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Address

International Criminal Justice 5.0*

Harold Hongju Koh†

The project of securing international criminal justice for the worst atrocities is approaching its seventieth birthday. At this milestone, it is worth looking back both on what international criminal justice has accomplished and what the United States has contributed to it. To use computer programming terminology, you may think of us as now experiencing what I call “International Criminal Justice 5.0.” Let me review the five phases of this historic global project, the role of the United States in advancing it, and the challenges that still loom ahead for international criminal justice and the United States.

I. INTERNATIONAL CRIMINAL JUSTICE 1.0: THE NUREMBERG TRIALS

Let me begin with Nuremberg, what could be called the “beta testing” phase for International Criminal Justice 1.0. Nearly seventy years after the Nuremberg Trials, what seems most remarkable now is that they happened at all. Looking back, we sometimes think of trials—particularly the International Military Tribunal at Nuremberg and the subsequent U.S. Nuremberg proceedings—as the logical and inevitable response to Nazi atrocities. But at the Tehran Conference, Stalin reportedly suggested that World War II conclude with the summary execution of at least fifty thousand Germans.¹ At Yalta,

* This work is adapted from an address I delivered at the Vera Institute of Justice in New York City on November 8, 2012, and a keynote lecture I delivered at the Grotius Centre, Leiden University, on November 15, 2012. See John R. Cook, *Contemporary Practice of the United States*, 107 AM. J. INT’L L. 431, 454 (2013). It represents the cleared views of the United States Government as of January 22, 2013, the last day I served as Legal Adviser to the U.S. Department of State, a position I held since 2009.

† Sterling Professor of International Law, Yale Law School. I have worked on the international criminal justice project with many, many friends and colleagues in the U.S. government over the past four years and, before that, during my time as Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton Administration. My colleagues in this enterprise include two former Secretaries of State—Madeleine Albright and Hillary Rodham Clinton—and many State Department colleagues, especially Ambassadors-at-Large for War Crimes Issues David Scheffer, during the Clinton Administration, and Stephen Rapp and Ambassador Rapp’s Deputies, Professors Diane Orentlicher and Beth van Schaack, during the Obama Administration, as well as Assistant Legal Adviser Todd Buchwald, and John Daley, Emily Kimball, Andrew Neustatter, and David Zions of the Legal Adviser’s Office, and Steven Arrigg Koh of the International Criminal Tribunal for the Former Yugoslavia, who gave extraordinary support to both the international criminal justice project writ large and to the completion of this Address. This work is dedicated to Thomas Alexander Singer, born April 11, 2013, who we hope will grow to wisdom during the era of International Criminal Justice 5.0.

1. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 107 (1992).

Churchill apparently “thought a list of the major war criminals . . . should be drawn up . . . [and] they should be shot once their identity is established.”² Even Roosevelt’s Secretary of the Treasury, Henry Morgenthau, suggested that war criminals be summarily liquidated.³

But in the famous Yalta memo, it was three American Cabinet Secretaries—the U.S. Secretaries of State and War, and the Attorney General—who all urged President Roosevelt that “the just and effective solution lies in the use of the *judicial method*.”⁴ They presciently pointed out the value in creating “an authentic record of Nazi crimes and criminality” that would be “available for all mankind to study in future years.”⁵ And these U.S. officials backed up their idea with both action and resources. As some would say, we cared enough to send our very best: Attorney General Francis Biddle and Judge John J. Parker to serve as judges; our most brilliant Supreme Court Justice, Robert Jackson, to serve as Chief Prosecutor; aided by an all-star team of lawyers that included Telford Taylor, Herbert Wechsler, Whitney Harris, future Senator Tom Dodd, and Ben Ferencz.⁶

From the beginning, some skeptics questioned the legitimacy of this enterprise. Then-Chief Justice Harlan Fiske Stone, speaking of his colleague Chief Prosecutor Robert Jackson, was heard to say

[Justice] Jackson is away conducting his high-grade lynching party in Nuremberg. . . . I don’t mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.⁷

And even after the trials had ended and the guilty had been convicted, American movies like *Judgment at Nuremberg* depicted some Americans’ continuing skepticism about whether Nuremberg really represented a triumph of law, so much as victors’ justice.⁸

In August 2012, I visited Nuremberg for the first time and learned much more about the nuts and bolts of those trials. What struck me most is that the

2. Theodor Meron & Jean Galbraith, *Nuremberg and Its Legacy*, in *INTERNATIONAL LAW STORIES* 21 (John E. Noyes et al. eds., 2007).

3. TAYLOR, *supra* note 1, at 34 (“[The Morgenthau plan] included a section on war crimes which closely resembled the British proposal, in that it envisaged the summary execution of those on a list of ‘arch criminals’ by military ‘firing squads,’ once their identity had been established.”).

4. Memorandum from the Secretaries of State and War and the Attorney General for President Roosevelt (Jan. 22, 1945), http://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf (emphasis added).

5. *Id.*

6. *See generally* TAYLOR, *supra* note 1.

7. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 716 (1956).

8. The Oscar-winning movie *Judgment at Nuremberg* centers on the trial of four German judges accused of individual complicity in crimes committed by the German state. As a defense, Hans Rolfe (Maximilian Schell), the attorney for the judges, raises such issues as the support of the practice of eugenics by U.S. Supreme Court Justice Oliver Wendell Holmes. The quintessential American judge, played by Spencer Tracy, the Chief Justice in the case, attempts to understand how defendant Judge Ernst Janning could have passed sentences that effectively deny the Holocaust. The film ends with the American judge having to choose between patriotism and justice, rejecting a call to let the Nazi judges off lightly to gain Germany’s support in the Cold War against the Soviet Union, a ruling that the convicted defendant himself ultimately praises as correct. *JUDGMENT AT NUREMBERG* (Roxlom Films 1961).

historic success of Nuremberg turned not just on the particular people who were there, but on four *institutional attributes* of international criminal justice that those proceedings worked hard to establish: legitimacy, professionalism, cooperation, and legality. Let me say a word about each.

First, *legitimacy*. Justice Jackson, in his November 21, 1945, opening presentation before the tribunal, memorably articulated why it was legitimate for victors to pursue international criminal justice, rather than simply vengeance:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. . . . We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.⁹

Second, as historical accounts indicate, the multinational teams of prosecutors and judges conducted themselves with enormous legal *professionalism*. Third, they *cooperated* surprisingly smoothly both with the Germans and with one another under extraordinarily stressful circumstances. Fourth, and perhaps most important, they sought to establish the Tribunal's legitimacy through a fundamental focus on *legality*. This means applying existing legal rules and developing jurisprudence in a reasoned way, not just pursuing a list of suspects or applying an aspirational version of the law. Among the most important of Nuremberg's contributions were its focus on individual responsibility, rather than collective guilt, and, critically, the *acquittal* of numerous defendants when the evidence to support conviction was lacking. At the same time, the trials self-consciously set out to assemble a meticulous historical record. In this way, the trials did not simply promote a legal norm of accountability to which subsequent generations could aspire; they also laid down a tangible, unforgettable factual record of what had happened.

The most enduring legacy of Nuremberg has been a set of seven legal principles—the Nuremberg Principles—that to this day continue to guide the project of international criminal justice:

- *Principles 1 & 2*—“Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment,” regardless of whether the act is prohibited under local law;
- *Principles 3 & 4*—“The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law,” and the individual is not protected from criminal punishment simply because he or she was carrying out orders;

9. ROBERT H. JACKSON, THE NÜRNBERG CASE 30-31 (1947).

- *Principle 5*—Those accused of crimes have a right to a fair trial; and
- *Principles 6 & 7*—Describing punishable international crimes as including crimes against peace, war crimes, crimes against humanity, and complicity in any of the above.¹⁰

As you know, these Nuremberg Principles do not stand alone; in four ways, they went on to galvanize an international criminal justice movement: first, by suggesting universal principles that gave the movement one of its authoritative *texts*; second, by declaring that individuals are *subjects, not just objects*, of international law, thereby denying that international law is for states only; third, by *piercing the veil of state sovereignty* behind which war criminals had all too often previously hidden and recognizing that individuals can be held criminally responsible for international crimes; and fourth, by reaffirming that *criminal courts* can be appropriate fora for holding those individuals responsible for international crimes.

In short, Nuremberg and its Principles provided what could be called the “intellectual operating software” for the international criminal justice movement. But for several decades after these Principles were developed, they lay largely dormant, lacking the necessary “hardware”: the functioning international institutions with the necessary legitimacy, legality, professionalism, and cooperation to implement those principles in real cases and crises.

II. INTERNATIONAL CRIMINAL JUSTICE 2.0: THE AD HOC TRIBUNALS

Only after the Cold War ended did the two new international ad hoc tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—finally usher in the modern age of international criminal justice. When horrifying atrocities occurred in the Balkans and Rwanda, the United States led the push for accountability, resorting to the U.N. Security Council’s Chapter VII authority to establish those ad hoc tribunals. As my old boss Madeleine Albright told the U.N. Security Council when the ICTY was established in 1993, “There is an echo in this chamber today. The Nuremberg principles have been reaffirmed. . . . The lesson that we are all accountable to international law may finally have taken hold in our collective memory.”¹¹

Nothing quite like the ICTY and ICTR had ever been attempted. Even when the United States and other countries invested in creating the tribunals, some quietly saw them as expressions of guilt for failing to prevent the atrocities, or distractions from the more serious work of peacemaking. The ICTY was simultaneously asked to deliver accountability and to help resolve a bloody conflict—all from a brand new architecture. And it began this work

10. G.A. Res. 95 (I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/236 (Dec. 11, 1946).

11. THE ‘YUGOSLAV’ CRISIS IN INTERNATIONAL LAW, PART I: GENERAL ISSUES 204 (Daniel L. Bethlehem & Marc Weller eds., 1997).

when Croatia, Serbia, and much of Bosnia remained openly hostile to the Tribunal. But like the Nuremberg tribunals, first the ICTY and then the ICTR built their bona fides by strengthening the four basic institutional attributes I just mentioned: legitimacy, legality, cooperation, and professionalism.

First, *legitimacy*. The question of legitimacy continued to dog international criminal justice—here, the claim was not, as in Nuremberg, that the tribunals exemplified “victors’ justice” after a completed armed conflict, but rather that they were *biased* players favoring one party or another in an ongoing armed conflict. Despite their many accomplishments, the tribunals—which enjoyed primary jurisdiction—heard many criticisms about their legitimacy among the local populations. To this day, according to surveys, many Serbs tend to think that the ICTY is biased against Serbs, while Croats tend to think that the ICTY is biased against Croats.¹²

To overcome such a critique, a true judicial institution must focus in part on the second attribute of international criminal justice, namely, *legality*. The ICTY and ICTR began developing a modern jurisprudence of criminal liability that was based on existing law as applied to a modern ethnic conflict. One of the ICTY’s early accomplishments involved Duško Tadić, a relatively low-level offender who—had he been caught only a few years later—would have been referred to Bosnia for domestic prosecution. The *Tadić* decision provided a reasoned basis for the seminal conclusions that (1) the U.N. Security Council had the *authority* to set up a criminal court under Chapter VII of the U.N. Charter; (2) the Tribunal’s jurisdiction extended to war crimes committed in the course of a *non-international armed conflict*; and (3) Tadić could be convicted for his association with a small group of offenders, articulating the concept of *joint criminal enterprise* (JCE) that later became a central feature of the ICTY’s work.¹³

As the late Judge Antonio Cassese later explained, JCE allowed international courts to pursue in a reasoned and logical way the masterminds of mass atrocities even in cases where those masterminds had not been present at the scene of the crime.¹⁴ The ICTR applied similar reasoning to pursue not just the low-level offenders who carried out the Rwandan genocide, but officials as high ranking as the prime minister. Moreover, the early jurisprudence-building of the ad hoc tribunals provided the reasoned and logical basis for the important global conversation that has ensued on the issue of sexual violence. The post-World War II tribunals had largely ignored sexual violence, but the ICTY and the ICTR situated the issue within the existing law of war crimes, crimes against humanity, and genocide. Although these decisions cannot, as a strictly legal matter, “bind” other courts, there is no doubt that the jurisprudence of the

12. See, e.g., Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1078 n.39 (2005).

13. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

14. See generally Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 109 (2007).

ICTY and ICTR has been influential in the broader development of international criminal law.

Third, *cooperation*. To deliver genuine accountability, a tribunal must win a strong measure of cooperation from the international community. In the early days of the ICTY, national cooperation proved sporadic. The Tribunal found itself without custody of many indictees, particularly high-level ones, and many of the local players were openly hostile. But over the years, the cooperation and support of the international community noticeably improved as the United States, together with many European Union countries, tied foreign assistance to the Balkan states to their apprehension of suspected war criminals and cooperation with the ICTY. The United States also entered into an arrest and surrender agreement with the ICTY. NATO and U.N. peacekeepers conducted arrests. United States cooperation helped not just in securing defendants, but also in procuring evidence. To take just one example, my office helped provide the ICTY Prosecutor with aerial images showing the construction of mass graves at Srebrenica, and the Trial Chamber in the *Popović* case specifically relied on these aerial images to determine that the Bosnian Serb Army had engineered the mass killing and burial of Muslim men and boys in July 1995.¹⁵ And my office, together with the U.S. Department of Justice, also gave the ICTR high-profile assistance in apprehending and transferring to the ICTR Pastor Ntakirutimana, a Rwandan who had come to live in Texas after the genocide. The ICTR gave Ntakirutimana a fair trial, after which he was convicted and sentenced.

A fourth and final attribute that helped the ad hoc tribunals succeed was the hard-won reputation of their component institutions—judiciary, prosecution, and defense—for *professionalism*. It is inevitable that countries will limit the sharing of sensitive information unless they have the confidence that the information will be appropriately protected by their tribunal counterparts. The ICTY developed effective rules to provide such protections, but the ultimate assurance was provided by a shared sense that the lawyers and institutions involved would in fact operate in the way that countries expect of true legal professionals.

In short, the phase that I call “International Criminal Justice 2.0” was an initial phase of hardware-building for the international criminal justice system. The U.N. Security Council created two new institutions that proved capable of doing hugely important work in promoting accountability. At the same time, it was becoming clear that these tribunals—which were expensive and lasted much longer than anyone had anticipated—would not necessarily be the all-purpose model for international criminal justice going forward.

15. Prosecutor v. Popović, Case No. IT-05-88-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010).

III. INTERNATIONAL CRIMINAL JUSTICE 3.0: THE HYBRID TRIBUNALS

Indeed, one lesson we came to appreciate in light of the ICTY/ICTR experiment was that justice for international crimes does not necessarily require justice before an *international* tribunal. To the contrary, in many cases, the best outcome—from the perspective of international justice, transitional justice, and institution-building—is for *states* to investigate and, if appropriate, to prosecute international crimes. For that reason, over the past fifteen years, the process of architecture-building in international criminal justice has taken a turn towards a “third way” of creating hybrid national-international tribunals—what could be called “hybridity” and “complementarity,” or simply “International Criminal Justice 3.0.” In three very different countries—Sierra Leone, Cambodia, and Lebanon—different arrangements were reached to promote justice and accountability, each tailored to their particular local context.

Take, for example, the Special Court for Sierra Leone (SCSL), which was formed to bring accountability for horrific abuses—including brutal amputations, trade in “blood diamonds,” and terror of civilians—during that country’s civil war. “Tribunal fatigue” from the ICTY and ICTR had set in, contentious debates about forming the International Criminal Court (ICC) were ongoing, and some were calling for domestic prosecutions only, even while the Sierra Leone government was requesting international help. I went to Sierra Leone as Assistant Secretary for human rights and worked with many others to help develop a novel hybrid tribunal—not imposed by the U.N. Security Council under Chapter VII and not purely a creature of domestic law, but rather the product of an innovative treaty between Sierra Leone and the United Nations, which created a tribunal based in Freetown. The Sierra Leone court became the first modern internationalized criminal tribunal to sit in the same country where the atrocities it was prosecuting occurred, although for security reasons the Charles Taylor prosecution—about which I will say more—took place in The Hague.

The hybrid model of the Sierra Leone tribunal illustrated new ways for international criminal justice to develop the four attributes of legitimacy, legality, cooperation, and professionalism that I have already mentioned. Surveys have shown support among Sierra Leoneans for the court, its contribution to peacekeeping, the fairness of its trials, and its role in deterring future violence.¹⁶ Surveys have also shown a local sense of legitimacy that compares favorably to the initial, sometimes negative local reactions to the ICTY.¹⁷ Many factors came into play to help advance the court’s legitimacy, not least of which was its initial decision to deliver justice locally.

The Sierra Leone Court’s key jurisprudential achievements have included its approach to amnesty and liability rules. Early on, the Court was confronted with a sweeping amnesty provision in the 1999 Lomé Peace Agreement

16. Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT’L L. 321, 366 (2002) (citing surveys).

17. *Id.*

between the Sierra Leone government and rebels. But—in accordance with the United Nations’s understanding—the Court determined that this domestic agreement could not block an *international* tribunal from prosecuting a serious *international* crime. Thus, in Sierra Leone, a domestic amnesty agreement was construed *not* to block international justice. And as scholars have noted, the inauguration of the SCSL coincided with notably diminished levels of violence on the ground,¹⁸ illustrating that accountability can be compatible with transition and peace.

Perhaps the greatest milestone achieved by the SCSL was the first conviction of a former head of state by an international tribunal since the end of World War II¹⁹: President Charles Taylor of Liberia was convicted for aiding and abetting atrocity crimes carried out by rebels in Sierra Leone, including murder, rape, conscripting child soldiers, sexual slavery, and acts of terrorism.²⁰ Although the verdict remains subject to appeal, the *Taylor* case reaffirmed the Nuremberg principle that high-ranking government officials should be held to account for their crimes, a result only possible after years of firmly rooting the criminal justice project within the broader fabric of international relations. Some have treated this as a shallow victory, questioning why Taylor was convicted “only” for aiding and abetting. But as the Nuremberg principles made clear, complicity in war crimes or crimes against humanity is no less a crime under international law than the predicate acts, fully worthy of international condemnation and punishment. These accomplishments in the courtroom required difficult work outside of it in the areas of professionalism and cooperation—a particularly important example being the voluntary financial contributions provided by the United States and others.²¹

Similarly, in Cambodia, the international community worked long and hard with domestic authorities to pursue accountability for atrocity crimes that took place decades ago. The Khmer Rouge Tribunal—formally, the Extraordinary Chambers in the Courts of Cambodia (ECCC)—was a different type of hybrid, established under domestic law but regulated by a United Nations-Cambodia agreement. The ECCC has, with U.S. Government support, successfully held Duch—a Khmer Rouge perpetrator—accountable, and we are supporting its continuing efforts to try the three living senior leaders of the Khmer Rouge: Nuon Chea, Khieu Samphan, and Ieng Sary.

18. See Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT’L L. 395, 451-52 (2011).

19. Serbian President Slobodan Milosevic had faced trial in the later ICTY years, but died before a verdict could be reached.

20. *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Sentencing Judgment (Special Court for Sierra Leone May 30, 2012).

21. See, e.g., THE SPECIAL COURT FOR SIERRA LEONE, www.sc-sl.org (last visited Apr. 12, 2013) (“The Special Court is the first international criminal tribunal to be funded entirely from voluntary contributions from governments. The Special Court has so far received contributions in cash and in kind from over 40 states, representing all geographic areas of the world. Canada, the Netherlands, Nigeria, the United Kingdom and the United States have provided strong support. In 2004, 2011, 2012 and 2013, the Special Court has been funded by subventions from the United Nations.”). For U.S. contributions, see Reports on United States Participation in the United Nations, U.S. DEP’T OF STATE, <http://www.state.gov/p/io/rls/rpt/index.htm>.

Finally, the Special Tribunal for Lebanon, established by the U.N. Security Council in 2007, represents an entirely different attempt at hybridity. Unlike the other tribunals to date, the Lebanon Tribunal was created as a quasi-*international* tribunal to apply domestic law in connection with the assassination of the former Prime Minister of Lebanon, Rafiq Hariri, and certain related political assassinations. For unique reasons, the Lebanese Government lacked the ability to prosecute locally but wanted an international-like tribunal with a clear Lebanese imprint—use of Lebanese law and procedure, and a mix of international and Lebanese judges and prosecutors. As you know, Lebanon continues to be a difficult environment for this effort. But as the Tribunal’s work has finally gotten underway, the United States has continued to offer unwavering and strong support.

IV. INTERNATIONAL CRIMINAL JUSTICE 4.0: THE ICC

This brings us to international criminal justice 4.0—the International Criminal Court or ICC. The struggles setting up the ICTY and ICTR made clear the value of a permanent, standing institution capable of delivering justice. And many forget that the United States was at the forefront in promoting the creation of an international criminal court.

You all know what happened afterwards. In 1998, a Statute for the ICC was developed in Rome, but the United States expressed serious reservations about certain aspects of the Statute as it was eventually adopted.²² We did not initially sign the Rome Statute, but participated in drafting the elements of crimes, which helped ensure greater precision in the definitions of crimes within the Court’s jurisdiction. But before leaving office in 2000, President Clinton did sign the Rome Statute, signaling our good faith hope to continue working to improve the Court, even while noting that he could not recommend that the United States ratify the treaty “until our fundamental concerns are satisfied.”²³ In 2002, Under Secretary of State John Bolton announced that the United States did not intend to become a party to the treaty. The United States entered a period that many would characterize as overtly hostile to the Court, but the Court began to establish itself nonetheless. Even before the end of the Bush Administration, though, U.S. skeptics of the Court began to appreciate some of the good it might do. Most notably, under the Bush Administration, the United States chose to abstain when the U.N. Security Council referred the Darfur situation to the Court. By the end of the second Bush term, my predecessor as Legal Adviser, John Bellinger, said explicitly that the United States needed to acknowledge that the ICC is a “reality.”

This chronology shows that our relationship with the ICC has had ebbs and flows. But please do not misread our skepticism of certain institutions as hostility to the bedrock norms and values of international criminal justice. In

22. Rome Statute of the International Criminal Court arts. 6-8, July 17, 1998, 2187 U.N.T.S. 90.

23. Presidential Statement on Signing of the Rome Statute of the International Criminal Court, 3 PUB. PAPERS 2816-17 Signing (Dec. 31, 2000).

fact, taking a stand for justice and the rule of law is part of our national character. Of course, many in our country still have fundamental concerns about the Rome Statute that have prevented us from becoming a party. This is hardly surprising, given concerns about the potential risks of politicized prosecutions, the United States' unique posture of having more troops and other personnel deployed overseas than any other nation, and the fact that we are frequently called upon to help ensure global peace, justice, and security. But if you ask Americans a concrete, practical question—should specific perpetrators of genocide, war crimes, or crimes against humanity be held accountable for their crimes in particular cases—the typical American answer to that question would be an unequivocal “yes.”

Moreover, the United States has long recognized that international criminal justice—and accountability for those responsible for atrocities—is in our national security interests as well as in our humanitarian interests. Among other things, supporting global criminal justice serves U.S. national interests by promoting a culture of accountability that can help increase stability and thus decrease the need for far more costly military interventions in the future. We have much to gain from the effective functioning of the rule of law, and the architecture of international criminal justice can play an important part in that effort.

By early 2009, Secretary Clinton had made clear that “whether we work toward joining or not, we will end hostility toward the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”²⁴ And the United States has sought to make our approach to the ICC more congruent with our broader approach to international criminal justice. So, while the United States will always protect U.S. personnel, we are engaging with states parties to the Rome Statute on issues of concern and we have applied a pragmatic, case-by-case approach toward ICC issues. Let me review not only what we have said, but what we have done.

First, from the beginning of this Administration we have dropped the hostile rhetoric. With almost 10 years' experience with the ICC under our belts, we had seen that the Court could play a key role in bringing perpetrators of the worst atrocities to justice and provide an important forum for advancing U.S. interests.

Second, we have begun to engage with the Assembly of States Parties (ASP) and the Court. Our “smart power” view is that the way to advance U.S. interests is not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements. Absenting ourselves from meetings of states parties and discussions about aggression allowed states parties to develop a definition of aggression without U.S. input, which greatly complicated our efforts when we did eventually engage on that topic in an effort to promote a more legally coherent outcome. We now regularly attend

24. ALEXIS ARIEFF ET AL., CONG. RESEARCH SERV., RL34665, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 4 (2011).

meetings of the ASP as an “observer” and we participated constructively at the Review Conference in Kampala. We are closely monitoring the evolving jurisprudence of the Court. And we have also actively engaged with the Office of the Prosecutor and the Registry to consider specific ways that we can support specific prosecutions already underway in all of the situations currently before the Court, including through cooperation on witness protection issues, and we have responded positively to a number of requests.

Third, we have publicly urged cooperation and expressed support for the Court’s work in *all* of the ongoing situations in which the Court has begun formal investigations or prosecutions, both in our diplomacy and in multilateral settings. To take just a few examples, last year we supported the U.N. Security Council’s referral of the situation in Libya to the ICC, our first affirmative vote for a referral, adopted even as atrocities were being perpetrated. This represented an historic milestone in the fight against impunity, and we have continued to support the Court’s engagement there. President Obama has made strong statements about the importance of accountability and cooperation with the ICC’s efforts in Kenya²⁵ and Côte d’Ivoire.²⁶ Secretary Clinton has made equally strong statements throughout her travels about the ICC’s work to ensure justice for the victims of atrocities in these and other situations before the Court. Following the landmark *Lubanga* judgment,²⁷ both the White House²⁸ and State Department²⁹ issued strong statements about the historic nature of the conviction and the message that it sends to those who engage in

25. See Press Statement, U.S. President Barack H. Obama, Statement by President Obama on the International Criminal Court Announcement (Dec. 15, 2010), <http://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement> (“I urge all of Kenya’s leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation.”).

26. See Press Release, U.S. President Barack H. Obama, Readout of President Obama’s Call with President Alassane Ouattara of Cote d’Ivoire (Apr. 12, 2011), <http://www.whitehouse.gov/the-press-office/2011/04/12/readout-president-obamas-call-president-ouattara-cote-divoire> (“The two leaders also reiterated the importance of ensuring that alleged atrocities are investigated and that perpetrators—regardless of which side they supported—are held accountable for their actions, and committed to support the roles of the United Nations commission of inquiry and the International Criminal Court in investigating abuses.”).

27. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 42 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf>.

28. See Press Statement, U.S. National Security Council Spokesperson Tommy Vietor, Statement by National Security Council Spokesman Tommy Vietor on the International Criminal Court Conviction of Congolese Warlord Thomas Lubanga Dyilo in Child Soldiers Case (Mar. 14, 2012), <http://www.whitehouse.gov/the-press-office/2012/03/14/statement-national-security-council-spokesman-tommy-vietor-international> (“The United States welcomes the conviction by the International Criminal Court of Congolese warlord Thomas Lubanga Dyilo for war crimes relating to enlisting and conscripting children under the age of 15 and causing them to participate actively in hostilities in the Democratic Republic of the Congo (DRC). As this decision illustrates, the international community is united in its determination to end the repugnant practice of using child soldiers. Today’s decision is a reminder that those who prey upon children, forcing them to become soldiers and sex slaves, are committing a despicable crime for which they will be held accountable.”).

29. See Press Statement, U.S. Department of State Spokesperson Victoria Nuland, ICC Conviction of Thomas Lubanga Dyilo (Mar. 16, 2012), <http://www.state.gov/r/pa/prs/ps/2012/03/185964.htm> (“As the Court’s first conviction, this ruling is an historic and important step in providing justice and accountability for the Congolese people. The conviction is also significant for highlighting as an issue of paramount international concern the brutal practice of conscripting and using children to take a direct part in hostilities.”).

the brutal practice of conscripting and using children to participate actively in hostilities. The United States has also supported recent U.N. Security Council presidential statements urging cooperation with the Court and supporting regional efforts to arrest Joseph Kony and top Lord's Resistance Army (LRA) commanders,³⁰ emphasizing the importance of Bosco Ntaganda's arrest in the Democratic Republic of the Congo (DRC),³¹ and stressing the importance of accountability for abuses and violations on all sides in Côte d'Ivoire, while encouraging the Ivorian government to continue its cooperation with the ICC.³² Last summer, we engaged diplomatically to urge the swift resolution of the detention of ICC defense counsel in Libya, including by supporting a U.N. Security Council press statement on the issue.

Fourth, we continue to find it a serious cause for concern that nine individuals who are the subjects of existing ICC arrest warrants have not yet been apprehended. For example, we have urged all states to refrain from providing political or financial support to the Sudanese suspects who remain at large, including by discouraging states from welcoming these individuals.³³ In the U.N. Security Council, Ambassador Susan Rice and other senior diplomats have repeatedly called for Sudan to cooperate with the ICC and for states to oppose invitations, facilitation, or support for travel by those subject to existing arrest warrants.

Fifth, on a related front, we have noted that states can lend expertise and logistical assistance to apprehend current ICC fugitives. In the case of the LRA, the United States has sent military advisors to the region to assist the national

30. Press Statement, Security Council, Statement by the President of the Security Council, U.N. Press Release S/PRST/2012/18 (June 29, 2012), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNOCA%20S%20PRST%202012%2018.pdf> ("The Security Council recalls the International Criminal Court's arrest warrants for Joseph Kony and two other senior LRA leaders on charges of, inter alia, war crimes and crimes against humanity, including murder, rape and the enlistment of children through abduction, and calls upon all States to cooperate with the Ugandan authorities and the International Criminal Court in order to implement those warrants, and to bring to justice those responsible for the atrocities.").

31. See Press Release, Security Council, Security Council Press Statement on Democratic Republic of Congo, U.N. Press Release SC/10709 (July 16, 2012), <http://www.un.org/News/Press/docs/2012/sc10709.doc.htm> ("The Members of the Security Council condemn in the strongest terms the attacks by the 23 March Movement (M23) mutineers, reiterate their demands that the M23 and all armed groups, including the Democratic Forces for the Liberation of Rwanda (FDLR), cease immediately any further advances and all forms of violence in the eastern part of the Democratic Republic of the Congo (DRC), and urge that the commanders of M23, including Bosco Ntaganda who is the subject of an International Criminal Court arrest warrant, be apprehended and brought to justice.").

32. See Press Release, Security Council, Security Council Extends Mandate of United Nations Operations in Côte d'Ivoire Until 31 July 2013, Unanimously Adopting Resolution 2062 (2012), U.N. Press Release SC/10730 (July 26, 2012) <https://www.un.org/News/Press/docs/2012/sc10730.doc.htm> ("Urges the Ivorian Government to ensure in the shortest possible timeframe that, irrespective of their status or political affiliation, all those responsible for serious abuses of human rights and violations of international humanitarian law, notably those committed during the post-electoral crisis in Côte d'Ivoire, are brought to justice in accordance with its international obligations and that all detainees receive clarity about their status in a transparent manner, *further encourages* the Ivorian Government to continue its cooperation with the International Criminal Court.").

33. In particular, we have actively worked to discourage states from inviting or hosting Sudan's President Omar al-Bashir, and have also called for additional efforts by and better coordination with other members of the international community in seeking to effectuate the Court's work in Darfur. For example, we have publicly commended the Government of Malawi for the example that it set for other African States by its recent decision to refuse to host Bashir for the African Union summit.

military forces that are seeking to bring the LRA's top commanders to justice and protect local populations.³⁴

Just four years ago, this list of examples of U.S. engagement with the ICC would have seemed like a surprise. But it shouldn't be. Of course we support international efforts to bring to justice those responsible for genocide, war crimes, and crimes against humanity in Darfur. Of course we think that the perpetrators of horrific war crimes in the Democratic Republic of the Congo ought to be punished. Everyone knows that the ICC is not the exact court we wanted, but it is the Court that exists, and we fully understand that the ICC has the potential in many cases to advance common goals in promoting accountability. Thus, the current policy toward the Court has been based less on an abstract debate about the value of the Court and more on a direct focus on the specific: do the ICC's efforts in this context complement U.S. efforts to ensure that perpetrators of this particular atrocity be held accountable and advance U.S. interests and values? If the answer to those questions is yes—and it nearly always has been—we have been able to view ICC prosecutions as part of the solution. This is part of our broader “smart power” approach: not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements that advance U.S. interests, including our interest in justice and the rule of law.

Putting all of this together, as I made clear more than two years ago in a speech at New York University,

[w]hat you quite explicitly do not see from this Administration is U.S. hostility towards the Court. You do not see what international lawyers might call a concerted effort to frustrate the object and purpose of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun.³⁵

When you look beyond rhetoric and the focus on the U.S. relationship with the Court, a crucial question remains: namely, where is this new institution going, and where does this “4.0” version fit within the broader architecture of international criminal justice? Let me point to three important considerations.

34. Letter from President Barack Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army (Oct. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore> (“For more than two decades, the Lord's Resistance Army (LRA) has murdered, raped, and kidnapped tens of thousands of men, women, and children in central Africa. The LRA continues to commit atrocities across the Central African Republic, the Democratic Republic of the Congo, and South Sudan that have a disproportionate impact on regional security. . . . In furtherance of the Congress's stated policy [of support for increased, comprehensive U.S. efforts to help mitigate and eliminate the threat posed by the LRA to civilians and regional stability,] I have authorized a small number of combat equipped U.S. forces to deploy to central Africa to provide assistance to regional forces that are working toward the removal of Joseph Kony from the battlefield. I believe that deploying these U.S. Armed Forces furthers U.S. national security interests and foreign policy and will be a significant contribution toward counter LRA efforts in central Africa.”).

35. See Harold Hongju Koh, Legal Adviser to the Dep't of State, *The Challenge and Future of International Criminal Justice*, Panel Discussion at NYU Center for Global Affairs (Oct. 27, 2010), <http://www.state.gov/s/l/releases/remarks/150497.htm> (emphasis added) (discussing what the ICC's President had called a new U.S. policy of “positive engagement” with the Court.).

First, the development of the notion of *positive complementarity*: the ICC is a court of last resort that, if it is truly successful, will have fewer, not more, cases. The complementarity principle is easy to describe but hard to implement, and it is still in the earliest stages of development. The ad hoc tribunals were designed to give the new international tribunals primary jurisdiction, and the hybrid courts were built on the premise that purely domestic justice was not possible in those particular cases. But the Rome Statute has codified the important lesson that domestic justice often remains the best form of justice. This idea underscores the importance of institution-building that can serve developing and post-conflict societies well. And when it works, positive complementarity empowers local populations to take ownership of the accountability process and to bear direct witness to the lesson that grave international crimes carry consequences.

Second, as I have noted, the ICC has finally achieved its first conviction, the conviction of Thomas Lubanga for the war crimes of enlisting and conscripting children and using them to participate actively in hostilities. This historic step in securing a measure of justice for the Congolese people also highlights the brutal practice of conscripting and using children to fight in armed conflict, a topic that is justifiably one of international concern. The ICC's Trial Chamber also recently issued an important decision on principles and procedures governing reparations for victims of Lubanga's crimes.³⁶

Third, we must remember that the ICC is still very much in its early stages, and that the bulk of its work is yet to come. The tribunals that came before it took many years to build their jurisprudence on atrocity crimes, to navigate the difficult waters of international cooperation, and to establish legitimacy. For that reason, I often describe the ICC as a bicycle, which is now moving, but remains wobbly. The ICC faces several challenges. First, to strengthen the bicycle, by building up the Court's resources and institutional capacities. The tribunal needs to function in a fair and transparent manner with able and unbiased prosecutors and judges. Second, to avoid putting too much weight on the bicycle too early. This is a reminder of the imperative of states lending resources to advise and assist national systems in countering atrocity crimes, so that there will be fewer instances in which the ICC is called upon to act. Third, it will be important to improve the cooperation of states and to enhance the efficiency and effectiveness of the Court's prosecutions, as well as to avoid unnecessary collisions with states, including by making prudent decisions about the cases it pursues and declines to pursue. The length of proceedings, as well the existence of fugitives and lack of cooperation in many of the existing cases before the Court, remain serious problems for the ICC. But note that such criticism was also leveled in its early days against the ICTY, now considered a mature, well-regarded institution that, remarkably, has no remaining fugitive defendants.

36. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures To Be Applied to Reparations (July 8, 2012), <http://icc-cpi.int/iccdocs/doc/doc1447971.pdf>.

Finally, there remain particularly live questions with regard to the implementation of the aggression amendments discussed in Kampala. The United States continues to have concerns about the amendments, and we do not support states' moving forward with ratification at this time. Our concerns about the possibility of investigations and prosecutions in the absence of Security Council action are well known. We believe that it was wise for the states parties to subject the Court's exercise of jurisdiction over the crime of aggression to a decision to be taken sometime after January 1, 2017, which provides some breathing space in which measures that require attention can be considered, and in which progress on other issues—particularly the effort to ensure accountability for perpetrators of war crimes, crimes against humanity, and genocide—can be consolidated.

In sum, the key to winning greater international and U.S. support going forward will be for the ICC to focus on strengthening itself as a fair and legitimate criminal justice institution that acts with prudence in deciding which cases to pursue. Critical to the future success of the ICC, and the views of it by the United States and others in the international community, will be its attention to the four values I have already highlighted: (1) building institutional legitimacy; (2) promoting a jurisprudence of legality, with detailed reasoning and steeped in precedent; (3) fostering a spirit of international cooperation; and (4) developing an institutional reputation for professionalism and fairness.

V. INTERNATIONAL CRIMINAL JUSTICE 5.0

Where does all this leave us, nearly seventy years after Nuremberg and twenty years after the creation of the first ad hoc tribunal? Plainly, we have come to an end of the software- and hardware-building phase—call it the “architectural stage”—of modern international criminal justice. But the real work is just beginning. What we have achieved in that time is a gradual, but real and important change in culture, one by which accountability has gone from being a subsidiary concern to an issue that now has a seat at the table as we face the great issues of the day.

Twenty years ago, the status quo was no international trials for war criminals; today, the status quo favors accountability, at least in principle. As important, we now have a menu of architectural options for pursuing justice—whether in an international framework, a domestic one, or some novel and flexible hybrid format. In the first instance, we continue to work to bolster the capacity of national governments to ensure justice for victims in the face of grave atrocities. For those cases where it is needed and appropriate, the architecture at the international level, however imperfect, now exists, and it presents the opportunity to focus on the full range of options for tackling concrete matters of accountability.

For the United States, the current challenge is how to build the accountability agenda of the past seventy years into a sustained “smart power” approach to international criminal justice that sees accountability as part of a broader approach to diplomacy, development, rule of law, and atrocities prevention. To that end, the President announced the formation of an Atrocities

Prevention Board, stating that “[p]reventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States.”³⁷ Through focused coordination, training, enhancing our civilian surge capacity, and many other efforts, the United States is working to put in place a whole-of-government approach to atrocities prevention. And as part of these efforts, as Secretary Clinton has said, “we want to deter atrocities by making clear that those who commit these crimes will be held accountable.”³⁸

Let me discuss two recent cases: Libya and Syria, which illustrate the role that accountability should play in managing ongoing crises. When the United States supported a U.N. Security Council referral of the situation in Libya to the ICC, our focus was on the concrete question, “Can the ICC be an effective tool in this situation and does it advance U.S. interests and values”? And our pragmatism compelled us to find in the ICC a positive way of moving forward with accountability.

We have continued to stress the importance of cooperation by the Libyans with the Court, and to find ways to assist a post-Qadhafi Libya to address its justice sector reform goals, emphasizing the need for accountability in Libya for violations and abuses on all sides. Our concern has been with the *outcome* of accountability, not so much the venue for it. And as the ICC proceedings move forward on Libya’s admissibility challenge in the case against Saif al-Islam Qadhafi, this will be an important moment for both Libya and the Court to show how the principle of complementarity will work in practice. In the meantime, we continue to stress the importance of Libya ensuring that the detention of and any domestic proceedings against Saif al-Islam and Abdullah al-Senussi fully comply with Libya’s international obligations.

In Syria, we witness a tragic conflict unfold. Still, we have continued to press for accountability without prejudging these choices by calling for an ICC referral by the U.N. Security Council now. As the transition proceeds, and as the U.N.’s Commission of Inquiry has recognized, the Syrian people should have a leading voice in deciding how to deal with those responsible for atrocities, in a manner consistent with international law. Perhaps the Syrian people will end up wanting to send cases to the ICC, or perhaps they will wish to prosecute and punish perpetrators themselves. We are working with our Arab and other international partners to help the Syrian people ensure that those perpetrating horrific violence against them are ultimately held accountable, and we think it critically important to continue documenting violations and abuses and collecting evidence so that the international community can uncover and tell the truth about what is occurring. We and our international partners are continuing to support the recently launched Syria Justice & Accountability Centre to document human rights abuses and to support accountability efforts in Syria through training and other activities.

37. Memorandum from President Barack Obama to the Vice President et al. (Aug. 4, 2011), <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>.

38. Hillary R. Clinton, Secretary, U.S. Dep’t of State, Keynote Address at the U.S. Holocaust Memorial Museum (July 24, 2012), <http://www.ushmm.org/genocide/endgenocide/transcript/clinton.php>.

Seventy years ago, it would not have been clear that any of those who perpetrate these atrocities would ever be subject to individual criminal responsibility for their actions. Twenty years ago, it would not have been clear that the world would be willing to act on the principles recognized in Nuremberg. But today, there is in place not only an architecture of accountability, but an emerging culture that elevates preventing atrocities and accountability for perpetrators as principal concerns in policy discussions. That culture, and the anticipation of certain forms of post-transition accountability may now help to facilitate transition—for example, by opening up space for the Assad regime’s opponents and encouraging defections by those officials who want to distance themselves from the regime’s crime.

So where is all of this heading? Before too long, the work of the ad hoc tribunals will continue and conclude in the work of the Mechanism for the International Criminal Tribunals (MICT). The MICT was established as a small, temporary, stream-lined institution capable of wrapping up the work of the ICTY and ICTR (for example, handling the remaining appeals after the ICTY and ICTR finish their work, and dealing with legacy issues such as managing sentences). You can think of this as an exit strategy for International Criminal Justice 2.0, as we focus on the international criminal justice issues of the future.

I am often asked, in ten years, will the United States have become a party to the Rome Statute? With respect, I think this is the wrong question. The real questions for the next ten years should be: “Are the worst international criminals being held accountable? Is a culture in which perpetrators commit serious violations of international law with impunity slowly but surely eroding in favor of a culture of respect for international law and of accountability? And is the United States doing everything it can to help?”

In answering that question, I would argue, the United States should be judged by its actions, not just its words. Those actions, I have argued, reveal an impressive record of U.S. leadership since Nuremberg in the international criminal justice arena: at Nuremberg itself, at the Yugoslav and Rwanda Tribunals, with the Hybrid Courts, and now with the ICC.

In short, for too long, the global conversation about international criminal justice has focused too much on what you might call “the reverberations of Rome”: on what did and did not happen at the Rome ICC Conference, and what it supposedly signals about America’s perceived ambivalence toward international criminal justice. Let me suggest that going forward, we focus less on the reverberations of Rome and more on what Secretary Albright called the “echo of Nuremberg”: the great and continuing efforts we have taken to embed the principles recognized in Nuremberg into the fabric of international institutions and the culture of international relations, and to support accountability as part of a broader, durable smart power approach to preventing atrocities and managing conflict. As Nuremberg’s Principles approach their seventieth birthday, it is my sincere belief that we are on our way to building a new era of international criminal justice—“International Criminal Justice

5.0”— a better version of international criminal justice for the twenty-first century that can endure and do good over the next seventy years and beyond.³⁹

39. Recent developments since I delivered this speech demonstrate the role the United States continues to play in supporting efforts to hold accountable those responsible for the worst atrocities. On March 22, 2013, Bosco Ntaganda, the subject of two ICC arrest warrants for war crimes and crimes against humanity allegedly committed in the DRC, voluntarily surrendered to the ICC several days after appearing at the United States Embassy in Kigali, Rwanda. After eluding justice for nearly seven years, his surrender marked an important day for international justice and the people of the eastern regions of the DRC. Ntaganda's appearance before the ICC in The Hague will contribute to the goal of peace and stability in the DRC and the Great Lakes, and will also send a strong message to all perpetrators of atrocities that they will be held accountable for their crimes. On January 15, 2013, President Obama also signed into law an expansion of the War Crimes Reward Program. This powerful new tool can be used to help bring to justice perpetrators of war crimes, crimes against humanity, or genocide. Under the expanded program, the State Department will offer monetary rewards of up to five million dollars for information that leads to the arrest or conviction of specific foreign nationals accused of such crimes by international criminal tribunals—including the ICC, mixed, and hybrid tribunals. On April 3, 2013, the State Department announced the Secretary of State's first reward offers under this enhanced authority, for Joseph Kony and two other senior LRA leaders, and Sylvestre Mudacumura, who is subject to an ICC arrest warrant for war crimes allegedly committed in the DRC. Since this speech was first delivered, one commentator has noted, with the italicized words, with the italicized words in the text accompanying note 35, *supra*, the Obama Administration has “now orally negated the Bolton note by remarks . . . made that the Administration's policy is not to defeat the object and purpose of the Rome Statute. [Legal Adviser Koh] stated this at N.Y.U.'s Center for Global Affairs on October 27, 2010, the Grotius Center of Leiden University on November 16, 2012, and the New York City Bar Association on November 26, 2012.” Jennifer Trahan, *U.S. Affirms That It Adheres to Rome Statute Signatory Obligations: It Should Put This in Writing*, OPINIO JURIS (Feb. 27, 2013, 7:30 PM), <http://opiniojuris.org/2013/02/27/u-s-affirms-that-it-adheres-to-rome-statute-signatory-obligations-it-should-put-this-in-writing>.