czech Republic, Hungary and Poland (1999), Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia (2004), Albania and Croatia (2009), and Montenegro (2017).

¹⁵¹ See Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America concerning the Status of United States Forces in Australia, and Protocol, Astl.-U.S., art. 8, 1963.

¹⁵² See Treaty of Mutual Cooperation and Security between Japan and the United States of America, regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Japan-U.S., art. XVII, 1960, <https://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>.

¹⁵³ See Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, S. Kor.-U.S., art. XXII, 1966, https://www.usfk.mil/Portals/105/Documents/SOFA/A01_SOFA.Art.I-XXXI.pdf. In 2001, the SOFA was amended to simplify the more complicated custodial arrangement provided for in art XXII(5)(c) of the 1966 SOFA. The amended regime now simply provides as follows: ‘The custody of an accused member of the United States armed forces or civilian component, or of a dependent, over whom the Republic of Korea is to exercise jurisdiction shall remain with the military authorities of the United States until he is indicted by the Republic of Korea.’ See art I of the 2001 amendment.

¹⁵⁴ Agreement between the United States of America and the Republic of Iraq on the withdrawal of United States forces from Iraq and the organization of their activities during their temporary presence in Iraq, Iraq-U.S., art. 12(1)-(2), 2008, <https://www.hsdl.org/?view&did=233424>.

that ‘United States Forces authorities shall make such accused persons available to the Iraqi authorities for purposes of investigation and trial.’¹⁵⁵

But it is important to stress that notwithstanding the question whether the agreed upon jurisdictional regime is exclusive or shared, the reason that the United States would claim jurisdiction would not be to shield American military personnel from criminal justice, when they are accused of engaging in conducts that Americans recognised as a crime even in their own country – and not merely violations of misogynistic norms. There will assuredly be circumstances in which the United States should justifiably withhold ‘sympathetic consideration’ to the idea of its nationals being prosecuted in a foreign judicial system – notably when the foreign judicial system is appreciably deficient in generally accepted fair trial standards. In those circumstances, the United States may be justified in claiming jurisdiction;¹⁵⁶ which it must then exercise in order to ensure that justice is done properly, rather than to ensure impunity. As the Supreme Court once relevantly put it in a case concerning the propriety of subjecting to court-martial overseas the civilians who accompany soldiers serving overseas:

[S]ince, under the principles of international law, each nation has jurisdiction of the offenses committed within its own territory, *The Schooner Exchange v McFaddon* ..., the essential choice involved here is between an American and a foreign trial. Foreign nations have relinquished jurisdiction to American military authorities only pursuant to carefully drawn agreements which presuppose prompt trial by existent authority. Absent the effective exercise of jurisdiction thus obtained, there is no reason to suppose that the nations involved would not exercise their sovereign right to try and punish for offenses committed within their borders. Under these circumstances, Congress may well have determined that trial before an American court-martial in which the fundamentals of due process are assured was preferable to leaving American servicemen and their dependents throughout the world subject to widely varying standards of justice unfamiliar to our people.¹⁵⁷

The ‘essential choice’ being ‘between an American and a foreign trial’ firmly precludes impunity. Impunity ‘contravenes the American sense of justice’, which

¹⁵⁵*Id.* art. 12(5).

¹⁵⁶ *But see Neely*, 180 U.S. at 123 (where the Supreme Court held that American citizens charged with violations abroad may have to accept the local jurisdiction as they are).

¹⁵⁷ *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956) (emphasis added).

does not permit serious ‘offenders to go “scot free”’.¹⁵⁸ That American sense of justice, against impunity, was so unequivocally reflected in the Declaration of Independence; in the complaint that King George had garrisoned his soldiers in the colonies¹⁵⁹ and had protected them from punishment for committing murders on the inhabitants.¹⁶⁰ Over one and a half centuries later, Justice Robert H Jackson memorably recaptured that rejection of impunity. In a report he made to President Truman on 7 June 1945, he rejected the idea of immunity even for Heads of State. As he put it: ‘We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still “under God and the Law”’.¹⁶¹ He returned to that theme in his opening statement at the Nuremberg trial five months later: ‘The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.’¹⁶²

It is against that background that one must appreciate the instances when the United States military hierarchy appeared ready to cooperate with local authorities for purposes of investigation and prosecution of US soldiers accused of crimes in the receiving States. A notorious example of such occurrences was when a US soldier raped and murdered a Japanese woman in Okinawa in 2016. The US Defence Secretary, Ashton Carter, told his Japanese counterpart ‘that the United States hopes the perpetrator of this crime will be held accountable *under the Japanese legal system*. Secretary Carter further pledged that the Department of Defense is determined to cooperate fully with the Government of Japan and local authorities regarding the investigation so that justice can be carried out.’¹⁶³

¹⁵⁸ See Robert W. Wild, *Criminal Jurisdiction Over United States Civilians Accompanying the Armed Forces Abroad*, 54 CORNELL L. REV. 459, 459-460 (1969).

¹⁵⁹ THE DECLARATION OF INDEPENDENCE, *supra* note 35, cl. 18.

¹⁶⁰ *Id.* cl. 19.

¹⁶¹ ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON at 47 (1949).

¹⁶² Robert H. Jackson, Chief Couns. for the U.S., Opening Statement Before the International Military Tribunal (Nov. 21, 1945) in *Trial of the Major War Criminals before the Int’l Mil. Tribunal*, 1947, at 98-102.

¹⁶³ See U.S. Dep’t. of Def., *Readout of Secretary Carter’s call with Japanese Minister of Defense Gen Nakatani*, (May 21, 2016) (emphasis added), <https://www.defense.gov/Newsroom/Releases/Release/Article/778250/readout-of-secretary-carters-call-with-japanese-minister-of-defense-gen-nakatani/>.

The predisposition of the US military authorities to hand over US soldiers is fully consistent with a relevant line of US case law. A leading case in this connection is *Wilson v Girard*,¹⁶⁴ in which a US soldier stationed in Japan failed in his bid to persuade the US Supreme Court to restrain the US Government from handing him over to Japanese authorities for prosecution on a charge of unlawfully killing a Japanese woman. The incident occurred during a US military small unit training exercise in the shooting range at Camp Weir, Japan. In the course of the training, Specialist 3rd Class William Girard fired a spent cartridge from the grenade launcher on his rifle, striking and killing one amongst scores of Japanese civilians who were dangerously swarming the shooting range to collect spent cartridges. US military command did not authorise its soldiers to fire empty shell cases from grenade launchers.

The shooting range was approximately eight square miles of land that the Japanese Government had made available to the US forces for part time use, with Japanese Defence Force also using it about 40% of the time. The land was also free for Japanese civilian agricultural and other uses when not in use by the soldiers of either nation. And it was habitual for local Japanese civilians to scavenge the spent brass cartridge cases from the shooting range, even in the dangerous circumstances of actual military training. Having made efforts in vain to clear out the civilians on the fateful day, the US commanding officer ordered that only blank – and not ball – ammunition might be used in the subsequent training session. In the course of the exercise, Girard and a mate were ordered to guard a machine gun and some items of personal clothing that had been left nearby. And Girard stated during the investigation that he had been ordered to chase the Japanese civilians away, though not by shooting at them. There was no evidence, other than the statement of Girard, that he was ordered to chase the Japanese away. But, in a contradictory statement, Girard's mate said the Japanese were merely collecting spent cartridges, 'so there was no need of chasing them away'.

The Japan-US SOFA of the time provided that the US had primary jurisdiction over US soldiers for conducts occurring in the course of duty. In the circumstances, the US asserted that the incident occurred in the line of duty. Japan disagreed and insisted on asserting criminal jurisdiction. Eventually the US capitulated and agreed to Japan's exercise of jurisdiction. To prevent that eventuality, Girard brought proceedings for *habeas corpus* and an order seeking to restrain the US military

¹⁶⁴ *Wilson v. Girard*, 354 U.S. 524 (1957).

command from handing him over to Japanese authorities. The US District Court for the District of Columbia denied the *habeas corpus* order, but granted the restraining order. On eventual appeal, the US Supreme Court upheld the denial of *habeas corpus* and reversed the restraining order: thus allowing the US Government to surrender Girard to the Japanese authorities for prosecution. In the critical part, the Supreme Court reasoned as follows:

A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *The Schooner Exchange v M'Faddon*, 7 Cranch 116, 11 US 136. Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant ... that "... The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty [i.e. the Japan-US SOFA] prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.¹⁶⁵

Following the precedent of *Wilson*, the US District Court for the District of Columbia denied in *Smallwood v Clifford*,¹⁶⁶ the efforts of an American soldier to prevent US military authorities from handing him over to Korean authorities for prosecution on a charge of murder of a Korean woman and arson committed outside the US military base in the Republic of Korea. It was argued on behalf of the soldier, first, that the US-Republic of Korea SOFA was not constitutionally approved in a proper manner – by the Senate – therefore the provision authorising the US authorities to hand him over to Korean authorities was invalid. It was next argued that the fair trial guarantees in the SOFA were insufficient in law and practice for purposes of the 14th Amendment due process rights of the soldier. It was argued in that regard that trial before a Korean court (at the time, being 1968) was inherently deficient in the light of the 14th Amendment due process rights. In dismissing the

¹⁶⁵ *Id.* at 529-530.

¹⁶⁶ *Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968).

first argument, the District Court reasoned as follows:

It should be stated at the outset that under the applicable principles of international law, Korea should have exclusive jurisdiction to punish offenses committed within its territory, unless it expressly or impliedly consents to surrender its jurisdiction. Thus, the Status of Forces Agreement embodied the consent of the Korean government to a diminished role in the enforcing of its territorial laws. The United States did not waive any jurisdiction over crimes committed within *its* territory. The Agreement constituted a unilateral waiver by Korea of criminal jurisdiction in certain limited cases. Where a crime falls outside the area covered by this limited waiver, primary jurisdiction is maintained by the nation within which the crime occurred. Ratification of this principle by the United States Senate is clearly unnecessary, since Senate approval could have no effect on a grant of jurisdiction by the Republic of Korea, which the United States could not rightfully claim.¹⁶⁷

The District Court also dismissed the second argument, because the argument was not substantiated in fact. Furthermore, the Court reasoned as follows:

Furthermore, the petitioner fails to point out to the satisfaction of this court by what authority the United States may dictate to a sovereign nation the procedure to be followed by that nation in the exercise of its primary jurisdiction over alleged violators of its criminal laws. Under international law, the United States is without authority to infringe upon that jurisdiction. The Supreme Court in *Girard* was surely aware that the due process safeguards of the Japanese courts differed from those of the courts of the United States, yet the Court did not look upon this as a fatal defect in determining that Japan had the power to try Girard.¹⁶⁸

In addition to the foregoing dictum, it may be noted that American judges have generally not viewed with much sympathy American citizens' objections to trials in foreign countries on grounds of different legal procedures. In dismissing such an objection in the extradition case of *United States v Howard*, Circuit Judge Selya observed that the 'United States has no monopoly on evenhanded justice.'¹⁶⁹ And, as noted earlier, in *Neely v Henkel*, the US Supreme Court was pointedly mindful that the appellant was an American citizen. Nevertheless, the Court observed as follows:

¹⁶⁷ *Id.* at 100.

¹⁶⁸ *Id.* at 101.

¹⁶⁹ *In re Extradition of Howard*, 996 F.2d 1320, 1333 (1st Cir. 1993).

But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people unless a different mode be provided for by treaty stipulations between that country and the United States.¹⁷⁰

In the light of the foregoing, it would be incorrect to suggest that American military personnel are generally immune from criminal proceedings for violations they commit in foreign countries.

VII. THE ALIEN TORTS CLAIMS ACT

The controversy surrounding the Afghanistan investigation reengages significance of the US Alien Tort Claims Act in a particular way. As already noted, the Alien Tort Claims Act was a piece of legislation that the Founders conceived in the early days of the new republic, for the purpose of ensuring that justice would be done within the United States, whenever a US citizen violated the law of nations. It is then apparent that the purpose of that piece of legislation goes a significant way to addressing the access to justice concerns of the Rome Statute; according to the doctrine of complementarity that gives States the primary right and responsibility to do justice at home. Indeed, though better known for its penal value, the interest of the Rome Statute is nevertheless unmistakable in the Alien Tort Claims Act, given that the Rome Statute also stresses the need for civil remedy – by way of reparation – against those who commit Rome Statute crimes.

The Prosecutor's investigation into Afghanistan may reveal evidence of offences against the law of nations, committed either by Afghans against their fellow citizens; or, indeed by US citizens.

Against the foregoing background, it becomes significant that the US Supreme Court has recently clarified, in *Jesner v Arab Bank plc*,¹⁷¹ that the access to justice under that statute is not available to foreigners who seek to sue non-US nationals in the US for violations of international law committed outside the US. *Jesner v*

¹⁷⁰ Neely, 180 U.S. at 123.

¹⁷¹ *Jesner v Arab Bank Plc*, 138 S. Ct. 1386 (2018).

Arab Bank tellingly involved the question whether foreign victims of terrorist activities committed outside US territory could bring a lawsuit, in the US, against a foreign bank alleged to have played a role in the financing of those terrorist activities. The Supreme Court said no. This line of jurisprudence thus leaves the ICC as the only viable jurisdiction where Afghan victims of crimes committed in their own country may receive some justice – not only in terms of punitive justice against Afghan perpetrators, but also the reparation that the Rome Statute provides for victims – should the Afghan justice system prove either unable or unwilling to bring justice to the victims of the crimes that the Prosecutor seeks to investigate.

Conversely, the intendment of the Alien Tort Claims Act will be served: to the extent that the Afghanistan investigation may reveal unlawful conduct against US personnel. Those investigations may enable access to civil justice in US courts against those personnel, as victims and their lawyers might now have access to evidence which otherwise might not be available to them. It means that there is the possibility that US courts may provide remedies for violations of the law of nations – precisely as the Founders had intended when they enacted the Alien Tort Claims Act in 1789.

VIII. SELF-DEFENCE

Perhaps, the US concern about the Afghanistan investigation would be that American soldiers might be prosecuted for prosecuting their country's right of self-defence.¹⁷² But that objection is mistaken as a matter of law, because international law fully accommodates the right of self-defence and of military necessity – two notions that the United States should take credit for as amongst their many contributions to the development of international law. The US gave international law the definition of self-defence in the *Caroline* case. The case involved a diplomatic crisis in 1837 between the United States and Great Britain, provoked by an attempted rebellion in Canada. William Lyon Mackenzie and his band of fellow Canadian rebels, supported by some American citizens, had proclaimed a 'republic' on an island in the Niagara River. They had use of the vessel *Caroline*. British soldiers launched a night-time operation against the vessel at its moorings in US territory. There was a shootout, resulting in the death of at least one American

¹⁷² See WHITE HOUSE, PROTECTING AMERICAN CONSTITUTIONALISM AND SOVEREIGNTY FROM THE INTERNATIONAL CRIMINAL COURT (September 10, 2018) <https://trumpwhitehouse.archives.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/>.

citizen. The British soldiers captured the vessel, set it ablaze and adrift down the Niagara. The British claimed self-defence. The United States rejected the claim.

In the process, Daniel Webster, United States Secretary of State, elaborated the law of self-defence in his 24 April 1841 note to Lord Ashburton (the UK representative). In a definition that has since guided understanding of international law on self-defence, Webster explained that those who claim self-defence must ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’ Even supposing that the necessity of the moment warranted the act of self-defence, it would still be necessary to show that ‘nothing unreasonable or excessive’ was done, ‘since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’ And, further, it must be shown ‘that admonition or remonstrance’ of the victims ‘was impracticable, or would have been unavailing’. If the operation was conducted at night, ‘it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty’; and that it would not have been enough to take a less drastic measure; ‘but that there was a necessity, present and inevitable ...’.¹⁷³

Beyond the *Caroline* case, international law has also derived an understanding of military necessity from the *Lieber Code* of 1863, more fully known as the *Instructions for the Government of Armies of the United States in the Field*. It was prepared by Francis Lieber, LLD, and revised by a board of officers, of which Major General E A Hitchcock was president, having been approved by the President Lincoln. In the relevant part, the document explains military necessity as follows:

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an

¹⁷³ See *Treaties and Other International Acts of the United States*, WASHINGTON: GOVERNMENT PUBLISHING OFFICE (1837), https://avalon.law.yale.edu/19th_century/br-1842d.asp.

enemy's country affords necessary for the subsistence and safety of the Army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

The foregoing explanations would surely help to guide the understanding of the Judges at the ICC. No doubt, those explanations would also guide the Prosecutor in her investigations. There is every confidence that if the Prosecutor's investigations revealed a credible defence of military necessity, no charges would be brought against any soldier concerned. If charges are brought nevertheless, but the evidence raises self-defence or military necessity, then the judges would not convict.

IX. IS THE ICC JUDICIARY A MERE RUBBER STAMP FOR A POWERFUL PROSECUTOR?

The primary orientation of the Federalist Society Speech was to portray the ICC Prosecutor as a rampant all-powerful international law and order Czar that is beyond anyone's control. As Mr Bolton put it: 'In short, the International Criminal Court unacceptably concentrates power in the hands of an unchecked executive, who is accountable to no one.' He had formed this view of the ICC very early on and never seemed to have revised it. Notably, in July 1998, he declared that the 'International Criminal Court' had been 'misnamed' as such: 'In fact, what the Rome conference has actually done is create not only a court, but also a powerful and unaccountable piece of an executive branch: the prosecutor.'¹⁷⁴ For good measure, that view was amplified to portray the Court's judiciary as cohorts – mere rubberstamps, perhaps – of that all-powerful Prosecutor. The point was put as follows in the Federalist Society Speech:

¹⁷⁴ Subcomm. on Int'l. Relations, *supra* note 23.

To make matters worse, the Court's structure is contrary to fundamental American principles, including checks and balances on authority and the separation of powers. Our Founders believed that a division of authority among three separate branches of government would provide the maximum level of protection for individual liberty.

The International Criminal Court, however, melds two of these branches together: the judicial and the executive. In the ICC structure, the executive branch—the Office of the Prosecutor—is an organ of the Court. The Framers of our Constitution considered such a melding of powers unacceptable for our own government, and we should certainly not accept it in the ICC. Other governments may choose systems which reject the separation of powers, but not the United States. ...

On this view, then, if ICC judges dared answer a legal question that the Prosecutor posed to them, they, too, must be 'punished' – if their answer displeased the US Administration.

The allegation that the ICC has an all-powerful Prosecutor that is accountable to no one aims to suggest two things at least: that there is no 'separation' between the Judges and the Prosecutors, such that the Judges would routinely endorse the Prosecutor's desires – including in cases; and, that the Prosecutor is unrestrained in her office as a general matter of ethics and professional responsibility.

As will be shown presently, those allegations are erroneous. But, before getting to them, it must likewise be said that it is an elementary error to make much of the 'ICC structure', in a complaint that impugns the establishment of the Judiciary and the Office of Prosecutor as 'organs' – and they are separate organs – within the same Rome Statute. The Judiciary and the Office of the Prosecutor are not 'blended together.' They are functionally separate.

Physically, the Judges and the Prosecutors are housed in separate locations, albeit within the same building complex. There are six towers at the ICC, designated seriatim according to the letters of the alphabet. The courtrooms are in the middle tower. The Judiciary and the Office of the Prosecutor are located on either side of the courtrooms' tower – each occupational group housed in their own separate blocks. Occupants of each block must access their own tower only by way of electronic access pass. There is no general electronic access right between the two blocks. There is nothing extraordinary about that arrangement.

Nor is there anything extraordinary with the statutory structure of the Rome Statute, which makes provisions in the same instrument, concerning the organisation of the ICC according to different organs. In that respect, all that the

Rome Statute did was create a legal ecosystem – made up of different organs whose purposes and functions are different and independent. But, precisely because those organs are different in purposes and functions, and yet must necessarily interact in their functions, as judges and lawyers do in every legal system, it was necessary to articulate – in an efficient way – the relationships and interactions between the different ‘organs’. Such is the case with the ICC Judiciary and the Office of the Prosecutor. As will become apparent shortly, such interaction has never compromised their separateness of purposes and functions between the two ‘organs’.

The structural arrangement described above is not at all peculiar to the ICC. The same structure was used at the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Sierra Leone, and the Special Tribunal for Lebanon – all of them international tribunals that the United States helped to create and where many serious Americans have served as judges, prosecutors, etc.

What is more, the idea of organizing a legal system in the same legal instrument, where the functions of judges and prosecutors are laid out is not unheard of even in the United States. Notably, the Judiciary Act of 1789 – a statute of the very first session of the US Congress more fully titled ‘An Act to establish the Judicial Courts of the United States’ – did precisely that in relation to the US federal court system. It established the offices of the Chief Justice and Associate Justices of the US Supreme Court.¹⁷⁵ It also created the Circuit and District Courts of the Federal Court, and described their jurisdictions.¹⁷⁶ What is more, the same act also established the offices of the Attorney General of the United States and those of US Attorneys – who represent the Federal Government as prosecutors in federal criminal cases. To that effect, section 35 provided as follows:

... And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States And he shall receive a compensation for his services such fees as shall be taxed therefor in the respective courts before which the ... prosecution shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall

¹⁷⁵ See First Judiciary Act, sec. 1 (1789).

¹⁷⁶ *Id.* at sec. 2 *et seq.*

be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments, touching any matter that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

What was done in 1998 in the Rome Statute by establishing the International Criminal Court, its Judiciary and its Office of the Prosecutor in the same document, was no different, then, with what the US Congress did much earlier in 1789 – in establishing in the same document ‘the Judicial Courts of the United States’, its judiciary and the offices of Attorney-General and federal prosecutors.

*

As for the substance, it is entirely incorrect to allege or suggest that the ICC judges are in thrall to the Prosecutor’s preferences and desires. It is very mistaken indeed. It may be enough to point out that the very nature of the complaint in the Afghanistan matter puts the lie to that allegation. That matter arose because the Prosecutor *needed the permission* of the judges before she could even proceed with an investigation. That is not a limitation that prosecutors endure in any common law system – certainly not in the United States. Prosecutors in the national system do not require authorization from judges before proceeding with an investigation. But, at the ICC, they require judicial authorization to proceed with an investigation that the Prosecutor initiated *proprio motu*, – i.e., in those instances in which the situation was not referred by either the United Nations Security Council¹⁷⁷ or by a State.¹⁷⁸

Beyond the limitation imposed upon the Prosecutor’s powers in *proprio motu* investigations, it is also the case that ICC Judges do not hesitate to render judgments that go against the Prosecutor. Some of those judgments involved refusal to confirm an indictment in whole or in part.¹⁷⁹ In other instances, ICC Judges have dismissed

¹⁷⁷ *Id.* at art. 13(b).

¹⁷⁸ *Id.* at art. 12-13(a).

¹⁷⁹ *See, e.g.*, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Judgement (Dec. 30, 2012); INTERNATIONAL CRIMINAL COURT, MBARUSHIMANA CASE: ICC APPEALS CHAMBER REJECTS THE PROSECUTION’S APPEAL (May 30, 2012), <https://www.icc-cpi.int/pages/item.aspx?name=PR798>, (On 16 December 2011, the majority of Pre-Trial Chamber I declined to confirm the charges. On 30 May 2012, the Prosecutor’s appeal of this decision was unanimously dismissed); Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Feb. 8, 2010), Prosecutor v. Bahar Idriss Abu Garda,

prosecutions at the close of the Prosecution case¹⁸⁰ or entered an acquittal on all or

Case No. ICC-02/05-02/09, Decision on the ‘Prosecution’s Application for Leave to Appeal the Decision on the Confirmation of Charges’ (April 23, 2010) (On 8 February 2010, Pre-Trial Chamber I unanimously declined to confirm the charges. On 23 April 2010, Pre-Trial Chamber I unanimously rejected the Prosecution’s Application for leave to appeal this decision); Prosecutor v. Saif Al-Islam Gaddafi et al., Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (Oct. 11, 2013), Prosecutor v. Saif Al-Islam Gaddafi et al., Case No. ICC-01/11-01/11 OA 6, Judgement (July 24, 2014), INTERNATIONAL CRIMINAL COURT, AL-SENSUSSI CASE: APPEALS CHAMBER CONFIRMS CASE IS INADMISSIBLE BEFORE ICC (July 24, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1034&ln=en>, (On 11 October 2013, Pre-Trial Chamber I unanimously decided that the case against Mr Al-Senussi was inadmissible before the Court as it was subject to ongoing domestic proceedings in Libya. On 24 July 2014, the Appeals Chamber unanimously confirmed this decision); Prosecutor v. William Samoei Ruto, et al., Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges (Jan. 23, 2012) (On 23 January 2012, the majority of Pre-Trial Chamber II declined to confirm the charges against Mr Kosgey); Prosecutor v. Fancis Kirimi Muthaura, et al., Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges (Jan. 23, 2012) (On 23 January 2012, the majority of Pre-Trial Chamber II declined to confirm the charges against Mr Ali. Although the charges against his co-defendants were confirmed in relation to some charges, including the charge of rape under count 5, the Chamber declined to confirm the charge of other forms of sexual violence under Count 5); Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona, Case No. ICC-01/14-01/18, Decision on the Confirmation of Charges (Dec. 11, 2019) (On 11 December 2019, Pre-Trial Chamber II unanimously confirmed some but not all of the charges against Mr Yekatom and Mr Ngaïssona).

¹⁸⁰ See, e.g., Prosecutor v. William Somoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on Defense Application for Judgement of Acquittal (April 5, 2016); INTERNATIONAL CRIMINAL COURT, RUTO AND SANG CASE: ICC TRIAL CHAMBER V(A) TERMINATES THE CASE WITHOUT PREJUDICE TO RE-PROSECUTION IN FUTURE (April 5, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1205> (On 5 April 2016, the majority of Trial Chamber V(A) ‘vacated all charges’ against Mr Ruto and Mr Sang following a ‘no case to answer’ application, made at the close of the Prosecution’s evidence); Prosecutor v. Laurent Gbagbo & Charles Blé Goudé, Case No. ICC-02/11-01/15, Reasons for Oral Decision of 15 January 2019 (July 16, 2019); INTERNATIONAL CRIMINAL COURT, ICC TRIAL CHAMBER I ACQUITS LAURENT GBAGBO AND CHARLES BLE GOUDE FROM ALL CHARGES (Jan. 15, 2019) (On 15 January 2019, the majority of Trial Chamber I acquitted Mr Gbagbo and Mr Blé Goudé from all charges of crimes against humanity following a ‘no case to answer’ application made at the close of the Prosecution case; this decision is currently under appeal), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1427>.

some of the charges at the close of trial¹⁸¹ or following an appeal of a conviction.¹⁸² In one remarkable incident, in June 2018, the Prosecution was driven to vent her frustration – unusually – in a lengthy public statement, protesting an appellate judgment that overturned the conviction in the *Bemba Case*.¹⁸³ The President of the Court felt constrained to restate the guiding principles, in the following terms:

I have taken note of the Prosecutor's statement issued 13 June 2018 in relation to the judgment of the Appeals Chamber in the Bemba Case.

In the circumstances, I find it important to recall and underscore certain fundamental principles that underpin the functioning of the Court. It will continue to be the case that all judgments and decisions by the judges of the Court are taken in accordance with the fundamental principle of judicial independence, consistently with the solemn undertaking of each judge to perform his or her duties 'honourably, faithfully, impartially and conscientiously', as required by

¹⁸¹ See, e.g., Prosecutor v Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Judgement Pursuant to Article 74 of the Statute (Dec. 18, 2012) (On 18 December 2012, Trial Chamber II unanimously acquitted Mr Ngudjolo of all charges of war crimes and crimes against humanity); Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12 A, Judgement on the Prosecutor's Appeal Against the Decision (April 7, 2015) (On 27 February 2015, a 3-2 majority of the Appeals Chamber upheld the decision to acquit Mr Ngudjolo of all charges); Prosecutor v. Jean-Pierre Bemba Gombo, et al., Case No. ICC-01/05-01/13, Judgement Pursuant to Article 74 of the Statute (Oct. 19, 2016); INTERNATIONAL CRIMINAL COURT, BEMBA ET AL. CASE: ICC TRIAL CHAMBER VII FINDS FIVE ACCUSED GUILTY OF OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE (Oct. 19, 2016) (On 19 October 2016, Trial Chamber VII found all five accused guilty of various offences of the administration of justice, though it acquitted Messrs. Mangenda, Arido, and Babala of some of the charges against them), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245>; Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (March 7, 2014); INTERNATIONAL CRIMINAL COURT, GERMAIN KATANGA FOUND GUILTY OF FOUR COUNTS OF WAR CRIMES AND ONE COUNT OF CRIME AGAINST HUMANITY COMMITTED IN ITURI, DRC (March 7, 2014) (On 4 March 2014, the majority of Trial Chamber II convicted Mr Katanga of accessory to one crime against humanity and four war crimes charges, but acquitted him of accessory to one crime against humanity and two war crimes charges), <https://www.icc-cpi.int/pages/item.aspx?name=PR986>.

¹⁸² See, e.g., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgement on the Appeal of Mr Jean-Pierre Bemba Gomba Against Trial Chamber III's Judgement (June 8, 2018) (On 21 March 2016, Trial Chamber III unanimously convicted Mr Bemba of war crimes and crimes against humanity. On 8 June 2018, a 3-2 majority of the Appeals Chamber overturned this decision and acquitted Mr Bemba from all war crimes and crimes against humanity charges); Prosecutor v. Jean-Pierre Bemba Gombo, et al., Case No. ICC-01/05-01/13 A A2 A3 A4 A5, Judgement on the Appeals of Mr Jean-Pierre Bemba Gombo (March 8, 2018) (On 8 March 2018, the Appeals Chamber confirmed some convictions, but acquitted Mr. Bemba, Mr Kilolo, and Mr Mangenda on charges of presenting evidence that a party knows is false or forged).

¹⁸³ See INTERNATIONAL CRIMINAL COURT, STATEMENT OF ICC PROSECUTOR, FATOU BENSOUDA, ON THE RECENT JUDGEMENT OF THE ICC APPEALS CHAMBER ACQUITTING MR JEAN-PIERRE BEMBA GOMBO (June 13, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat>.

article 45 of the Rome Statute and Rule 5 of the Rules of Procedure and Evidence. When judges acquit or convict, it is because those core principles direct them to do so. And it is hoped that it is consideration of those core principles that should guide any post-judgment statements by a party or participant in the case – be it the Prosecutor, the Defence or Counsel for Victims.

While the senior management of the ICC will continue to endeavour to apply a ‘one court’ principle in purely budgetary and other administrative matters of concern to the Court, it is important to emphasise that this does not apply for the purposes of the Prosecutor’s functions and responsibilities, and those of the Judiciary. They must remain separate and independent functions.¹⁸⁴

The foregoing record does not support any supposition to the effect that ICC Judges are beholden to the Prosecutor in their decisions and judgments.

X. IS THE ICC PROSECUTOR ‘UNACCOUNTABLE’?

It is also not correct to allege that the Prosecutor is unrestrained in running her office as a general matter of ethics and professional responsibility. The evidence cited in the Federalist Society speech to support the thesis of an unaccountable Prosecutor are alleged conducts that a former chief Prosecutor committed after he had left office or which came to public light after he had left office. As it was put in the speech:

The ICC’s Assembly of States Parties cannot supervise the Court any more than the United Nations General Assembly can supervise the UN bureaucracy.

Recent allegations of mismanagement and corruption among ICC personnel make this perfectly clear. The first Prosecutor elected by the Assembly of States Parties attempted to protect a high-ranking government official from prosecution, assisted a businessman with links to violations in Libya, and shared confidential court documents with Angelina Jolie.

In short, the International Criminal Court unacceptably concentrates power in the hands of an unchecked executive, who is accountable to no one. It claims authority separate from and above the Constitution of the United States.

ICC Prosecutors are subject to a regime of accountability – as are the Judges – when

¹⁸⁴ See INTERNATIONAL CRIMINAL COURT, STATEMENT OF THE PRESIDENT OF THE COURT IN RELATION TO THE CASE OF MR JEAN-PIERRE BEMBA GOMBO (June 14, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180614-pres-stat>.

allegations of misconduct are made, investigated and borne out. Disciplinary measures can range from reprimand to removal from office.¹⁸⁵ There is no question of any official of the ICC being unaccountable. The example of allegations against a former Prosecutor concerning post-tenure conduct or conduct alleged post-tenure do not support the claim of ‘unaccountable’ officials. It may be noted that I have in the past specifically rejected (on record) the proposition that former officials or staff of the Court may escape accountability for violations committed while they were in post, when the evidence of such violations emerged post-tenure. I remain of that view.

XI. FAIR TRIAL STANDARDS AT THE ICC

Finally, it was suggested in the Federalist Society speech that the fair trial standards at the ICC may not be good enough for the trial of US soldiers. Notably, in an early salvo of disenchantment directed at the ICC, Senator John Ashcroft specifically protested that one major reason that Americans should oppose the ICC is his supposition that the Rome Statute lacked the norms of fair trial guaranteed in the American Bill of Rights.¹⁸⁶ This is all mistaken. Ambassador Scheffer, the head of the US Delegation to the Rome Conference, was clear in noting that the Rome Statute is not deficient in this connection. As he put it: ‘[W]e note that the United States, along with other countries, worked vigorously to see that the ICC Statute incorporated adequate due process protections for defendants. This is not an aspect of the treaty that we consider to be seriously deficient or flawed.’¹⁸⁷

Notwithstanding Ambassador Scheffer’s adequate defence of the Rome Statute in this regard, the fair trial standards incorporated in the Rome Statute are not just ‘adequate’ – they are exacting. They are an upgraded version of the exacting standards of fair trial that have been elaborated in robust international human rights instruments in the course of years. In their own way, those standards enact precisely the same norms provided for in the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, which deal with the right of fair trial.

Indeed, the Rome Statute is a constitutional text that spells out in many places the specific requirements of fair trial, in addition to an elaborate code of Rules of Procedure and Evidence. The provisions of the Rome Statute which aim to ensure

¹⁸⁵ See *Rome Statute*, arts. 46 & 47; *ICC Rules of Procedure and Evidence*, § 26, 32 (2013).

¹⁸⁶ Subcomm. on Int’l. Relations, *supra* note 23, at 9.

¹⁸⁷ *Id.* at 46-47.

fair trial include – but are not limited to – the provision of article 67(1) on the ‘rights of the accused’, which provides as follows:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2,¹⁸⁸ to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or

¹⁸⁸ *Rome Statute*, art. 63(2) (“If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”).

innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

The question put in issue in the Federalist Society speech is whether the foregoing standards, the application of which has led to many acquittals in whole or in part at the ICC, are adequate for the due process rights of American soldiers. That question requires keeping in mind that American soldiers charged with war crimes in the US justice system are usually tried by courts martial, pursuant to the Uniform Code of Military Justice. Indeed, in their hearing in the summer of 1998, Senator Ashcroft was concerned to know whether an American soldier appearing before the ICC '[s]hould he enjoy the same protections applicable to him in a court martial proceeding[.]'¹⁸⁹

Here, a number of considerations may be kept in mind. First, there are the sensible observations of US federal appeals court Judge Selya that the 'United States has no monopoly on evenhanded justice.'¹⁹⁰ Second, there is the matter of punishment as the ultimate measure of evenhanded justice. An American soldier who stands trial in the US military justice system may face the death penalty for certain offences,¹⁹¹ or 'any punishment not prohibited by the law of war' in cases tried under the law of war.¹⁹² In contrast, the Rome Statute is specific as to the very short list of penalties that the ICC may impose. Capital punishment is not on that list.¹⁹³ Finally, it is instructive that the US Supreme Court has observed as follows:

¹⁸⁹ Subcomm. on Int'l. Relations, *supra* note 23, at 47.

¹⁹⁰ *Howard*, 996 F.2d at 1333.

¹⁹¹ See UNITED STATES, MANUAL FOR COURTS-MARTIAL R. 1003(b)(9), 1004(a).

¹⁹² *Id.* at R. 1003(b)(10).

¹⁹³ Rome Statute, art. 77, (prescribes applicable penalties).

‘Trials by court-martial are governed by the Uniform Code of Military Justice The Code was carefully drawn by Congress to include the fundamental guarantees of due process, and in operation it has provided a fair and enlightened system of justice. *However, courts-martial are not required to provide all the protections of constitutional courts*; therefore, to try by court-martial a civilian entitled to trial in an Article III court is a violation of the Constitution.’¹⁹⁴ ICC trials are not court-martial trials. The ICC is an international court of a civilian nature: where the best guarantees of due process are afforded accused persons, in proceedings that some critics have often bemoaned as much too punctilious, precisely for that reason, possibly making it harder to secure convictions. There is no basis to worry that an American national who may face trial before the ICC will be treated worse than (s)he would be under the US justice system. It is even possible that an American soldier would prefer an ICC trial – if given a choice between that and a US court-martial.

CONCLUSION

The imperfections that exist in any human system duly discounted, the United States has done much good for the modern world by way of good ideas and much else. These include historical global propulsion for the rule of law, respect for human rights, and, yes, global governance along those lines. In reverse order of precedence, President Truman, President Franklin Roosevelt and President Wilson were the great champions of that development. On behalf of the United States, they led the world to establish plenary international organisations, as ‘great instrument[s] of peace and security and human progress in the world’.¹⁹⁵ President Truman called it a great betrayal of those who gave their lives in the cause of peace, if the resulting instruments of global peace are put to use ‘selfishly – for the advantage of any one nation or any small group of nations’.¹⁹⁶ In that regard, he said: ‘We all have to recognize – no matter how great our strength – that we must deny ourselves the licence to do always as we please.’¹⁹⁷ In his ‘Four Freedoms’ speech, President Roosevelt denounced the idea of a ‘one-way international law, which lacks mutuality in its observance, and, therefore, becomes an instrument of oppression.’¹⁹⁸

¹⁹⁴ *Kinsella*, 351 at 474.

¹⁹⁵ See Truman, Closing Address, *supra* note 5.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Franklin Delano Roosevelt, Four Freedoms, *supra* note 27.

The idea of mutual observance or application of international law received unmistakable articulation in US Supreme Court Justice Jackson's speech the day after Roosevelt died and Truman became President. Jackson observed, as noted earlier:

It is futile to think ... that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.¹⁹⁹

It is against the foregoing background that the objection of the United States to the Rome Statute is to be examined. There is a need to reconsider America's refusal to accede to a treaty that it has influenced to a greater extent than the substance of its objection truly bears out. As Professor Michael Scharf testified, in Rome, the United States achieved 95 per cent of her demands at the Rome Conference.²⁰⁰ That the remainder became a persisting stumbling block bears out the phenomenon that President Truman described when he urged Senate to ratify the Charter of the United Nations, when he observed that 'widespread discussion has created the impression in some quarters that there were many points of disagreement among the United Nations in drafting th[e] Charter. Naturally, much more public attention was given to the items of disagreement than to the items of agreement.'²⁰¹

The stumbling block for the Americans who oppose the ICC substantially concerns the fear that nationals of the United States may without its consent be subjected to the jurisdiction of the ICC, thus exposing them to 'frivolous prosecution.' It is correct indeed to worry about frivolous prosecution in any justice system – not only at the ICC. And, it is especially understandable to worry that the circumstance of contemporary geo-politics will inevitably see instances in which some States or other groups may seek to use the ICC to settle scores or get at certain States. But, there are adequate guarantees – both legal and political – in place against such risks. And it is critical that vigilance is not relented in that regard.

¹⁹⁹ Robert H. Jackson, *supra* note 46, at 142.

²⁰⁰ Subcomm. on Int'l. Relations, *supra* note 23, at 38.

²⁰¹ U.S. President Harry S. Truman, Address Before the United States Senate Presenting the Charter of the United Nations for the Maintenance of International Peace and Security, together with the Statute of the International Court of Justice annexed thereto (July 2, 1945).

Beginning with the political guarantee against what some States may consider ‘frivolous prosecution’, it is noted that article 16 of the Rome Statute empowers the UN Security Council to adopt a resolution to block an investigation or prosecution in renewable periods of one year. Such a resolution was adopted in 2002 to block investigation or prosecution of ‘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 operation’.²⁰² It was renewed the following year.²⁰³

But, beyond that political guarantee, the existing layers of guarantees (legal type) against truly *frivolous prosecution* include the following:

- First Layer: there are rules of admissibility of cases, the purpose of which is to ensure that the ICC is statutorily precluded from investigating or prosecuting a case, where that case is already being investigated or prosecuted – or has so been done – in good faith in a national jurisdiction.
- Second Layer: there are rules which ensure that the Prosecutor does not initiate investigation on her own without authorisation from a majority of the Pre-Trial Chamber. In other words, the Prosecutor may *never* initiate an investigation solely on the basis of her own desire or determination. Such a decision, though motivated by her own independent assessment, and though made in unimpeachable good faith as to whether the statutory criteria are met, *must* still always be accompanied by an authorising decision of the Pre-Trial Chamber – in those cases not referred by a State Party or the UN Security Council.
- Third Layer: in the event that the Prosecutor has received authorisation to investigate to begin with, she is still required to present her indictment for confirmation by a majority of the Pre-Trial Chamber, before the case can proceed to trial. Experience thus far has shown that the Judges take the confirmation process very seriously, so much so that they have declined to confirm some indictments.
- Fourth Layer: where an indictment is confirmed, and the trial proceeds, the judges have now accepted a special procedure called a ‘no case to answer’ procedure, the purpose of which is to end a case only after the close of the case for the Prosecution, without calling upon the Defence to mount its own

²⁰² U.N.S.C. Res. 1422 (July 12, 2002).

²⁰³ U.N.S.C. Res. 1487 (June 12, 2003).

case. This is a procedure designed to terminate weak prosecutions, after judges have had a chance to see the substance of the evidence that underpins the case for the Prosecution; it is noted that at the ICC two separate Trial Chambers have stopped a case at this stage.

- Fifth Layer: even where the case is not brought to an end at the Fourth Layer, the Prosecutor would still be required to persuade two out of three judges to convict an accused person – on a standard of proof beyond reasonable doubt. At the ICC, a number of accused persons have been acquitted at the close of the trial, because the trial judges were not persuaded that this standard was met.
- Sixth Layer: in the event of a conviction and the conviction is appealed, a majority of the Appeals Judges will need to confirm the conviction. In at least one case, the Appeals Chamber completely reversed a conviction and acquitted the defendant.

All this is to say that along every point in these series of obstacles, there are in many cases serious questions of law and fact that the Prosecutor must address in order to win her case. Experience has shown that ICC Judges take these questions of law and fact very seriously; so much so that many accused persons have been acquitted at the ICC either at the end of the trial or even earlier at the end of presentation of the Prosecution evidence.

Upon sober and careful reflection on the considerations discussed in this paper, and especially taking into account all the layers of protection outlined above, there truly is no real reason for the United States to fear joining the Rome Statute. The lingering reticence betrays more nervousness aversion to risk than a realistic prospect of substantive risk. Close allies of the United States – even those with just as much tendency to engage in peace keeping operations overseas – did not see an undue risk to them from joining the Rome Statute. The United States should join her closest allies at the Rome Statute.