2025 January - February

Kankee Briefs

Resolved: The United States ought to become party to the United Nations Convention on the Law of the Sea and/or the Rome Statute of the International Criminal Court.

## Letter From The Editor

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## Topic Analysis

### 1.1 Introduction

#### Introduction

Resolved: The United States ought to become party to the United Nations Convention on the Law of the Sea and/or the Rome Statute of the International Criminal Court.

Prepare thy self for one of largest Jan-Feb topics in the history of Kankee Briefs – never in the history of my brief writing has a topic has a topic covered such breadth of topic areas in-depth, being inclusive, including, but not limited to the international criminal law, Arctic/Alaska, the South China Sea, Africa, Ukraine/Russia, and the entirety of the ocean, including the seafloor. The scope of this topic is truly enormous. It includes two distinct areas of disparate treaty law with far-reaching impact to large swathes of the globe.

Note that henceforth the United Nations Convention on the Law of the Sea will be known as UNCLOS and the International Criminal Court will be known as the ICC. I will also note that the Jan-Feb topic literature has a perhaps excessive number of acronyms for international law precedents, treaties and UN organizations – I recommend keeping a running list of acronyms/international law terminology for the sake of your own edification and understanding (i.e. International Seabed Authority, Commission on the Limits of the Continental Shelf, exclusive economic zone, complementarity, etc.). I will also note whether a contention is focused on the ICC or UNCLOS (or both) in the contention headers in parenthesis as applicable.

It is fair to treat this topic as an amalgamation of two topics with little common ground beyond them both being treaties. Resolutions that have focused solely on ONE treaty accession (without a breathe mentioning other treaties) have occurred, such as the September/October 2018 PF topic (a playlist of UNCLOS PF debates can be found at the link [here](https://youtube.com/playlist?list=PLXoG-EkIUvj2cCKNxMH2tuGcwMBIB2t6s&si=6eTIviFDME1NS1wr) for reference). However, the inclusion of UNCLOS AND the Rome Statute aggrandizes the topic to a scale that is perhaps too big, especially given the lack of common disadvantage or counterplan ground that applies to both halves of the topic. Topic prep work ought to be premised upon the need to prepare for two distinct topics – ICC topic research regarding international criminal law has little utility in discussions of UNCLOS’ cards focused on the freedom and laws of the seas. There is no uniting disadvantage ground besides perhaps treaties bad, which is not that great of an argument. For instance, a disadvantage about deep-sea mining or the South China Sea is less then useful against affs only defending the war crimes prosecution under the ICC.

Because of the topic scope and potential for plan inclusive critique, this is the topic to run a plan even if you have reservations about running plans. Given the resolution’s usage of the term ”and/or,” and how it's strategic suicide to unnecessarily defend both treaties, plans are likely expressively encouraged by the topic committee. There are no worries regarding typical plan bad arguments regarding bare plurals or unpredictability as the resolution explicitly grants you permission to defend one treaty, OR the other. Defending both treaties is an option available, but by no means is it recommended. Because of the bipartite nature of affs, pay the utmost attention to which of the two treaties the aff’s focus is on – a generic, catch-all neg usable against all affs (which generally ought to be advised against) is not a strategy available here.

#### What does the topic and common terms in topic literature mean?

All things being equal, only two terms unrelated to the niceties of them treaties themselves are of note. The first term is “party,” of whom the definition could potentially be utilized to answer circumvention arguments to iterate the treaty is binding and ought to be implemented. Note that in terms of treaty law for topicality discussions, the best source likely is the Vienna Convention on the Law of Treaties, which is the “treaty on treaties” that governs generalizable laws regarding treaties and their usage/rules.

#### Party

UN 69 [United Nations, 05-23-1969, Vienna Convention on the Law of Treaties,” UN, https://legal.un.org/ilc/texts/instruments/english/conventions/1\_1\_1969.pdf]/Kankee

(f) “contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force; (g) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force; (h) “third State” means a State not a party to the treaty;

The second term of note is “and/or,” which is a quintessential term in CX debates wishing to indicate that multiple sub-topic areas/implementation methods are available – it means that not all items in the resolution need be defended by the aff, and that the aff can, to an extent, selectively pick and choose which parts of the resolution they wish to implement (thereby excluding the sections the did not implement). “And/or” is the definitive policy debate term for a multi-option resolution, and predictability implies it ought be utilized in the same context for LD.

#### And/or means the former, latter, or both

FreeDictionary 16 [FreeDictionary, 2016, "and/or", TheFreeDictionary, https://www.thefreedictionary.com/and%2for]/Kankee

and/or Used to indicate that either or both of the items connected by it are involved. Usage Note: And/or is widely used in legal and business writing. Its use in general writing to mean "one or the other or both" is acceptable but often sounds stilted. See Usage Note at or1.

#### Rome Statute/International Criminal Court (ICC)

In terms of debate history, the ICC is a rarity, which is likely due to it a fairly new development, being established in 2002 (for reference, this is quite youthful in terms of international organizations, with the International Court of Justice having existed for ~80 years). In the history of high school LD, PF, and CX debate, to my knowledge, there has never been a topic focused on the International Criminal Court. However, a tiny portion of the 2002/2003 NDT policy topic did have a tiny section to the Rome Statute (alongside a grab bag of topics including the Ban Treaty, Kyoto Protocol, SORT, and the a Protocol to the ICCPR, so it was most definitely not this chief focus). That NDT topic was also 20+ years ago, before widespread usage of the Opencaselist Wiki (or likely even its invention), so the value of the prior topic is practically worthless. As an aside, some have complained the 2024 Jan-Feb potential topics were fairly lengthy wording and too big – cherish the fact you need not endure the 2003/2004 [NDT](https://nationaldebatetournament.org/history/topics/) policy topic.

Resolved: that the United States Federal Government should enact one or more of the following: Withdrawal of its World Trade Organization complaint against the European Union’s restrictions on genetically modified foods; A substantial increase in its government-to-government economic and/or conflict prevention assistance to Turkey and/or Greece; Full withdrawal from the North Atlantic Treaty Organization; Removal of its barriers to and encouragement of substantial European Union and/or North Atlantic Treaty Organization participation in peacekeeping in Iraq and reconstruction in Iraq; Removal of its tactical nuclear weapons from Europe; Harmonization of its intellectual property law with the European Union in the area of human DNA sequences; Rescission of all or nearly all agriculture subsidy increases in the 2002 Farm Bill.

Regardless, unlike prior topic with prior topic research (i.e. the 2023 Nov-Dec wealth tax was a near repeat of the 2021 wealth accumulation topic), ICC affs and negs will break new ground. Before discussing the nitty gritty of the topic, I would recommend watching the YT video linked [here](https://youtu.be/Uc_1VlcEpv8?si=bBfF97I9_rmGvMNe) as a good primer on the function of the ICC and the 4x crimes that it is able to prosecute (this has also hopefully clarified that the International Criminal Court has no relation to the International Cricket Council).

#### Crimes for the ICC include genocide, war crimes, crimes against humanity, and crimes of aggression

Klobucista and Ferragamo 24 [Claire Klobucista, Deputy Editor at CFR with a Master’s degree in journalism from Boston University and a Bachelor of Arts in international relations and Africana studies from Tufts University, and Mariel Ferragamo, writer at CFR with a bachelor’s degree in environmental policy from Colby College and a certification in journalism from New York University, 11-22-2024, "The Role of the ICC", Council on Foreign Relations, https://www.cfr.org/backgrounder/role-icc]/Kankee

The court has eighteen judges, each from a different member country and elected by the member states. It requires its members [PDF] to seek a gender-balanced bench, and the judiciary must include representatives of each of the United Nations’ five regions. Judges and prosecutors are elected to nonrenewable nine-year terms. The president and two vice presidents of the court are elected from among the judges; they, along with the registry, handle the administration of the court. The court has jurisdiction over four categories of crimes under international law: ● genocide, or the intent to destroy in whole or in part a national, ethnic, racial, or religious group, as such; ● war crimes, including grave breaches of the laws of war under the Geneva Conventions and serious violations under customary international law, such as torture, taking of hostages, willfully causing great suffering, intentionally attacking civilian populations as such, attacking undefended civilian property, schools, historic monuments, or hospitals, using starvation of civilian populations as a method of warfare, or using child soldiers; ● crimes against humanity, or violations committed as part of a large-scale attack against any civilian population, including murder, rape, unjust imprisonment, slavery, persecution, torture, or apartheid; and ● crimes of aggression, where a political or military leader plans or executes the use of armed force by a state against the territorial integrity, sovereignty, or political independence of another state, or in any other manner inconsistent with the UN Charter. The court can open an investigation into possible crimes in one of three ways: a member country can refer to the prosecutor a situation arising anywhere provided it is within the jurisdiction of the court; the UN Security Council can refer a situation occurring anywhere in the world; or, with the approval of pretrial ICC judges, the prosecutor can launch an investigation into a situation proprio motu, or “on one’s own initiative.” The court can investigate individuals from nonmember states if the alleged offenses took place in a member state’s territory, if the nonmember state accepts the court’s jurisdiction, or with the Security Council’s authorization.

#### UNCLOS

UNCLOS deals with law of the sea, hence the name, and is considered the “constitution of the oceans.” UNCLOS establishes maritime rights for all states, irrespective of UNCLOS membership. For instance, it establishes territorial seas, exclusive economic zones, and extended continental shelves, all of whom iterate the specific maritime rights of the country that other countries cannot violate. Beyond the coast line are multiple invisible maritime lines offset from the coast, which effectively extends a country’s land mass beyond the land. UNCLOS also establishes rules for the sea, most of whom are related to ensuring the non-harassment and peaceful passage of ships irrespective, which aims to increase the stability and norms of maritime trade.

### 1.2 Affirmative Topic Analysis

#### 1.2.1 International Law (ICC).

Contention 1 is International Law (ICC). Recent events have brought vigorous ire and hatreds into the US-ICC relationship, with the US fundamentally attacking the institution. Virtually all politicians, but especially Republicans, in Congress and the Executive branch are severely outraged from the ICC arrest warrant for the Israeli Prime Minister Netanyahu, threatening to defund and sanction the ICC and the UN in retaliation. The US’ “special relationship” with Israel has caused a US warpath against the ICC, sabotaging ICC efforts at every opportunity. Additionally, US military and diplomatic support for the war in Gaza (similar to US support for the Saudi-led coalition in Yemen) has caused the US to be accused of abetting war crimes, and could potentially lead to US culpability at the ICC. Under Trump’s first term, the threat of the ICC prosecuting US troops for crimes in Afghanistan caused US retaliatory actions towards the ICC and its staff (eventually causing the lead prosecutor for the ICC to drop the investigation into the US).

More broadly, the US has continually had major issues with international criminal law when it inconveniences them, such as supporting ICC investigations into Putin for the war into Ukraine, while opposing investigations into its ally Israel. Charges of US hypocrisy are rampant when they desire selectively prosecuting war crimes on this basis of whether a country has a good relationship with the US, as opposed to universal norms where crimes against humanity and war crimes are illegal and wrongful in *all* circumstances irrespective of the context. Independently, the US is threatened to invade the Netherlands via the “Hague invasion Act” (otherwise known as the American Service-Members' Protection Act) if they detain US personal in ICC investigations.

All of these things fundamentally harm US standing as a supporter of international law and human rights, and by extension, destroying US credibility. The solvency mechanism is twofold: the aff prevents US sabotage and obstruction of the ICC, preventing things such as sanctions and engaging ICC jurisdiction. This is effectively a counter-circumvention argument in that affirming causes the US to abide by the terms of the agreement, which includes not actively being an awful member and desiring its destructions. Durable fiat effectively means that the US ought to follow the “employee handbook” and not threaten to invade the Hague or block prosecutions. The second mechanism is the prevention of hypocrisy, as the US shows its willingness to play by the same rulebook it applies to other countries, and that no one is above the law

#### 1.2.2 War Crimes (ICC)

Contention 2 is War Crimes (ICC). The US has lived in state of exception in regards to international law, especially international criminal law. It generally follows the “rules for thee but not for me” principle in that it writes and supports international law and treaties, but ultimately does not ratify it. They help bind the hands of others through international law, but fail to apply the same principles to themselves. For instance, they helped the Nuremberg Trials of Nazi collaborators, but ignored the rules of war they helped establish (linked [here](https://www.youtube.com/watch?v=5BXtgq0Nhsc) is a Noam Chomsky video describing crimes chargeable under the Nuremberg principles that US presidents have since committed). This has especially been true with the war on terror, including things like the crime of aggression against Iraq, or war crimes against civilians treated as “collateral murder” in drone strikes. Obviously, the US being part of a treaty that requires them to follow the rules of war and not commit war crimes and crimes against humanity helps them not do those things. Note that the big weakness for this contention is that the ICC need not be involved – via a magical fiat wand, the US can solve their own war crimes and ensure they meet standards of accountability and good behavior. To the extent this contention solves war crimes more broadly via international law precedents, the greater extent it can beat the counterplan, but it cannot, on its own, rationalize why ICC action is uniquely key.

#### 1.2.3 Arctic (UNCLOS)

Contention 3 is Arctic (UNCLOS). There are two main impacts in the Arctic. First is continental shelf rights. In order for a state to gain rights to its continental shelf in the Arctic, it *generally* must make a submission to the Commission on the Limits of the Continental Shelf (CLCS), though it is technically possible for non-states to gain continental shelf rights. The US is in legal limbo in that the CLCS, and UNCLOS law more generally, is designed assuming that parties are members of UNCLOS. The US is the only Arctic state that is not a member, and is the only member of the Arctic Council which is not a member, so most Arctic law is premised on UNCLOS membership. Lack of membership burdens the US with a harder, potentially impossible task to legally recognize their continental shelf rights in international law while not being party to the relevant international law. This implicates our ability access Arctic oil/natural gas and allows Russia to lead Arctic energy and Arctic norms, granting Russia a big economic boon in the wake of its economic crisis.

Second is dispute settlement. Post-Ukraine, Russia has had its diplomatic position quashed at many multilateral forums, notably for our purposes the Artic Council. The Arctic Council was effectively the only means for Russia and the US to communicate on Arctic issues and governance, as the Arctic lacks a unified framework for cooperation like the Antarctic Treaty. Non-communication in the face of Arctic militarization from Russia threatens escalation and miscalculation in the region. UNCLOS offers both a forum for US Russia talks, and UNCLOS has an inherent dispute settlement mechanism for members that help resolve conflicts. A more clarified situation with the continental shelf would also help avoid conflicts over resources with Russia, as the boundary of what is Russian and American in the Arctic would be more clearly indicated.

#### Arctic governance is structurally collapsing – non-communication with Russia in the Arctic threatens miscalculation

Cunningham 24 [Alan Cunningham, doctoral student at the University of Birmingham’s Department of History in the United Kingdom, 5-14-2024, "Shifting Ice: How the Russian Invasion of Ukraine has changed Arctic Circle Governance and the Arctic Council's Path Forward", Arctic Institute - Center for Circumpolar Security Studies, https://www.thearcticinstitute.org/shifting-ice-russian-invasion-ukraine-arctic-circle-governance-arctic-councils-path-forward/]/Kankee

In early March of 2022, roughly fifteen days since the beginning of Russia’s invasion, the Wilson Center held an event titled “Ukraine and the Arctic: Perspectives, Impacts, and Implications”. One panelist, Dr. Michael Sfraga, the Chair of the US Arctic Research Commission and founding director of The Polar Institute, described how the Ukraine crisis has and will affect the Arctic impressively. He states, “There is a wide array of social, cultural, environmental, economic, political aspects of the Arctic that, at this moment, are feeling the tensions originating in Europe … we see how connected, interdependent, and integrated we really are”.2) The same day this panel was held, “Seven of the Arctic Council’s eight members — all except Russia, which currently holds the council’s rotating chairmanship — have agreed to boycott future meetings … indefinitely [pausing] council proceedings on issues from climate change to Arctic oil drilling”.3) This effectively halted all kinds of work being performed in the Arctic given Russia is such a massive partner to various projects in the region. With the conflict now drawn out for over two years with no end in sight, it is apparent now how the invasion has affected the Arctic. The Arctic Council’s determination to boycott future meetings has substantially changed the way in which governance will occur. While the removal of Russia from the Council does allow for a temporary end to “[Russian] participation in one of its few remaining soft power venues capable of meaningful international coordination”, it also means the Council “forfeit the institutional legitimacy and progress [it] has fostered” with “little utility [existing] in such an organization without Moscow”.4) This spells severe problems for the Arctic as the Council can no longer claim to be fully or wholly immune to armed geopolitical conflicts and also indicates that the Council will “lose legitimacy and goodwill and its agenda will shrink in both scope and size as future Russian statements on Arctic cooperation will likely be met with more skepticism from the other seven members than ever before”.5) In July 2022, the Arctic Council announced it would resume limited work “in projects that do not involve the participation of the Russian federation,” posing serious problems for future governance policies in the Arctic for 2023.6) From a climate and scientific research standpoint, Russia is a key figure in “tracking changes such as permafrost degradation and methane emissions from warming landscapes,” yet this work has now been halted due to Russia’s actions in Ukraine and the international community’s desire to pressure Russia into submission. Some academics focusing on climate issues argued that “[the breakdown in relations is] significantly worse now because of the open warfare”.7) From a military perspective, Russia has long been building up a military presence in the region, modernizing and expanding “military installations … along more than 6,000km of Arctic coastline” as well as reorganizing and updating “Russia’s fifth, military district … [serving to] protect the forces of the Northern Fleet and its nuclear deterrent,”8) while also announcing in August 2022 that it would refocus its military might on the Arctic and Nordic region. Given that Russian militarization shows no sign of stopping in the Arctic,9) this is quite concerning and poses a problem for nation-states in the European Arctic, especially for those states that are fiercely opposed to Russian action like Norway.10) Furthermore, according to national security and defense experts at the think tank CNAS, “the Kremlin’s sense of security is most likely to be affected by the movement of any NATO infrastructure into Finland and Sweden, the increased size and complexity of NATO exercises in the region, the gathering of air forces on the Scandinavian peninsula, cross-border air exercises, enhanced intelligence collection, and the changed dynamics in the Baltic Sea, which will now be surrounded by NATO member states,” which in turn could heighten the chances “of miscalculation and escalation.”11) Not only this, but strategically, China has become a far stronger power12) in the Arctic,13) using the power vacuum and political instability to further its economic and military goals in the region. Overall, the Arctic remains highly vulnerable to changing geopolitical developments, and has likely never been more vulnerable in its history, considering increased global interactions with the region. In fact, the Arctic affairs have become even more vulnerable in recent months, considering Russia’s threat to leave the Arctic Council and their refusal to pay the annual contributions.14) How the West Can Reclaim the Arctic Allowing China to gain a further foothold in the region could lead to severe issues for the global community and for the Arctic itself. However, the end result of Russia’s invasion of Ukraine and how this may affect the Arctic in the immediate future of the conflict and after the conflict is over remains to be seen. Writing for The Conversation, Mathieu Landriault and Paul Minard, political scientists at the University of Ottawa and the University of Saint-Paul, write, “it’s difficult to foresee how Arctic institutions will continue in the future given the fundamental rift between Russia and the West … [but many Arctic experts] were correctly pessimistic about Arctic Council members, including Russia, resuming co-operation by the end of September 2022,”15) with most instead seeing the most likely scenario being that Russia and the other members of the Arctic Circle be unable to resume their regular operations in the near future. In spite of this, commentary in the Financial Times16) and Foreign Policy17) has argued that Western efforts at cooperation must be made with Russia in the Arctic. While these experts certainly do not ignore the realities of the Ukraine-Russia conflict, there appears to be a desire to disregard these events in favor of keeping the status quo that has long existed in the Arctic. No matter the desire to see a return to normalcy or continue operations in the Arctic, while it is important to ensure continuity, it is also important to protect human rights and work against those who are continuing to engage in illegal or criminal activities with no indication or inclination to stop. By continually refusing to work with Russia in the Arctic Circle, the Arctic Council is applying pressure to the Russian Federation in coordination with the international community and the rest of the West. Certainly, the nation-states that make up the Council do realize that this lack of participation with Russia does spell issues for the Council as a whole and in terms of properly governing and regulating the region, yet they understand that what Russia is doing in Ukraine (flagrantly violating international law, indiscriminately killing Ukrainian civilians, torturing and mutilating combatants and prisoners of war, suppressing their own domestic population, and using sexual assault as a weapon of war) matters far more than the current stability of the Arctic Circle. To them, and to the vast majority of individuals, protecting human rights and stopping totalitarian regimes matters more than maintaining the status quo of a region. Nonetheless, this is not an excuse for allowing China or other world powers that pose an additional threat to stability and apply further pressure and influence in this important region. As such, it should be an additional priority of the Arctic Council to halt Chinese incursion and consolidate Western power over the Arctic against nation-states intent on further increasing their own power to the West’s detriment. Solutions for the Arctic of the future

This impact is NOT intentional war – miscalculation is premised on a US-NATO security dilemma causing militarization that can more easily escalate a crisis with heightened tensions and non-communication. UNCLOS becomes a means of crisis management and a de-escalation of tensions between superpowers. Note that if Russian Arctic policy is revisionist and they seek Arctic domination by force, international law matters much less and military deterrence much more. Think critically of Russian goals in the Arctic and the rationale behind their actions, as if the security dilemma is true, then Russia desires dialogue and cooperation. There is still potential for you to win miscalculation impacts if Russia is revisionist, but it becomes harder to win uniqueness as Russia desires hegemonic control.

#### 1.2.4 South China Sea (UNCLOS)

Contention 4 is South China Sea (UNCLOS). China’s disdain for UNCLOS has been showcased in the South China Sea via its nine-dash line (yes, lets iterate precise maritime claims regarding thousands of square miles of maritime rights through NINE lines) and aggressive action to enforce its maritime claims. Some have argued that Chinese UNCLOS impropriety is due to a lack of US standing under UNCLOS to critique Chinese actions. The US is the chief enforcer of UNCLOS, and as its position is weakened by it not following the rules (a symbol of hypocrisy and the unimportance of the rules according to Beijing). Independently, a crucial element in UNCLOS is the dispute settlement mechanism – this is somewhat similar to the above Arctic US-Russia security dilemma in that Chinese militarization threatens miscalculation.

#### 1.2.5 Deep Sea Mining Good (UNCLOS)

Contention 5 is Deep Sea Mining Good (UNCLOS). As part of UNCLOS, the US would gain membership in the International Seabed Authority (ISA), the multilateral body that regulates deep-sea mining (DSM) sites. No DSM occurs without their approval, and they set the norms for appropriate DSM practices. Due to a lack of US membership in UNCLOS, the US is granted un-preferential treatment in obtaining mining sites, and it lacks the legal certainty associated with treaty bound DSM rights. Because of a lack of US leadership in DSM, China has taken the lead, causing the US to lose out on potentially billions, if not trillions, in rare Earth elements, and allowing China to set norms regarding DSM. For reference if you do not understand DSM, linked [here](https://www.reuters.com/graphics/MINING-DEEPSEA/CLIMATE/zjpqezqzlpx/) is a DSM guide (it’s pretty to look at even if you don’t read it):

There are three main impacts. The first is US-China competition - rare Earth elements are critical for military technology and renewable energy, and they offer the US an opportunity to end the Chinese rare Earth element monopoly that could cripple US military production capacity and the defense industrial base. Through geological happenstance, the vast majority of rare Earth elements mining sites are found in China (and the DRC), and in the event of US-China conflict, China could withhold rare Earth elements, which has major implications on the US military’s power capabilities. China in 2016 has previously used its monopoly as a weapon, establishing an embargo for rare Earth elements in response to disagreements with the Japanese regarding the Senkaku islands. This is analogous to how oil producing nations halted their exports of oil in response to US support for Israel in the 1970s.

The second impact is DSM norms. US membership in the ISA allows the US to set norms about sustainable DSM. Lack of participation in the ISA has allowed Chinese-led norms and regulations to allow a potential free-for-all, environmentally speaking for DSM, with lacks and vague regulations that care more for benefiting China than protecting the environment. This argument is valuable to make as it proves DSM is inevitable, as other countries will engage in DSM irrespective of US participation, and the US can make DSM more environmentally safe. This is helpful in responding to arguments that DSM is environmentally catastrophic, as absent a counter plan with universal international fiat that bans DSM everywhere, DSM is not unique to the aff. If the US doesn’t do it, China will do it, and it will be comparably worse.

The third argument is rare Earth elements are key to a green energy transition. Rare earth elements are a necessity in almost all renewable technology, whether it be solar panels, windmills, electric vehicle engines, or batteries/energy storage (to retain otherwise invariable renewable sources). The argument is more sophisticated beyond you needing fancy rocks to make solar panels, as adding potentially billions of tons of to the rare Earth element market substantially decks prices for otherwise expensive renewables, and encourages innovation with a wider potential market share.

This contention can also be supplemented through cards that say membership is key to the Commission on the Limits of the Continental Shelf (as often mentioned in the Arctic contention), as DSM can be done in an exclusive economic zone (give an automatically regardless of UNCLOS membership), the US continental shelf (which can be heavily extended in the Arctic), or the ocean floor (which is heavily regulated by the ISA). Membership with both give us more sites for mining through the ISA, and the entirety of our Arctic continental shelf as potential mining sites.

### 1.3 Negative Topic Analysis

#### 1.3.1 Deep Sea Mining Bad CP/DA (UNCLOS)

Contention 1 is Deep Sea Mining Bad CP/DA. The counter argument for DSM good, based on the meaning of words and their antonyms, is DSM bad (if this was unclear to you, please go back to elementary school). The arguments listed in this contention can be both an independent disadvantage without a counterplan, and a plan inclusive counterplan that would restrict US DSM rights, making the US otherwise abide by the entirety of the terms of the treaty. Effectively the counter-plan portion is entirely optional, and the DSM bad arguments are sufficient on their own if you so desire. Ideally you would run this as a PIC, but it is entitled CP/DA given its dual-purpose.

In terms of topic literature and the majority opinion of the scientific community, aff DSM good arguments are complete rubbish - deep sea mining has the potential to be catastrophically horrible to the environment in terms of biodiversity, carbon sinks, and fishery stocks. We don’t know this for certain, as we haven’t had full-on experiments with an actual DSM site, but limited experiments have shown DSM can cause underwater dead zones that won’t recover for *hundreds of millions* years and smother life with toxic plumes pulled up via what is effectively a giant vacuum.

#### 1.3.2 Colonialism/Imperialism (ICC)

Contention 2 is Colonialism/Imperialism (ICC). Ponder a court having effectively only convicted black folk, primarily tried black folk, and prioritized the prosecution of black areas while ignoring the crimes of white folk. After writing that sentence, I have realized I half-described the US criminal justice system, but the ICC is still particularly awful in terms of race relations. The ICC tries crimes based on the principle of complementarity in that the ICC will only intervene if a state is unable or unwilling to prosecute a crime. For instance, say the hypothetical country of Trekbak began a genocide of a minority population – if it had a strong legal system and began investigating the issue themselves, the ICC would likely not be involved. However, this assumes that the ICC assessment of Trekbak believed in their democratic capacity to resolve wrongdoing, or that their judicial process was equitable and fair. However, this begs the question of whom is making the assessment and their beliefs in an ideal justice system. If Trekbak resolved the issue in a way they internally found fair, but the solution was unacceptable to the ICC, the ICC could investigate. This is why the leaders from Trekbak may be prosecuted, but the leaders from the neighboring country of Marliburgh that more aligns itself with Western values may not be. Effectively, but officially, ICC prosecution of crimes cares more so for who commits the crimes as opposed to whether a crime has been committed.

#### 1.3.3 ICC Bad/Ineffective (ICC)

Contention 3 is ICC Bad/Ineffective (ICC). This is a catch-all contention for solvency deficits/case link turns, of which are too varied to discuss in overarching detail here.

#### 1.3.4 Unilateral CP (ICC)

Contention 4 is Unilateral CP (ICC). Both of the unilateral counter plans attack whether the multilateral aspect of the aff is necessary, as domestic law can potentially solve issues with US war crimes/hypocrisy (ICC) or counteracting Russia/China in the Arctic/SCS (UNCLOS). Obviously this is imperfect, as otherwise countries would lack purpose for international treaties, but it sends a strong signal internationally that likely solves a sufficient amount of the aff. This unilateral counterplan (and the UNCLOS specific CP) can be paired with ICC/UNCLOS bad arguments as a net benefit to unilateral action, as the CP solves without multilateral action. This version of the CP desires limiting US war crimes and US involvement in other countries war crimes.

#### 1.3.5 Unilateral CP (UNCLOS)

Contention 5 is Unilateral CP (UNCLOS). See above for more detail regarding the strategic purpose of the unilateral counterplan. This version of the CP desires counteracting Chinese violations of UNCLOS through military power and deterrence, as China is a revisionist country and only respects military force. The central argument is that UNCLOS does nothing for international norms on its own, and it is reliant on US military power to enforce them. Post-aff, China would finds other means of crituqing the US and rationalizing its behavior as China’s long-term military aspirations are not dependent on whether the US signing a treaty.

#### 1.3.6 Circumvention (General)

Contention 6 is Circumvention (General). Circumvention is a valuable solvency deficit in terms of the ICC - the US has been vehemently opposed to US prosecution and US implementation, and it has sanctioned its officials in response to investigations towards the US. The likelihood of sabotage, sanctioning, and circumvention is high given US political opposition and current un-implementation of the treaty as a matter of customary international law (as iterated in the aff international law contention inherency evidence).

In contrast, for UNCLOS, circumvention is not as great – the US has followed the edicts of UNCLOS as a matter of customary international law and routinely engaged in freedom of navigation operations to counter China's aberrations towards the treaty. Despite non-ratification, the US dedication towards the treaty is immensely strong because of its geostrategic interest in a free and open Indo-Pacific and the several defense treaties with US allies concerning their maritime rights and protection such as the Philippines (Spratly Islands and Scarborough Shoal), Japan (Senkaku Islands) and Korea (Yellow Sea). Unlike the ICC, there are no major political hatreds towards UNCLOS and it's in the US’ interest to follow the treaty.

These can be supplemented by cards describing Trump/Republican animus towards the UN and disregard for international norms. There are major plans to curtail UN funding and oppose the institution from within during Trump’s second term. Even if this doesn't apply to the ICC/UNCLOS directly as a matter of durable fiat, the side effects of Trump’s anti-UN policies impact aff solvency and the strength of impacts related to US credibility and international law. Even if the US abided by the entirety of the terms of the Rome Statute or UNCLOS, our behavior in other multilateral forums, and our efforts to undermine and disparage the UN implicates other countries belief in our dedication to the treaties.

Circumvention also has strategic implications beyond harming aff solvency. To the degree of which the US unquestionably follows every jot and tittle of the treaties, the strength of a plan inclusive counterplan increases, as the aff commits to more action under the treaty the CP can avoid. Similarly, if the US refuses to follow the terms of the treaty, such as not arresting Netanyahu per the ICC arrest warrant, that allows other circumvention efforts, as the aff interpretation of fiat now allows circumvention of the treaty when it's implementation is inconvenient for the US.

#### 1.3.7 Leader Exemption CP/DA (ICC)

Contention 7 is Leader Exemption CP/DA (ICC). This focuses on the consequences of prosecuting heads of states in terms of international stability, particularly in terms of Putin and Netanyahu. Why would a leader stop war crimes and conflicts if doing so means they have to do hard time? Why show up for negotiations and ceasefire agreements if the ICC will arrest you? ICC prosecutions have potential to extend conflicts and alter leader’s behavior negatively, as they’re highly motivated to avoid losing power and end up in a Dutch jail cell.

At first glance, the head of state counter plan has slight weaknesses in terms of uniqueness, as the arrest warrants for several major leaders such as Netanyahu and Putin already exist. However, the world's most predominant military power supporting the ICC substantially increases the risk of these being enforced (possibly similar to the invasion of Libya and the ICC indictment of Gaddafi). This is especially true given the US precedent for democracy promotion efforts against Sadaam Hussein in Iraq, which was not rationalized because of the war on terror, but because Sadaam Hussein was a bad guy (that may have had WMD).

This counter plan is competitive given the text of the treaties. Under treaty law, there is a process of selective ratification of a treaty through reservations, understandings, and declarations (RUDs), which change the overall meaning of the treaty in the context of that country. Hypothetically, one could join UNCLOS/ICC with RUDs as a perm do the counterplan argument, saying RUDs are a normal process for treaty ratification. However, as iterated in the contention cards, UNCLOS/ICC both do not allow RUDs (and to the extent they do, they cannot majorly change the treaty). This is why the US was unable to join UNCLOS with a RUD regarding deep-sea mining, as the treaty did not accept RUDs that fundamentally altered the treaty.

Notably, the resolution does NOT have the phrase “without reservations” as it did in previous treaty resolutions, which does in fact potentially permit the aff to include RUDs, but given the treaties do not allow them, the UN would not allow the US to become party. There is likely more justifications for CP competition beyond this, but I believe the standard of the aff not altering the treaty is a worthwhile, as otherwise the aff can add RUDs on any number of things, such as obligating the ICC prosecute Xi Jinping or cancelling Russian Arctic maritime claims under UNCLOS

## Affirmative

### Contention 1: International Law (ICC)

#### Unconditional support for Israel causes US assaults on the ICC, politicizing it as a weapon against US opponents, but not for US allies

Whitson 24 [Sarah Leah Whitson, executive director of Democracy for the Arab World Now with a BA from UC Berkely and a JD from Harvard Law School, 9-18-2024, "The White House’s Defense of Israel Is Undermining International Law", Foreign Policy, https://foreignpolicy.com/2024/09/18/biden-israel-icc-icj-gaza-netanyahu-international-law/]/Kankee

This is not the first instance of states refusing to cooperate with the ICC. Even some member states have failed to execute arrest warrants the court has issued, like Mongolia’s refusal to arrest Putin earlier this month when he visited, or Jordan’s and South Africa’s failure to arrest Bashir. Thomas-Greenfield’s declaration means that the United States, the supposed enforcer of the international rules-based order, is now keeping company with states that ignore the court’s orders. This sort of rhetoric from leading U.S. officials further erodes the standing of all international courts and will be used as a justification by authoritarian governments who will copy the U.S. playbook to reject international law and ignore those seeking to enforce it. The Biden administration has made no secret of its disdain for the International Criminal Court’s decision to prosecute Israeli officials and members of Palestinian armed groups for war crimes, crimes against humanity, and other violations of the Rome Statute since 2014, following the State of Palestine’s 2018 referral. On June 4, the U.S. House of Representatives once again passed a bill to sanction the prosecutor, and twelve U.S. senators responded to the prosecutor’s request for warrants by threatening, “Target Israel and we will target you. If you move forward … we will move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States. You have been warned.” While both Secretary of State Antony Blinken and President Joe Biden complained that the ICC had “equated” Hamas and Israel, presumably because he requested arrest warrants for both Israeli and Hamas officials, Thomas-Greenfield’s comments are the first time that a senior U.S. official has baldly declared that Washington will defy an ICC arrest warrant. To justify this stance, Thomas-Greenfield explained that the U.S. “has questions” about the court’s exercise of jurisdiction over Israel, presumably referring to the Biden administration’s rejection of the court’s jurisdiction over Israeli nationals. (She also incorrectly asserted that the U.S. had already reflected its unwillingness to arrest Netanyahu when he visited Washington in July, suggesting that the court had issued the arrest warrants, although it has not). The question of territorial jurisdiction, however, is a matter that the court ruled on in 2021, refusing Israel’s arguments challenging jurisdiction, recognizing Palestine as a member state of the court with legal capacity to refer a case in its territory to the court, and reiterating the court’s authority to exercise jurisdiction over non-member state nationals who commit crimes in such a territory. The fact that Netanyahu is the head of government in Israel does not immunize him from international criminal prosecution. The ICC has previously held that such domestic immunities do not trump an ICC arrest warrant because they would undermine the ICC’s purpose, including Article 27 of the Rome Statute, which provides that “all people are subject to the statute without distinction based on official capacity.” The court furthermore clarified that complying with an arrest warrant does not mean subjecting a head of state to domestic prosecution—something that domestic immunity statutes prohibit —but merely transferring them to the The Hague for international criminal prosecution. More significantly, Thomas-Greenfield’s suggestion that compliance with a court’s rulings is optional depending on whether or not a government agrees with a ruling further undermines the very basis of the ICC’s capacity to act as an international court with the power to issue binding decisions. Basically, Washington’s message to the world is that it loves the ICC when it prosecutes America’s enemies and hates the court when it prosecutes its friends. While the Biden administration in 2021 canceled U.S. sanctions against the previous ICC prosecutor, Fatou Bensouda, her staff, and their families that the Trump administration imposed on them for pursuing the prosecution of Israelis and Americans, it has not stopped pressuring the new Prosecutor, Karim Khan, to back off; Khan said that “some elected leaders” even told him, that the ICC “was built for Africa” and for “thugs like Putin” but not Western or Western-backed leaders. Israeli officials have continued their nine-year campaign to spy on, harass, pressure, smear and threaten both the current and former prosecutors in an attempt to derail the investigation. It is exactly such attacks on the court in the face of the first prosecution of a U.S. ally that have led a number of African states to threaten to withdraw from the court, seeing it as mere cudgel with which to beat African abusers, while never allowing it to move against U.S. allies. A related question Thomas-Greenfield refused to answer was whether the United States would comply with the orders issued by the International Court of Justice, which hears disputes between states. In a recent advisory opinion ruling, the ICJ ruled that Israel’s occupation of Palestinian territories is illegal and that it must remove its forces and settlers from there and reverse its illegal annexations. The court ordered states not to recognize any illegal Israeli acts, such as annexations (The Trump administration recognized Israel’s annexations of East Jerusalem and the Golan Heights, but the Biden administration has not reversed these.) More significantly, the court said that states are under obligation “not to render aid or assistance in maintaining the situation created by Israel’s illegal presence in the Occupied Palestinian Territory.” This is a problem for the U.S government, if it is to obey the directives of a court of which it is a founding member, by virtue of Washington’s ratification of the United Nations Charter. That’s because the United States is Israel’s largest aid provider, with over $20 billion in military aid provided in 2024, and more than that in arms sales authorizations. As a result, such aid not only violates U.S. laws prohibiting arms to states that violate human rights, but a direct order from the ICJ. The U.S. Mission to the United Nation’s tweet this week stating that it will vote against a pending U.N. General Assembly resolution to enforce the advisory opinion is a pretty clear indication that the U.S. has no intention of complying with the ICJ. The continued transfer of U.S. weapons to Israel may well become the source of charges against the U.S. government in the ICJ occupation case (as well as the separate case South Africa initiated concerning genocide claims against Israel), but also against individual U.S. officials in the ICC case, for aiding and abetting the crimes with which Israel is charged. During her talk, Thomas-Greenfield made a point of remembering her “friend and mentor” Madeleine Albright. I suspect Thomas-Greenfield’s remarks last week may go down as her very own Albright moment. In 1996, then-Secretary of State Albright infamously responded to 60 Minutes host Lesley Stahl’s question about whether the “price” of U.S. sanctions in Iraq, which had caused “half a million dead Iraqi children… more children than died in Hiroshima” was “worth it,” by saying “I think it’s a very hard choice, but the price—we think the price is worth it.” It’s sad and somewhat ironic to have solicited an equally damning response from Thomas-Greenfield, highlighting, 30 years later, the persistence of the United States’ highly selective use of international law as a political cudgel against opponents, but never against itself or U.S. allies. The downside of this approach, of course, is that international law—and the courts responsible for upholding it—cannot survive the world’s leading superpower’s continued assaults, and will continue to crumble, to the detriment of all those international legal institutions are meant to serve, Americans included.

#### Support for a war-crime ridden pariah state destroys US standing and prestige

Robins 24 [James Robins, writer for the New Republic, 12-2-2024, "Joe Biden Is Trashing International Law", New Republic, https://newrepublic.com/article/188883/joe-biden-trashing-international-law]/Kankee

For once Matthew Miller, a man as sinister as he is bland, had nothing to say. It was unusual. Nearly every day of the last 13 months has been witness to Miller’s banal podium performances as the mouthpiece of the State Department. Miller’s role: to run American complicity in the mass murder of Palestinians through the filter of colorless, exculpatory bureaucrat-speak. Yet on November 21, mere hours after the International Criminal Court issued its warrants for the arrest of Benjamin Netanyahu and his former defense minister, Yoav Gallant, State abruptly canceled a scheduled press briefing. There are, it appears, limits to Miller’s powers of obfuscation. Words failed him. Just as words so often fail us when we face the scale of Gaza’s destruction. But silence too is an action, and the list of things the United States will not do to protect its accomplices is shrinking fast. The two highest courts in the world—the ICC and the International Court of Justice—now have open cases against the state of Israel and its current leadership. Rather than pull back a single inch, even to save its own face, the United States would prefer instead to trash these courts, the law they represent, and the moral principles they embody. Carry on like this, and the virtues America claims to defend will soon look exactly like what’s left of Gaza: ruined. This time it’s personal. Netanyahu and Gallant stand accused of war crimes and crimes against humanity. As of last Thursday, neither man can visit any of the 125 nations party to the Rome Statute (including United Kingdom, Canada, and Germany) without serious fear of incarceration and speedy shipping to The Hague. They are marked men, branded as killers for the rest of their lives, confined to countries just as dismissive and offensive to international law as theirs is. These warrants are a monumental event. They prove two things. To lead an alleged democracy does not make you immune from justice. And for the Palestinians, as a people, there is hope yet that their assassins might suffer some punishment. The warrants also reveal a world tipped sharply on its axis. The Nuremberg precedent, which serves as the foundation of modern international law, has always been thin and precarious—especially after Vietnam, after Iraq. The U.S. acted in the postwar era as if the law was limp, placid, and pliable—a sidearm for the imperial hegemon rather than a gold standard applicable everywhere. But we scoff today to hear Secretary of State Antony Blinken trumpeting a “rules-based international order” precisely because that order has never been so openly insulted. With one side of its face, the U.S. smiles; with the other, it bites. The ICC was praised to high heaven when it indicted Vladimir Putin for his forced transfer of children from Ukraine. “I think,” Blinken said in March last year, “anyone who’s a party to the court and has obligations should fulfill their obligations.” Now, when the ICC applies the same standard toward an “ally,” Joe Biden calls the court “outrageous.” In one sense, the government of the United States—and its propagandists, like Matthew Miller—doesn’t need to care. It is not a member of the ICC or a signatory to the Rome Treaty. Indeed, the U.S. refused to join the court when it was formed 22 years ago, at the dawn of the “war on terror,” to avoid moments like this. Senator Lindsey Graham admitted as much. The U.S. should, he said, “act forcefully against the ICC.… We cannot let the world believe for a moment that this is a legitimate exercise … because to do so means we could be next” (my emphasis). Meanwhile, the American Service-Members’ Protection Act is still in force, a law that allows the U.S. to use “all means necessary … to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the [ICC].” This law’s nickname is The Hague Invasion Act. Intentional famine. Deliberate famine. Hunger as a weapon. These are Netanyahu and Gallant’s crimes. The pair, according to the ICC, “intentionally and knowingly deprived the civilian population in Gaza of objects indispensable to their survival.” As such, they bear “criminal responsibility for the war crime of starvation.” And these are crimes still ongoing. Blinken gave Israel 30 days to improve the grotesque humanitarian strife in Gaza or face “implications for US policy.” He gave no clue of what those “implications” might be. That was on October 13. The Israel Defense Forces allowed a few more aid trucks to enter. Not nearly enough to improve Palestinian life above the condition of bare, meager existence. But it was enough for the U.S. to admit, 30 days later, that those threatened “implications” no longer mattered. It was another “red line” to be passed over at the same speed as the “red line” drawn before the Rafah offensive in May—an offensive the ICJ insisted should cease immediately. On October 9 last year, Gallant incriminated himself with the infamous “No electricity, no food, no fuel” order. Today’s dire circumstances are really no different. That instruction still stands. Indeed, to apply any caveats whatsoever on aid entering Gaza’s ruins is a violation of Israel’s legal duty. The ICC noticed the country’s duplicity here, stating that deliveries “were not made to fulfil Israel’s obligations.… They were a response to the pressure of the international community or requests by the United States.” Regardless, that aid was “not sufficient.” Gaza remains held in a sick stasis. Every soul is suspended, kept alive long enough for the cold to kill them this Christmas. Or disease. Or dumb bombs made by American hands. Netanyahu and Gallant face arrest for these strikes as well, these “widespread and systematic” attacks. The ICC indicts them with “criminal responsibility as civilian superiors for the war crime of intentionally directing attacks against the civilian population.” This alone proves the Israeli army and its intelligence agencies are incapable of prosecuting the war in a manner that even begrudgingly allows for the right of Palestinians to live. Israel’s defenders, including the U.S., would protest that Netanyahu’s regime is engaged in a conflict against valid enemies. Regardless of the battle against Hamas or Hezbollah, they have, by their methods, forfeited the right to pursue the war on their own terms. Like its client and customer, the U.S. finds itself at the opposite end to the goal of greater justice. Daily it sacrifices the postwar legal and moral order on the altar of Israeli arrogance and bloodlust. It is to Netanyahu and Gallant’s benefit that Joe Biden destroys whatever respect the rest of the world might still have for one of the proud authors of Nuremberg. And as Biden passes into political senescence, retiring shamed to his wintry Delaware home, we should hope that his mental agility is not as far decayed as it looks. Because only those sound of mind are able to reflect on a lonely legacy: The adamantine support Biden offered, as the representative of totemic American power, on the side of two men indicted for the acts humanity has collectively judged to be gravest of all. Short of joining the pair in the dock as a co-conspirator, we can wish too that late at night he weeps the tears of the guilty. The twilight of his life and presidency is the twilight of American prestige.

#### Biden is on a scorched earth rampage against the ICC, destroying ICC credibility and US leadership

Marcetic 24 [Branko Marcetic, staff writer at Jacobin magazine, 5-21-2024, "Biden Should Stop Attacking the International Criminal Court", Jacobin, https://jacobin.com/2024/05/icc-israel-arrest-warrant-biden-administration]/Kankee

Not one of these holds any water. The ICC plainly has jurisdiction here, since Palestine is a party to the Rome Statute that created the court in the first place (a statute, incidentally, that the US government still hasn’t signed onto). As many have already pointed out, we didn’t hear any of this legal hairsplitting in the Western world last year when the ICC waded into the Ukraine war, where neither the aggressor nor the victim had ever signed onto the 2002 treaty. In fact, its actions were roundly applauded within the United States and by US allies, with President Joe Biden calling it “justified” and one US official rhapsodizing the court made up “part of a larger ecosystem of international justice.” The idea that Khan is some kind of politically driven zealot vindictively targeting Israel is equally laughable. Khan was nominated by a right-wing (and pro-Israel) British government and was Israel’s preferred candidate for the post. Plus, one of his first acts as ICC prosecutor was to “deprioritize” the court’s investigation into US war crimes in Afghanistan, under US pressure. The last charge is the silliest one. The idea that indicting Israel and Hamas at the same time is a statement of “equivalence” is as nonsensical as saying that if officers arrest a serial killer as well as someone responsible for a hit-and-run on the same day, the police are making a statement that those crimes are fundamentally the same. In fact, it’s the opposite: by targeting both Israel and Hamas, the ICC is proving that it’s committed to taking an evenhanded application of international law. But it’s true that the two aren’t equivalent: while Hamas’ monstrous rampage killed 767 Israeli civilians, the Israeli government has so far slaughtered at least sixteen thousand Palestinian civilians, by Netanyahu’s own self-serving count (lower than the actual likely number of civilian deaths). There’s another major significance to the court’s request. Thanks to the brazenly hypocritical, wrathful response to the ICC announcement from US officials (and some US allies), this episode is another, major step in the entirely avoidable process of international isolation and faltering global leadership status of Washington and its Western allies, as well as the Biden administration’s gradual reputational self-destruction. It’s broadly taken as a given around the world that the response from Republicans — including those who just a year ago applauded Khan for issuing an arrest warrant for Putin and waxed poetic about the ICC’s importance then — would be unhinged. So some of the GOP’s leading lights, including Senator Lindsey Graham and House speaker Mike Johnson, are talking about slapping sanctions on the ICC, with Senator Tom Cotton even threatening ICC officials’ families. But this kind of talk isn’t limited to the GOP. A host of prominent and even high-ranking Democrats have publicly denounced the ICC’s decision as “trash,” “reprehensible,” “wrong,” and “political,” leading them to double down on their support for Israel’s war. Even worse, all of this is being backed up and repeated by the Biden administration itself, which at this point seems hell-bent on not just shredding its own public diplomacy strategy, but burning the shredded leftovers into ash. Biden’s state department has questioned “the legitimacy and credibility” of the ICC investigation, while the president himself explicitly said that “we reject” the application for arrest warrants. Earlier today, Secretary of State Antony Blinken confirmed the White House was backing US retaliation against the court, declaring at a Senate Foreign Relations Committee hearing that the administration would “work with Congress, with this committee, on an appropriate response.” Amazingly, all of this — lobbing threats against the ICC, denying its jurisdiction, preparing retaliation, even describing its indictment as “outrageous” — closely mirrors the apoplectic Russian response to the ICC’s Putin warrant last year. That Biden is doing this high-stakes act of geopolitical seppuku on behalf of not even his own war, but that of a foreign government — and a foreign government that openly disrespects him and is rooting for him to lose in November — makes this even more remarkable. But then, so deep and integral is US support for the brutality and continuation of Israel’s war that the Biden administration’s attacks on the ICC at this point may well be an act of rational self-preservation. As Johnson put it just hours ago, “if the ICC is allowed to threaten Israeli leaders, ours could be next.” A consistent pattern throughout this war is that the longer it’s gone on, the legal and political perils for Biden and the United States have not only piled up, but gotten progressively more serious. Netanyahu once said that not even The Hague “will stop us” from continuing to wage Israel’s terrible war. We’re about to find out just how far he and his benefactors in Washington will go to prove that true — and to what depths they’re willing to drag the United States to as a result.

#### The US wants full on lawfare against the ICC, attacking the institution when we don’t like its position

Hathaway 24 [Oona A. Hathaway, Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School and a Nonresident Scholar at the Carnegie Endowment for International Peace, 5-24-2024, "Don’t Go to War With the ICC", Foreign Affairs, https://www.foreignaffairs.com/israel/dont-go-war-icc]/Kankee

COLLATERAL DAMAGE There are those in Congress who want to return to the Trump administration’s all-out war on the court. A bill proposed in the U.S. House of Representatives—dubbed the Illegitimate Court Counteraction Act—would sanction and revoke the visas of any ICC employee or associate involved in the investigation into the war in Gaza. Although this proposed bill may not win enough votes to pass, the Biden administration has signaled it is open to working with Republicans to retaliate against the court. That would be a huge mistake. Even if the court issues arrest warrants, the chance of a criminal trial for either Netanyahu or Gallant remains a remote possibility. Israel is highly unlikely to turn either one over to be tried any time soon. The main effect of arrest warrants will likely be to undermine their legitimacy and make it impossible for them to travel to any ICC member state without risk of apprehension. Meanwhile, sanctions on ICC staff would undermine Washington’s efforts to bring Russia to justice for its crimes in Ukraine. In the wake of Russia’s invasion, a Senate resolution sponsored by Republican Senator Lindsey Graham and cosponsored by members of both parties described the court as “an international tribunal that seeks to uphold the rule of law, especially in areas where no rule of law exists.” Legislation passed in 2023 amended existing law to allow the United States to assist with investigations and prosecutions of foreign nationals related to the situation in Ukraine. That has, in turn, led to unprecedented levels of cooperation between the ICC and the United States, resulting so far in four arrest warrants—including one for Russian President Vladimir Putin himself. Sanctions also would put at risk cooperation over accountability for crimes in Sudan as a new genocide looms, as well as witness protection and fugitive apprehension efforts. Retaliating against the ICC would also cripple the United States’ capacity to advocate for international justice in other situations in the future. The United States has long made advocacy for global criminal justice a key element of its foreign policy. Ambassador-at-large for Global Criminal Justice Beth Van Schaack travels the world pressing states to meet their international legal obligations and ensure that they hold those who commit international crimes to account. Those efforts would be rendered ineffective if the United States is seen to support criminal accountability only for geopolitical opponents. Demonstrating hypocrisy in response to the ICC’s work would further isolate and alienate the United States on the global stage at a moment when it is engaged in a contest for the hearts and minds of people and states around the globe to uphold the rules-based international order. The effort to win influence abroad does not just require creating effective economic or military ties. It also requires demonstrating that the United States can live up to the principles it claims to support. Attacking the ICC proves just the opposite: it shows that the United States supports global justice only when applied to its adversaries. And in doing so, it suggests that the United States’ commitment to the rule of law extends only so far as its short-term naked self-interest allows. There is no surer way to erode the global legal order. The United States should continue to offer its strongest support for the security of Israel. But that does not require attacking the court. If the United States and Israel truly believe there is no legal basis for the charges, they should call the ICC prosecutor’s bluff. Israel should launch a genuine investigation of its own. It should demonstrate its commitment to the rule of law and justice by carefully reviewing the evidence and showing that the charges are, indeed, groundless. Opening a genuine investigation would force the court’s hand, as it would have no choice under its own rules but to find the cases against Netanyahu and Gallant inadmissible, while allowing the cases against the leaders of Hamas to continue. Of course, Netanyahu, who is already facing domestic corruption charges, is extremely unlikely to agree to a domestic investigation. He has proven impervious to U.S. pressure, ignoring the Biden administration’s calls to better protect civilians in Gaza again and again, as he and Gallant continue to wage a war that Biden has called “indiscriminate” and “over the top.” If Israel will not take advantage of the one surefire way to end the proceedings before they go any further, the United States should not shred its credibility simply to protect the men who have ignored every warning.

#### And Trump sanctions independently implode the ICC’s operational capabilities

Anderson 24 [Janet H. Anderson, international law and justice reporter with a BA from Durham University in Modern Middle Eastern Studies, 12-02-2024, "The clouded skies over the ICC", JusticeInfo.net, https://www.justiceinfo.net/en/139020-clouded-skies-over-the-icc.html]/Kankee

Every year the representatives of the now 124 member states (Ukraine will join officially in January) that fund the ICC meet in the Hague or New York to discuss the budget. This year prosecutor Karim Khan has provided a welcome fillip to the mood by announcing last week his intention to seek an arrest warrant against Myanmar’s military ruler, in relation to the alleged crimes against the Rohingya and their deportation over the border into Bangladesh, which is an ICC member state. But this year’s context looks particularly strained. The ICC states parties face a decision on how to investigate the prosecutor’s alleged sexual misconduct. And, come January, when Donald Trump becomes the US president again, the court is likely to face sanctions – in retaliation against the arrest warrant for Benjamin Netanyahu, a staunch ally of the coming US administration – that will pose an even greater challenge. “They have the potential to sanction the actual institution, which would be an absolute disaster. It is an existential threat for the court,” says Maria Elena Vignoli of Human Rights Watch. “We don't know what ultimately will come down,” says James Goldston, the head of Open Society Justice Initiative, an NGO, “but they are potentially devastating. No question about that.” Growing outside pressure The court was long criticised for its focus on Africa. All the individuals who have been tried since 2002, when the court became active, are Africans. Its six successful prosecutions have all been for medium-level rebel commanders across that continent. Now the court has been able to break out into Asia, Europe and the Middle East and challenge some of their heads of state or governments for their alleged responsibility in crimes against humanity. But 2025 also looks set to be the year when the states finally have to decide where they stand on implementing international justice rules and how they can fix some of the flaws in the body they built. The vulnerabilities of the international criminal court have been visible on several fronts. After Putin’s indictment by the court a cyber-attack in 2023 caused a return to paper binders and USB flash drives to run cases. A whopping 4.3 million Euros is still needed to fix those systems and restore security. Russia has opened criminal cases against elected officials. Former prosecutor Fatou Bensouda has also spoken of the bullying tactics she says were employed against the court’s officials by Israel. And Israel continues to be suspected of targeting the court. Meanwhile, the office of the prosecutor is being asked to do more and more. States continue to refer situations. Last week Chile along with Costa Rica, Spain, France, Luxembourg and Mexico called on the prosecutor to focus on women in Afghanistan, and earlier this year Lithuania pointed to crimes against humanity in neighbouring Belarus. This year the Office of the Prosecutor requested an additional €9.31 million (a 15.4 per cent increase) on last year. But the committee on budget and finance admonished the prosecutor’s office for over-reliance on external contractors and urged it to get its human resources recruitment system in order. Slow internal reforms It was in 2019 that states decided that a root and branch review of the court was needed. The Independent Expert Review led by South African Justice Richard Goldstone exposed some ugly truths about the failures of parts of the Rome Statute system to operate effectively in dealing with atrocity crimes and poor morale in key areas like the Prosecutor’s office. The reform process has been implemented by states, with reports to the Assembly of States Parties (ASP) every year. OSJI Goldston (no relation) notes that some reforms are trickling through – there’s now a process of vetting for candidates for senior roles and judges have recently changed certain rules which now allow them to “move at a pace that at least more approximates the expectations of various stakeholders” than before. But, he says, “at the same time, I think there has not been sufficient progress in addressing what the independent expert review identified as a really challenging, very toxic environment internally for many staff of the court when it came to their work environment and the lack of trust that was exhibited apparently by many members of the staff, of the internal disciplinary processes and review processes that ostensibly existed to address concerns about harassment and hostility in the workplace. I just don't think we've seen enough progress in respect of that.” Should Karim Khan step aside? That continued poor work environment and the mistrust in the internal disciplinary procedures embodied in the court's own Independent Oversight Mechanism publicly erupted via a sexual misconduct allegation against the prosecutor himself. The alleged victim refused to cooperate with the court’s investigators. Instead, members of Khan’s office have leaked alleged elements of the situation to members of the media. The prosecutor has now agreed that an investigation is needed. How independent it will be of the court and what it would cover, including any allegations of a smear campaign against him, are still unclear. Against that backdrop, several senior NGO figures have called for the prosecutor to temporarily step aside “while such an investigation is proceeding without prejudice, of course, to his right to be presumed innocent and without taking any sides about the allegations that have emerged,” says Goldston. “There's no reason why stepping aside and leaving it in the hands of his capable either one or both deputies and the staff that support them should in any way prejudice the progress of any continuing investigation or prosecution.” Alix Vuillemin of Women’s Initiatives for Gender Justice, whose organisation wrote jointly with FIDH on this matter, agrees that “the best, perhaps the most gracious thing to happen would be for him to step aside for the moment. He's clearly indicated he won't. Perhaps we can help change his mind, since he took a very strict zero tolerance approach with his own staff, that could be a measure of fairness.” Vuillemin though points out the bigger picture – that “the rules around this issue are very vague”. She recalls how the first ICC prosecutor Luis Moreno Ocampo advocated hard for the independence of his office from potential state interference and the court ended with a relatively weak internal oversight mechanism: “And now we see the consequences of that”. (Allegations of misconduct against Moreno Ocampo were subject to an internal investigation whose conclusions were never disclosed.) It is also hard to see how a prosecutor would not be automatically weakened by having to step aside, and with him the whole institution. Victim’s interest and outside influence So what is the solution? “It's a very tricky question,” says Vuillemin, because of the precedents that this may create, “particularly because, of course, of potential for politicisation and the risks that could come in in future”. Under the Rome Statute, states can remove a prosecutor by a majority secret ballot if they are “found to have committed serious misconduct or a serious breach of his or her duties”. Instead of anything like such a drastic step, Vuillemin is “asking the states to focus on the allegations, and particularly being survivor-centred in all of this, not to be distracted by the politics around this, but to focus first on this particular situation. The system at the ICC to address these sorts of allegations may not be broken, but [it is] insufficient”. As states are absorbing the flurry of judicial activity in the last few months at the court and especially the issuance of an arrest warrant against Netanyahu, there is a risk that any investigation into the man pressing for that arrest warrant, Karim Khan, could be politicised. At the moment observers say that the ASP’s president Päivi Kaukoranta is playing her cards close to her chest. Vuillemin says it should be up to external independent investigators as to where their inquiry leads. “Any, good proper investigator or team of investigators will necessarily judge the credibility of the allegations,” she says. “They will over the course of their work find out quickly enough if there's any reason to broaden the scope of their mandate. I cannot imagine that it would not be part of their terms to investigate potential outside influences,” as Khan has suggested. Two separate issues Stephen Rapp is the former US ambassador at large for war crimes, and a former chief prosecutor at UN tribunals. He sees the dangers of how the sexual misconduct allegations can be weaponised against the court’s most sensitive investigation. “These are entirely separate issues,” he emphasises. “The cases that the court pursues on every front should continue to be pursued at the same time as there is an appropriate investigation of alleged misconduct by Khan or if there are allegations against other persons.” But Goldston notes that the allegations are “already are being used or misused in ways that are not helpful to the court”. Nevertheless, he says, “the fact that enemies of the court are willing to misuse these kinds of allegations for their own purposes doesn't, in my view, mean that the prosecutor or the court itself should forgo what is the professionally and ethically responsible thing to do,” which is, in his view, to step aside temporarily. Which budget for 2025? Eventually the meat of the debates will be around the threats to the court and its functioning, and the budget needed for its work. “The baseline problem is that the court is operating in a situation of chronic underfunding,” says Vignoli. After several years of a group of countries pushing for zero nominal growth, “which was completely arbitrary,” she says, since 2022 there's been “an acknowledgement that the workload of the court has increased. Some of the states that in the past were more stingy, less progressive in terms of the court's budget like France, Canada, the U.K., Japan, and Germany were being much more progressive. There have been budget increases over the past three years, but they have been overall minimal and they have not solved the underlying problem of chronic underfunding.” This year, the Court has proposed an annual budget of 202,612,400 euros, representing an increase for 2025 of 19,113,200 (or 10.4 per cent) over the approved budget for 2024. But the Budget and Finance Committee concluded that a total increase of 6.6 per cent should be sufficient. The proliferation of special funds A notable feature of the last couple of years has been the proliferation of special funds to support specific aspects of the court’s work. “We are very wary about voluntary contributions overall,” says Vignoli. “To start with there is a lack of transparency.” When states decided to give some extras for the Ukraine investigation, the Office of the Prosecutor established a special trust fund and designated three areas to which the 33 million euros now raised is going: improving the analysis of information, sexual and gender-based crimes along with those against children, and psychological support. But Vignoli is concerned there's little public information about “how that money is used besides the three main buckets”. A separate Trust Fund for cooperation was also established of some 125,000 euros for working with local justice actors in the Democratic Republic of Congo and capacity building at the Central African Republic special court. “We're not saying they shouldn't be there,” says Vignoli. “But they have been used over the past few years to fill gaps that were left in the regular budget. And that is a problem because voluntary contributions are not meant to cover the core activities of the court.” “There's also the issue of politicisation, when a minister of foreign affairs of State X makes a contribution and then says, we just gave X million for Ukraine or for Palestine. It's problematic in terms of perception.” And there's an issue of sustainability. “States use this as an excuse to keep the general budget down. It creates this vicious cycle, where the court doesn't have enough, so asks for voluntary contributions. And then states say, look, we've given you voluntary contributions so we don't need to raise the budget. It's hard to break this cycle.” US sanctions With the arrest warrants announcement by ICC judges in the Palestine situation, the court now faces political fractures in the system. France has declared that it is not obliged to follow the ICC rulings on head of state immunity, and would not arrest Netanyahu if he visited Paris. There is also direct fire from across the US political spectrum, in defence of Israel’s war. When Donald Trump was last in power in Washington between 2016 and 2020, his administration froze the assets of the then-prosecutor Bensouda and a member of her staff. “It's a very fraught situation,” says Goldston, who points out that “the incoming Senate majority leader has made clear his desire that the Congress act on that threat of sanctions as soon as it comes into being in January”. And that “the Trump administration itself has the power to impose sanctions, by executive order, in addition to anything Congress does”. Goldston warns of the potential consequences of sanctions: “The sanctions could be really a devastating blow to the court, simply because such sanctions in principle can essentially cut off the court's ability to function, its ability to retain and command and preserve the services of a variety of vendors, of banking services, of all kinds of things, or IT services, which are likely to have dollar components that run through the U.S.” In addition, he says the court’s cooperation agreements with a number of other states would be likely to suffer. “When I was [U.S.] ambassador at large for six years [under Obama’s administration], we worked very hard to become a ‘non-party partner’, and to work with the court on a case-by-case basis as our law allows,” recalls Rapp. “That provided very specific assistance in bringing the two fugitives Bosco Ntaganda and Dominic Ongwen to the court. They surrendered to our officers, and we worked very hard to get them to the ICC, where to date they're the two strongest cases with the longest sentences of any of the six cases that have gone through trial and sentenced at the court. Frankly, these courts need that kind of assistance from states if they're going to be successful. Their own warrants, and their own orders are, in the end, meaningless without state cooperation, and that includes the cooperation of non-parties. And obviously, any effort to go after the court and to sanction its prosecutor or his staff or other arms of the court or the court itself would necessarily undermine that effort to achieve accountability for the crimes being committed in Ukraine.” Other clouds on the horizon Double standards are clear, Goldston stresses. “It was not long ago that some of the same people calling for sanctions [against the ICC] now in respect of Israel and Palestine were going out of their way to applaud the court for its work in respect of Ukraine and support charges against President Vladimir Putin of Russia. I think it is worth underscoring the fact that even in the narrower view of certain elected officials, this court serves an interest of addressing serious crimes in certain situations.” What will the ASP actually do though? “The ASP is a very important platform and forum for states to express support for the work of the court, and explicitly condemn these threats, especially sanctions. But that's not enough. It will also be an opportunity to have conversations with EU countries to see where they are with active preparation and support,” says Vignoli. Meanwhile, the court is also gearing up for a special review meeting on the fourth crime in the Rome Statute - that of aggression. And Vanuatu along with other states wants to change the court’s statute with a new crime of ecocide to be added. “Definitely we are going to talk about it and build support” at the ASP, Vanuatu’s special envoy on climate change Ralph Regenvanu told Justice Info. But he was not sure if now would be the best time to put the issue to a vote. Other huge clouds on the ICC’s horizon include the limited functioning of the Trust Fund for Victims, the reparations arm of the Court. The Budget and Finance Committee complains that the Trust Fund still has not put a transparent fundraising strategy together. That is despite the awards made by the court’s judges of more than 86 million euros for reparations in the cases of Ntaganda in the Democratic Republic of Congo and Ongwen in Uganda. And then there is concern that the courtrooms in The Hague are going to look growingly empty, even though the Prosecutor has been busy applying for arrest warrants, with arrests not happening (see our article tomorrow).

#### Trump sanctions have full support AND they don’t require congress

Goldston 24 [James A. Goldston, Executive Director of the Open Society Justice Initiative and associate professor at NYU, and graduate of Columbia College and Harvard Law School, 11-20-2024, "To Protect the ICC, Its Chief Prosecutor Must Step Aside", Foreign Policy, https://foreignpolicy.com/2024/11/20/icc-israel-hamas-gaza-karim-khan/]/Kankee

The election of Donald Trump as the next president of the United States has once again placed the International Criminal Court (ICC) in extreme peril, raising the threat of U.S. sanctions because of its probe of crimes in Israel and Palestine during the ongoing Gaza conflict. Since May, when ICC Prosecutor Karim Khan requested arrest warrants for three Hamas leaders as well as Israeli Prime Minister Benjamin Netanyahu and then-Defense Minister Yoav Gallant, members of the U.S. Congress have assailed the court for what incoming Senate Majority Leader John Thune recently called its “outrageous and unlawful actions,” for which he promised to make imposing sanctions a “top priority in the next Congress.” In addition to the threat of legislative action, once he takes office, Trump could simply impose sanctions by executive order, as he did four years ago to retaliate against an examination into alleged George W. Bush-era U.S. crimes in Afghanistan. By sealing off the court from the global financial system, sanctions would stymie ongoing efforts to hold accountable perpetrators of grave crimes, not just in Israel and Gaza but also in other countries where the United States has backed ICC investigations. However well-intentioned, criticisms of the ICC have unfortunately not always been consistent. The current resistance to the court’s investigation of crimes in Israel and Palestine comes not too long after U.S. lawmakers on both sides of the aisle praised the court for charging Russian President Vladimir Putin for crimes in Ukraine. Opposition from powerful political forces would be bad enough. Yet in addition to these external challenges, the court faces an internal crisis that jeopardizes its most precious resource: moral authority.

#### Trump has full Congressional support for ICC sanctions

Gramer and Bazail-Eimil 24 [Robbie Gramer, national security reporter for POLITIC and graduate of Georgetown University’s School of Foreign Service, and Eric Bazail-Eimil, national security reporter with POLITICO, former associate director of transatlantic security at the Atlantic Council, and graduate of American University in Washington, 11-21-2024, "A Trump storm cometh for the ICC", POLITICO, https://www.politico.com/newsletters/national-security-daily/2024/11/21/a-trump-storm-cometh-for-the-icc-00183727]/Kankee

The Trump world has a message for the International Criminal Court: Brace for impact. Top Republican officials lashed out at the ICC with a mixture of fury and threats after it issued arrest warrants today for top Israeli officials over the war in Gaza, giving clear indications that DONALD TRUMP will play hardball with the global court once he enters office. “The ICC has no credibility and these allegations have been refuted by the U.S. government,” said Rep. MIKE WALTZ (R-Fla.), Trump’s incoming national security adviser, in a post on X. “Israel has lawfully defended its people & borders from genocidal terrorists. You can expect a strong response to the antisemitic bias of the ICC & UN come January.” Sen. TOM COTTON (R-Ark.) lashed out in a post of his own at the ICC and its top prosecutor, KARIM KHAN. “The ICC is a kangaroo court and Karim Khan is a deranged fanatic. Woe to him and anyone who tries to enforce these outlaw warrants,” he said. While the U.S. isn’t a party to the ICC, it has at times partnered with the international tribunal to investigate war crimes around the world. So what would Trump’s reaction to the ICC look like once he’s in office? While Trump himself hasn’t (yet) responded to the ICC news, Republicans have plans. U.S. cooperation on ICC investigations into Russian war crimes in Ukraine, for example, may come to a screeching halt. “While I supported the work the ICC was doing to prosecute Putin for his war crimes in Ukraine, I can no longer support an organization that has blatantly chosen to disregard its mandate,” said Sen. JIM RISCH (R-Idaho), the incoming chair of the Senate Foreign Relations Committee. Then, expect sanctions. Risch has pushed to advance sanctions against ICC officials in response to the court’s decision to advance cases against Israeli Prime Minister BENJAMIN NETANYAHU and former Defense Minister YOAV GALLANT. That bill has turned into a huge political headache and source of fierce impasse and infighting within the SFRC between Democrats and Republicans. “His bill will absolutely be a priority next Congress if Biden or Schumer don’t act sooner,” a Republican Senate aide said, referring to Democratic Senate Majority Leader CHUCK SCHUMER. The aide was granted anonymity to discuss the matter candidly. U.S. allies in Europe, already bracing for new tensions with Washington under Trump, are also in an awkward spot now. The ICC indictments against Netanyahu and Gallant mean that both of them could face arrest if they travel to any of the 120 countries party to the founding treaty of the ICC. (Israel also isn’t a member). That includes key U.S. allies such as the United Kingdom, France and the Netherlands, where the ICC is headquartered. Already, the Dutch government said it would adhere to the ICC ruling and arrest Israeli officials if they came to the Netherlands. This could lead to even more tensions between Washington and its European allies once Trump enters office, as if there weren’t already enough.

#### Past Trump actions prove an anti-ICC position

Kersten 21 [Mark Kersten, Consultant at the Wayamo Foundation and an Assistant Professor of Criminal Justice & Criminology and the University of the Fraser Valley, 3-5-2021, "Biden and the ICC: Partial cooperation, selective justice", Al Jazeera, https://www.aljazeera.com/opinions/2021/3/5/biden-and-the-icc-partial-cooperation-selective-justice]/Kankee

But the Obama administration’s partial engagement with the court also worried many who felt that it promoted selective justice. Indeed, during this period the US had more of an influence on the ICC – and more of the court’s attention – than any of the states that actually joined the institution. As a result, crimes committed by the US itself and its allies continued to remain beyond the court’s reach, while those that lacked US support were readily investigated by ICC. Then came Donald Trump. The Trump administration was hostile towards the court from the very beginning. Trump’s Secretary of State, Mike Pompeo, regularly derided the court as a threat to the US that needs to be isolated and even publicly referred to it as a “kangaroo court”. His one-time National Security Adviser, John Bolton, declared in a speech to the Federalist Society that the court is “dead” to Washington. His so-called Ambassador at Large for Global Criminal Justice, Morse Tan, meanwhile, openly stated that under Trump’s leadership “the US would seek the dissolution of the court”. Trump was hostile to the ICC because he feared that the court may soon start issuing warrants for US officials following its investigation into alleged war crimes in Afghanistan. Moreover, he wanted to thwart any move by the court to open an investigation into alleged Israeli atrocities in Palestine. To ensure US officials and allies remain beyond the reach of the ICC, the Trump administration not only embarked on a propaganda campaign against the court, but also took action to intimidate its staff. It issued sanctions against the ICC’s Chief Prosecutor Fatou Bensouda and the head of its Jurisdiction, Complementarity and Cooperation Division, Phakiso Mochochoko. A new chapter in US-ICC relations?

#### The Afghanistan decision harm US and ICC cred

Ochs 20 [Sara L. Ochs, fellow at Elon University School of Law, where she teaches International Criminal Law and Legal Method & Communication with a J.D. from Loyola University New Orleans College of Law and a B.B.A. from Loyola University Maryland.2020, “THE UNITED STATES, THE INTERNATIONAL CRIMINAL COURT, AND THE SITUATION IN AFGHANISTAN,” Notre Dame Law Review Reflection, https://ndlawreview.org/wp-content/uploads/2020/01/Ochs\_FINAL.pdf]/Kankee

\*PTC: Pre-Trial Chamber

III. THE IMPACT OF THE PRE-TRIAL CHAMBER’S DECISION Prosecutor Bensouda’s request to open an investigation into the situation in Afghanistan embodied the primary concerns voiced by the United States since the negotiations of the Rome Statute. It presented a concrete possibility of investigation and prosecution of not only U.S. citizens, but of high-ranking military and state officials. Viewed through this lens, the Trump administration’s backlash to Prosecutor Bensouda’s request is far from surprising. Yet, the ICC’s response to U.S. hostilities in denying the investigation request has potentially drastic implications both for the court’s legitimacy and for U.S. foreign policy. The PTC’s decision does little to assuage criticism of the court’s exclusive focus on prosecuting African crimes. In fact, by rewarding the United States for its failure to cooperate, the PTC sends the message that Western powers are immune from international prosecution for war crimes, especially when they act to pose obstacles to OTP investigations. The PTC’s decision is a clear example of the ICC succumbing to American pressures and sweeping heinous crimes under the rug in an effort to ensure goodwill with members of the U.N. Security Council. Specifically, this sets dangerous precedent undermining the OTP’s recent efforts to expand its geographic reach. This is especially concerning given the open preliminary examination into alleged war crimes committed by UK nationals in the context of the Iraq conflict between 2003 and 2008.4 7 Like the Afghanistan situation, any investigation opened within the Iraq–UK situation would most likely be through Prosecutor Bensouda’s propio motu authority.4 8 The PTC’s decision logically encourages UK officials to refuse cooperation to the greatest extent possible in an effort to render infeasible any potential investigation into British war crimes. While the PTC’s decision has been met largely with outrage,4 9 one group of scholars has applauded the PTC’s decision on the ground that it marks a policy shift towards devoting the court’s minimal resources only to those investigations that yield a strong likelihood of success.5 0 This view further promotes an ICC focused only on crimes that do not implicate states with close ties to the United Nations, further alienating the developing Asian and African states who already feel victimized by the court. Moreover, there is no evidence that this decision marks any new policy towards focusing exclusively on investigations and prosecutions in which the states or parties involved are highly cooperative. Indeed, the court continues to pursue a case pertaining to crimes committed in the government of the Philippines’ “war on drugs” campaign, even though the Philippines objected so strongly to the ICC’s opening of a preliminary examination that it withdrew from the Rome Statute.5 1 Thus, marking the PTC decision as representative of a policy shift in favor of efficiency is unrealistically optimistic. Further, while the Trump administration has labeled the PTC’s decision a “major international victory,”5 2 the United States’s apparent disdain for the ICC significantly compromises the nation’s status as a proponent of global justice. The Trump administration’s conduct in rebuking the authority and the legitimacy of the only permanent court established to prosecute crimes committed at an international level undermines U.S. policy in bringing perpetrators of worldwide atrocities to justice.5 3 By calling for the death of the ICC, the Trump administration has concretized the United States’s reputation as an international bully and has sought to eradicate an institution that oftentimes provides the sole means for bringing brutal dictators and atrocity perpetrators to justice. The Trump administration’s actions also undermine U.S. foreign policy initiatives. By taking a very public, very loud offensive to the ICC’s Afghanistan decision, the United States has welcomed impunity for atrocities committed by the Taliban and affiliated groups deemed as terrorist organizations by the U.S. Department of State.5 4 The United States’s constant pressure on the ICC resulted in the PTC’s decision to block Prosecutor Bensouda’s requested investigation in its entirety, meaning that the OTP lacks judicial authorization to investigate any of the three categories of crimes listed in Prosecutor Bensouda’s request, including those committed by the Taliban. This is especially concerning, not only because of the gravity of the Taliban’s atrocity crimes, but also because—unlike the alleged crimes committed by Afghan forces and the U.S. military—the OTP had obtained meaningful cooperation from both international and domestic organizations in Afghanistan and had compiled significant evidence connecting the Taliban to these alleged crimes.5 5 The Trump administration’s rash and selfish attack on the ICC has effectively prevented one of the world’s most feared and despised terrorist organizations from facing repercussion for some of its most heinous crimes. More broadly, the Trump administration’s hostilities against the ICC undermine U.S. foreign policy initiatives advocating for the international prosecution of atrocities perpetrated abroad. For instance, the Trump administration has maintained a policy of bringing to justice those responsible for the persecution of Rohingya Muslims in Myanmar,5 6 which the U.N. has labeled a “textbook example of ethnic cleansing.”5 7 While the Trump administration has noted “serious concerns” regarding the capability of Myanmar’s domestic judicial system to adequately prosecute those crimes, it has also failed to provide a valid option for a judicial mechanism that would be capable of rendering appropriate justice.5 8 The United States’s refusal to acknowledge the potential of the ICC, which has recognized jurisdiction over certain aspects of the Rohingya situation and currently appears to be the only criminal law mechanism capable of achieving justice for the Rohingya,5 9 not only portrays the current administration as illogical and uncooperative, but more importantly disadvantages the victims of these crimes. If the current administration is—as it claims—striving to achieve justice for the Rohingya and similarly situated victims of internationally recognized crimes, its failure to cooperate and support the ICC essentially renders this goal unattainable. Finally, the Trump administration’s attack on the ICC and the subsequent PTC decision is most detrimental to the victims of the heinous crimes committed in Afghanistan. A 2017 report issued by the Office of the Prosecutor on the investigation into Afghanistan included tentative estimations that the Taliban and its affiliated groups were responsible for 17,000 civilian deaths, 7000 of which were the result of deliberate and targeted civilian attacks, including attacks on schools, shrines, mosques, and humanitarian organizations’ offices.6 0 The ICC’s decision to close the investigation at the bullying hands of the Trump administration rewards the perpetrators of these crimes with temporary, and possibly complete, impunity. Again, not only does this impunity contribute to issues of instability within the Afghani government and society, but it further undermines U.S. policy to bring to justice those Taliban leaders responsible for these mass atrocities, many of whom also targeted U.S. military personnel. CONCLUSION

#### Joining the ICC bolsters the rules-based order and international law norms

Vindman 21 [Yevgeny Vindman, former colonel in the U.S. Army JAG Corps and former deputy legal advisor on the White House National Security Council with a master of laws from the Judge Advocate General's Legal Center and School, 4-21-2021, "It’s Time for the United States to Join the ICC", Foreign Policy, https://foreignpolicy.com/2023/04/11/russia-putin-ukraine-war-icc-united-states-crimes-arrest-warrant/]/Kankee

On March 17, the International Criminal Court (ICC) took a momentous step. For only the second time in its history, the ICC issued a public arrest warrant for a sitting head of state: Russian President Vladimir Putin. No sanctions, weapons, or ammunition delivered to Ukraine since the start of Russia’s full-scale invasion in February 2022 has targeted Putin as directly as this action. And even if the immediate prospect of Putin appearing in the dock at the Hague is remote, there will still be significant ramifications resulting from the ICC’s announcement. Founded in 1998 after nearly a century of major-power wars and conflicts, the ICC was designed to hold individuals accountable for genocide, war crimes, and other serious international crimes. The ICC is a critical pillar of the rules-based international order and has played an important role in getting justice for victims of regimes that flaunt human rights and international norms. However, despite touting the importance of this order and having called for accountability for Russia’s war crimes, the United States has declined to join or recognize the jurisdiction of the ICC in the 25 years since its founding. Even if the arguments against cooperation with the ICC were compelling in the past, the costs of not supporting the court are now too high in a world where authoritarian empires are once again embracing aggressive neocolonial warfare against their sovereign neighbors. The time for straddling the fence is over: The United States should cease its objections and robustly support—and perhaps even finally join—the ICC. Doing so will not only benefit justice efforts in Ukraine but will also strengthen U.S. foreign policy and international leadership for decades to come. Despite being an active proponent of the rules-based order, the United States is an outlier in the democratic world when it comes to its lack of support for the ICC. The ICC’s founding treaty, the Rome Statute, boasts a broad geographical coalition of 123 state party signatories—including many of the United States’ strongest allies, such as Japan and the United Kingdom. The United States has thus far provided several justifications for not joining the treaty, yet many still see this absence as hypocrisy. Having served 25 years in the military, including as a legal advisor on international criminal law and ICC matters at the White House during the Trump administration, I know the case against joining the ICC well. Critics argue that the ICC infringes on U.S. sovereignty, limits our freedom of action in international relations, and exposes our soldiers and politicians to potentially politically motivated prosecutions by foreign bureaucrats. But under closer scrutiny, many of these fears fall flat. Further, in the current geopolitical environment, there is good reason to believe that the benefits of supporting the ICC now will heavily outweigh the risks. Since World War II, the United States has helped build, reinforce, and lead an international order in which countries play by predictable rules. Conflicts, at least between major powers, are resolved through negotiation and consensus instead of force. This system of postwar institutions provides a bedrock of stability that has allowed for a climate of relative peace among global powers and economic prosperity for the American public. Russia’s aggression in Ukraine is the most serious attack on this system since at least the collapse of the Soviet Union and the greatest threat to peace on the European continent since World War II. As one of the guardrails put in place to maintain the rules-based international order, if the ICC’s warrant is ignored, then the other remaining guardrails to prevent illegal warfare may erode, too. Inversely, abiding by international legal norms, including those enforced by the ICC, has the potential to walk back the damage Russia has already done to the rule of law. If the global community can put up a united front to hold Russia accountable for its crimes, other would-be aggressors—especially Russia’s backers in Beijing—would take note. Supporting institutions of justice and accountability—even those that could potentially hold the United States accountable—would be a much-needed investment in the long-term viability of the U.S.-led international system for generations to come. As is the case of any international treaty, support for the ICC undoubtedly involves a certain sacrifice of sovereignty in pursuit of stability, deterrence, and peace. But even sharp criticisms and great concerns about joining the ICC should not dissuade the United States from entering into a treaty that will support the international rule of law. The idea that unelected bureaucrats in a supranational body can question and impugn the actions of democratically elected national officials is unconvincing. Though international prosecutors have vast powers, they can be constrained by the U.N. system and are only effective when the actions at hand violate principles of international law either in the initiation or conduct of conflict. Any objectively just and appropriate use of force would be beyond the ICC’s reach. One would hope that any use of force by the United States would meet these simple criteria. The greatest concern about cooperating with the ICC is that doing so would expose U.S. service members and leaders to politically motivated prosecution by foreign bureaucrats. But the court operates on the principle of complementarity, meaning that the ICC will not exercise jurisdiction when a state exercises its own prerogatives to investigate and prosecute potential war crimes. The ICC steps in only when a state fails to use its own national criminal justice apparatus to handle war crimes, as is currently the case in Russia. In the United States, however, the robust military justice systems ensure that crimes are investigated and prosecuted as a matter of maintaining order and discipline within the armed forces, making ICC jurisdiction against U.S. military personnel unlikely, so long as the United States continues to police its own behavior. Because the United States is already compliant with core principles of international criminal law, supporting and even joining the ICC would have very little practical effect on U.S. operations. Support for the ICC would, however, eliminate the argument that the United States is hypocritical and send a clear message that the United States plays by the same rules that it expects of all other international actors. For example, even though the U.S. military has a robust legal regime that effectively polices compliance with the law of war, there have been recent lapses at the political level, specifically the Trump-era grants of clemency for war criminals such as former Navy SEAL special operations chief Eddie Gallagher, who was accused of committing various war crimes while deployed in Iraq in 2017, and four security guards from the private military firm Blackwater—Paul Slough, Evan Liberty, Dustin Heard, and Nicholas Slatten—who were serving jail sentences for a 2007 civilian massacre in Baghdad. These actions were not popular with career military prosecutors—including myself—because the lack of justice and accountability erodes not only U.S. moral authority but ultimately good order and discipline within the military. Justice for its own sake is, of course, a worthy goal. Signing the Rome Statute would be a powerful step toward justice for Ukrainians who have suffered at the hands of Putin, as well as those who deserve accountability elsewhere. But many short-sighted critiques of the ICC miss the larger point that support for this body is not just the morally correct choice; it’s also the strategically correct one for U.S. foreign policy. A demonstrated commitment to accountability will strengthen the United States’ own institutions and make U.S. leadership of international institutions more credible and viable. Further, ICC membership would potentially chill U.S. political leaders’ appetite for unjust wars that could land them in dicey moral and legal terrain. An added layer of restraint and accountability may prevent future foreign-policy follies, whether by the White House or even by an expansionist China eyeing Taiwan. American choices made in the coming months and years will either further erode the international system or accelerate Russia’s status as a global pariah. By making the right choice and joining the ICC’s efforts for justice, the United States adds to its own security by fortifying the rules-based international order and dissuading aggressive adventures by its competitors.

#### Ratification allows strategic US-centric ICC lawfare and moots criticism of US double standards

Scheffer 23 [David Scheffer, former U.S. Ambassador at Large for War Crimes Issues and Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University, 7-17-2023, "The United States Should Ratify the Rome Statute", Lieber Institute West Point, https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/]/Kankee

I firmly believe that whatever the merits of the immunity interpretation 25 years ago, it has been overtaken by the march of customary international law combining both state practice and opinio juris, by judicial decisions, by persuasive scholarly work, by a renewed recognition of fundamental principles of criminal law and of sovereign decision-making, and frankly by common sense. Related to the immunity interpretation is the debate playing out in Washington over the implementation of ICC cooperation legislation that President Biden signed into law on December 29, 2022. Administration officials have delivered tortured testimony before Senate committees in recent months when confronted by Senators over the failure of the Administration to follow through on cooperation efforts with the ICC that are mandated by U.S. law regarding the Court’s investigation of Russian atrocity crimes in Ukraine. In a recent Senate Appropriations defense subcommittee hearing, Senators Lindsay Graham (R-SC) and Dick Durbin (D-IL) pressed Secretary of Defense Lloyd Austin on the Pentagon’s resistance to the legal mandate. Austin said that he was concerned about the issue of reciprocity. Such views are old think and reflect the concern that someday the tables will be turned and the ICC will be investigating and prosecuting U.S. actions and that we would not want other governments to cooperate with the ICC in its investigative work. The cooperation train left the station decades ago. All of America’s allies, with the exception of Israel and Turkey, are States Parties to the Rome Statute and are obligated to cooperate with ICC investigations. But there is no comparison in modern times with what is transpiring in Ukraine. Ambassador-at-Large for Global Criminal Justice Beth Van Schaack answered Austin quite effectively when asked on the PBS NewsHour recently. She said, “I think there is virtually no equivalency or comparison to what Russia has done here to anything that might involve U.S. personnel or service members. We have a full-scale war of aggression being committed through the systematic and widespread commission of war crimes, crimes against humanity. There’s no comparison here. And so I do not see a concern that this would set any sort of a precedent that might redound badly to the United States.” Austin’s statement also reflects a presumption that should be challenged. During the Clinton Administration, my instructions as the U.S. chief negotiator of the Rome Statute were based on the intent of building an international criminal court which the United States one day would join. The instructions were not to negotiate for six years to build a court that the United States would never join. When I signed the Rome Statute, the intent was to signal that the United States would remain on deck with the treaty and work towards one day joining the Court, not to stand in permanent opposition to it. President Bill Clinton conceded in his signing statement that the treaty would not (during Clinton’s remaining three weeks in office) and should not be submitted by his successor to the Senate until “fundamental concerns are satisfied,” a primary one being to “observe and assess the functioning of the court.” That opportunity to “observe and assess” began on July 1, 2002, when the ICC became operational following ratification of the Rome Statute by 60 nations. We have had 21 years to “observe and assess” and while there are some imperfections in the workings of the ICC, as there are with every legal system, the ICC’s professionalism and track record merit Washington’s respect. In any event, U.S. policy towards the ICC today should not be premised on, structured, or implemented as if the United States intends to be a permanent non-party State. Such isolation was never the Clinton Administration’s position and never reflected my negotiating instructions. The immunity interpretation was not advanced by the United States in order to permanently keep the United States out of the ICC, but rather to explain its status and non-exposure to ICC jurisdiction until Washington ratified the treaty. Otherwise, why did we negotiate and sign the treaty? Rationalizations for permanent non-party status may attract the support of those seeking that outcome, but such thinking defies all that was negotiated into the Rome Statute and its supplemental documents to protect U.S. interests, including due process protections, complementarity, Security Council backstop under Article 16, precise definitions of the crimes, judicial oversight of the Prosecutor’s investigations, tough admissibility standards, high approval requirements for amendments, precise rules of procedure and evidence, comprehensive elements of crimes, and much more. If the United States were to become a State Party of the Rome Statute, the immunity interpretation would become irrelevant—a non-issue—for the United States even if Washington wished to argue its merits for Israel, Turkey, Pakistan, North Korea, China, Iran, Myanmar, Libya, Egypt, Russia, Belarus, India, Saudi Arabia, Indonesia, Cuba, and other non-party States. Those who express concerns about “reciprocity” unfortunately convey an intimidated attitude about the ICC. Rather than be on the defensive about the ICC, the U.S. Government and particularly the Pentagon should take the offensive and recognize how the ICC in fact advances critical U.S. values, particularly against an aggressor State like Russia. The United States can weigh in and influence gravity requirements at the ICC and how the Prosecutor can best utilize his discretion, not to mention placing an American judge on the bench and perhaps one day greeting an American chief prosecutor. Washington can use its diplomatic clout to advance ICC investigative and prosecutorial objectives globally and in ways that are compatible with U.S. foreign policy and global security needs. The ICC should become part of this nation’s lawfare strategy. In other words, Washington should weaponize the ICC for worthy objectives—such as justice in Ukraine and Darfur—that reflect critical American values rather than taking an anemic defensive posture towards the Court. The Pentagon should embrace the duty of the law and when necessary justify the conduct of warfare to Congress, to the public, and even to the courts during the adjudication of relevant cases. A skeptical fear of being accused of atrocity crimes is a long way from the reality of credibly being investigated or prosecuted for such international crimes. The world has changed, and any presumption of the right to commit atrocity crimes, or to be shielded from accountability, is quite antiquated. If the U.S. military dared to plan and implement genocide, crimes against humanity, or serious war crimes anywhere in the world, then such action would demand investigation and prosecution at home with enforcement of federal and military law. Article 18 of the Rome Statute, which as a negotiator I proposed and largely drafted, is intended to give a country like the United States the opportunity to seize the reins of justice and hold onto them without interference by the ICC. We should take that option seriously if the need arises, but which actually should not arise because U.S. armed forces and indeed our civilian leadership should never be engaged in the planning and commission of atrocity crimes and certainly not of the magnitude that could trigger ICC jurisdiction. One has to think counter-intuitively to enter the world of ICC paranoia, namely that the United States must never become a State Party because it should be at liberty to act with permanent impunity as a non-party State or that the United States should be free to plan and commit atrocity crimes without consequence even if it were to become a State Party, so the Rome Statute should somehow permit that outcome. What do we have to fear from the ICC? I would argue that scenarios of illegal American conduct overseas or at home should never come to pass, but if they did, then the response must be first and foremost the enforcement of U.S. law, be it federal criminal law or the Uniform Code of Military Justice, or both, and adherence to Congressional oversight. The United States could become a pillar of complementarity and leadership in the ICC if some in Washington were not so intimidated by fear of ICC scrutiny. Lawmakers still have work to do on complementarity. For many years, Senator Durbin has advanced legislation to fill the gaps in federal criminal law for genocide, war crimes, and crimes against humanity. If the gaps can be filled, then the United States can demonstrate its capacity to investigate and prosecute the atrocity crimes found in the Rome Statute and thus, if addressed properly, avoid ICC scrutiny. This is the same goal shared by our allies, which are almost all States Parties to the Rome Statute, and many have amended their criminal codes accordingly. Durbin has almost reached the finish line. Laws of essentially universal jurisdiction have been adopted for commission of genocide and war crimes. The next step should be the Crimes Against Humanity bill, which Durbin introduced on July 12 as an amendment to S. 2226 authorizing appropriations for fiscal year 2024 for the Department of Defense. One should not expect a mirror image of Article 7 of the Rome Statute in the Durbin bill, but if adopted it will be the first opportunity to bring crimes against humanity into the federal criminal code. Administration and Congressional negotiators should be able to get it over the finish line this year given the impetus afforded by the Russia-Ukraine war, the recent enactment of the Justice for Victims of War Crimes Act, and the new legal authority for cooperation with ICC investigations in Ukraine. Senator Charles Grassley of Iowa (R-IA) stepped forward in 2022 to co-sponsor the Justice for Victims of War Crimes Act and thus build bi-partisan support for it. Even though at present the United States is not a State Party to the Rome Statute, the consequence of these legislative acts would be that any Russian soldier or government official involved in atrocity crimes in Ukraine and who steps foot in the United States, including Disney World with his family, would risk arrest and prosecution in federal criminal court for the crime of genocide, war crimes, or crimes against humanity. Even though President Vladimir Putin, Foreign Minister Sergey Lavrov, and Defense Minister Sergei Shoigu, if they dared to visit the United States, could claim head of state immunity as the most senior officials of the Russian Government and thus avoid sustained arrest, the fact that a federal criminal indictment and an arrest warrant could be issued would present legal jeopardy and public shaming none of them may wish to risk. Of course, if the United States were a State Party to the Rome Statute, any ICC arrest warrant against such individuals should be honored if they were to visit this country. In so many discussions I have had about the ICC and U.S. policy over the years, particularly dialogues with foreign scholars, lawyers, think tankers, diplomats, and journalists, there arises the constant refrain that American invocations about international criminal justice fall on deaf ears overseas, particularly in the Global South, because of the foreign perception of double standards. The complaint centers on the United States negotiating treaties like the Rome Statute that it then does not ratify. In their view, the U.S. military sometimes acts illegally on a large-scale, such as the Anglo-American invasion of Iraq in 2003 and the use of torture in Afghanistan, foreign black sites, and Guantanamo during the so-called war on terror. These are very deep scars. While I was negotiating the Rome Statute, other negotiators often would press me in sidebar discussions about perceived American hypocrisy and the peculiar American failure to commit. They would remind me that they re-opened the Convention on the Law of the Sea at President Ronald Reagan’s insistence to revise the deep sea mining provisions. But once they met U.S. demands and ratified the treaty amendments, the United States never followed through with ratification of that critical treaty. And yet today our government relies heavily on the rights protected by that treaty, albeit claiming they are customary international law, to ensure U.S. commercial and military access on the seas. Our foreign friends are not pacified and are quite cynical. There is deep resentment that the United States intensively negotiates international treaties, signs many of them, and then often fails to follow through with ratification. The United States would begin to overcome the double-standards perception, which cripples our influence on so many fronts, including international criminal justice, if the U.S. Senate were to follow through on major treaties that the United States took the lead in negotiating and then often signed. These include the Convention on the Law of the Sea, Additional Protocols I and II of the 1949 Geneva Conventions, the Convention on the Rights of Persons with Disabilities, and, yes, the Rome Statute of the International Criminal Court. All but one of these treaties have been languishing for decades. For example, it has been 23 years since the United States signed the Rome Statute. Despite some flaws in its performance, the ICC has demonstrated its credibility, competence, fairness in protecting due process rights, reasoned jurisprudence, and a mixture of convictions and acquittals. It also is demonstrating every day its relevance in a highly dynamic and violent world. All of Europe and Latin America, most of Africa, the Caribbean and Central America, and a good number of Asian and Pacific nations are committed to a credible ICC. White House and Congressional support for ICC investigations in Ukraine is an encouraging signal of more open minds about the ICC in the Executive Branch and on Capitol Hill. The Biden Administration should take the following steps now to advance American engagement with the ICC and pave the way for U.S. ratification of the Rome Statute: 1. The Crimes Against Humanity bill should be navigated towards adoption in the Senate and the House of Representatives as a bipartisan initiative to close an increasingly inexplicable gap in federal criminal law and better insulate the United States from ICC scrutiny. The White House should signal its intention to sign an acceptable bill into law. 2. The Biden Administration should undertake a thorough review of the American Service Members Protection Act and determine what provisions, if any, should remain U.S. law as the government considers ratification of the Rome Statute. 3. The Biden Administration should cease use of the immunity interpretation when discussing the Rome Statute, the ICC, and U.S. policy. There is no need to explicitly reject the immunity interpretation, but there is an imperative need now to stop defining U.S. policy as being anchored in it. A simple explanation would be that the immunity interpretation no longer guides U.S. policy. 4. The State Department should send a letter to the United Nations, as depository of the Rome Statute, to withdraw the George W. Bush Administration’s letter of May 6, 2002, which states the intention of the United States not to become a party to the Rome Statute and to abandon any obligations as a signatory party. Those statements undermine U.S. foreign policy objectives and are embarrassing even to read in 2023. The letter remains a beacon of hopelessness for other countries seeking to understand the U.S. posture towards the ICC. Fortunately, the U.S. signature has never been removed from the Rome Statute but no longer should be soiled by such statements. A fresh State Department letter would send a powerful signal that the United States is shedding this symbol of weakness. 5. The United States should take the lead in the U.N. Security Council to ensure that the fresh investigation by the ICC Prosecutor of the recent atrocity crimes in Darfur can be fully resourced and supported by the Council under the UN Charter Chapter VII enforcement authority of UN Security Council Resolution 1593 of March 31, 2005, which referred the Darfur situation of 18 years ago to the ICC and which the United States enabled at the time. This would demonstrate that the Biden Administration not only is interested in supporting ICC investigations of the atrocity crimes in Ukraine but also is backing other designated ICC investigations, notably in Darfur. Further, the State Department should indicate its clear support for the ICC investigation of atrocity crimes committed against the Rohingya and seek Congressional authorization for that assistance, similar to what has been obtained for investigation of the Ukraine situation. 6. The National Security Council should chair an inter-agency task force to draft “declarations” to the Rome Statute that would address key U.S. interests, including adherence to the U.S. Constitution and to full complementarity within the U.S. judicial system. Senators undoubtedly would craft their own declarations, and those would be critical to consider, in part to ensure that none of them rise to the level of reservations, which are prohibited by the Rome Statute to all States Parties. But the initiative to draft declarations, which many nations have employed for the Rome Statute, would be a pragmatic and constructive means to mold acceptable terms for ratification of the Rome Statute. 7. President Biden should use the occasion of his address before the UN General Assembly in September to express his intention to take the necessary steps with consultations and legislation on Capitol Hill so that the United States can ratify the Rome Statute with bipartisan support in the U.S. Senate. (He will need 67 out of 100 votes to achieve U.S. ratification.) Everyone knows this will take time (likely years) to achieve but the stated intention will boost American credibility and blunt the double standards criticism that constrains U.S. foreign policy aims. My hope is that it will not take another 25 years before the United States is part of the International Criminal Court. The fact that it took the United States 40 years to ratify the Convention on the Prevention and Punishment of the Crime of Genocide is a dishonorable precedent in American history and we should strive not to repeat it. Atrocity crimes are the scourge of our times and the United States should be proudly and confidently at the forefront of bringing the perpetrators of such heinous acts to justice.

#### US participation enhances global leadership and NATO relations

Geoghegan 22 [Thomas Geoghegan, staff writer and contributing writer to The New Republic educated at Harvard Law School, 5-9-2022, "There’s No Good Reason for the United States to Stay out of the International Criminal Court", New Republic, https://newrepublic.com/article/166300/international-criminal-court-ukraine-russia]/Kankee

Now that the Biden administration has pledged to help the International Criminal Court, or ICC, in The Hague—“and other efforts”—to prosecute Putin and others for war crimes committed during the invasion of Ukraine, it makes even less sense for the United States not to join the court after decades spent ducking the responsibility. Let’s face facts: After Ukraine, the ICC will be the only game in town. And like it or not, the U.S. has already been forced to build the court up, the perennial objections from the Pentagon that the ICC should not be permitted to have jurisdiction over U.S. military personnel notwithstanding. It is a fantasy to believe that the ad hoc tribunals created by the U.N. Security Council—where Russia has a veto—are going to derail the ICC from its steadily growing preeminence in the judging of war crimes of the future. And while the claim that the ICC has no “jurisdiction” over nonsignatory countries may technically be a limit in the ICC’s charter, that limitation was rendered impractical well before the Russian invasion. Russia is not a member either; while Ukraine may have technically accepted jurisdiction, the reality is that the ICC has, in its legal DNA, the ability and the responsibility to act globally—especially against monsters who do not accept its jurisdiction. There is no future for the U.S. in trying to stand apart from the ICC. And we will be far better able to protect our legitimate national security interests by being inside, and not outside, the court. Let’s start with what we get out of participating in the ICC. Just as we did at Nuremberg in 1945, we will have a hand in defining what is or is not a war crime, what is or is not genocide, and what is or is not a crime against humanity. We will participate in the judging, and inside the ICC, we will be primus inter pares—first among equals—at least in the bloc of ICC members who are our NATO allies and who are beholden to us for their own security. Why would we stay out, give up that leadership role, and let other countries take the lead in defining the legal standards that will apply to us? Aside from setting the standards, it is additionally important for the U.S. to have some say about who should be prosecuted under these standards. We can continue to cheer from the sidelines if we wish. But there is no internal institutional reason why Ukraine, our NATO allies, or less friendly countries should take any heed from us as to whether it makes sense to prosecute Putin. And it is not just that the U.S. loses this power by staying out. It has erected a law that is designed to alienate or poison our relationship to anyone who is a lawyer, civil servant, or part of whatever permanent bureaucracy, formal or informal, constitutes the European Union. That’s because of the spectacularly ill-advised American Servicemember Protection Act, or ASPA, one of the more stupid and self-defeating laws ever enacted by Congress. Under the ASPA, should the ICC detain or take custody of any American service member or “U.S. person”—which is defined to cover just about anyone helping us—the president has authority to use any means necessary, other than bribery, to obtain that “U.S. person’s” release. In other words, the president can conduct a special military operation, the term Putin used for the initial invasion of Ukraine. The notion is utterly ridiculous. Consider that Article 5 of the 1949 NATO Treaty—invoked only once, after the 9/11 attacks—would have to be invoked again if the U.S. carried out a military assault upon The Hague, located within the territory of a NATO country. Not only would our NATO allies be required to attack the U.S., the U.S. would be required … to attack itself. Nonsense it may be, but it is hardly lost on those connected with the ICC that each and everyone is potentially under a shoot to kill order, enacted without a sunset clause, by the same U.S. that is providing assistance to build up the ICC into a preeminent global institution. While we lose leverage by staying out, we lose nothing by going in. After the Ukraine invasion, our claim that the ICC has no jurisdiction over the U.S. will be even more illusory: If it is to be brushed aside in the case of Russia, the logic that the U.S. is similarly exempt will no longer be tenable. It is also true that there is a big distinction: In effect, American service members and American citizens, if not the looser category of “U.S. persons,” would not be subject to prosecution in the ICC if the U.S. legal system can render justice on its own. This is the principle of “complementarity,” a key part of the original Rome Statute of the International Criminal Court, the founding treaty adopted now by 123 member states and which went into effect in 2002. It is the ICC that is supposed to be “complementary,” used only in case no nation or applicable nonstate is willing to exercise jurisdiction. Aside from that jurisdictional limit in the Rome Statute itself, Congress can put in that same limit into a federal law as an additional limit on ICC jurisdiction. With any treaty the U.S. signs, Congress can always pass a law to limit—or modify or clarify the limit of—the U.S. commitment. Such a law will generally have precedence under the Constitution over any treaty obligation. In effect, we can join the ICC and still determine its jurisdiction, or lawfully exclude it over American personnel. Congress can do so by mandating the jurisdiction of the federal or military courts over the same crimes covered by the ICC. In the last resort, the president also can even abrogate a treaty—lawfully under the Constitution—should he choose to do so, and such an abrogation by the president is effectively unreviewable, not only by our own courts but by the ICC as well. Once in the ICC, and with such a law in place, the U.S. could refuse to extradite or turn over any American service personnel. Under the Rome Statute—but also under a law—we have a legal entitlement to their release. Or we do so long as we have a functioning judicial system capable of adjudicating possible war crimes. God help the U.S. if it does not have such a system. For the sake of our domestic liberty, we might want such a check. And to have such legal entitlement taken from the statute, even if it is one that we unilaterally enforce under our own domestic law, is at least as much protection as we have now. For the heretofore reluctant Pentagon, membership in the ICC may offer a boon: It should increase the capacity of military leadership to command and control the lower ranks. It will increase the importance of the military courts in which Senator Lindsey Graham used to practice. The worst thing for both the military and the delicate military missions it is likely to conduct in the future is to bear any resemblance to the anarchic insubordination of the Russian army in Ukraine. We need to incorporate military justice into military missions in an age when global standards are here to stay. Remaining outside the ICC weakens our ability, as well as NATO’s, to overcome suspicion of the U.S. on those occasions when winning the cooperation of civilians is crucial. Staying out of the ICC will always be a stain on our military—a mark of Cain on them in any country where American soldiers may find themselves serving. But regardless of whether joining the ICC will have an effect on military discipline or on amplifying the standards of the U.S. military to a level beyond Russia’s or China’s reputation, we have a vital interest in being part of a court whose territory is the NATO heartland. We are the West—and it is in our long-run interest to be the West. The ICC exists as the bearer of values that historically came out of Europe’s civil wars. What is the interest of leaving our NATO allies and other countries to develop the legal standards that will inevitably be applied to us? There is a moral issue that has become sharper since the invasion of Ukraine. So far, the U.S. has had a very good war. Without risking a single life, or losing a single soldier, the U.S. has achieved a remarkable strategic objective: the degrading of the capability of the Russian military. We have had to sit back and write checks—checks that are not even that dear, compared to what’s at stake in this war. For all the human sacrifice the Ukrainian people have made for us, for all that they have served our own interest, the U.S. owes an enormous debt: a debt that money can never repay. Should the outcome of this war permit it, we owe them a new world order. A Nuremberg for our century, wrought through joining the only institution through which it can happen. It would be a lasting stain upon our country not to join the ICC.

#### Ratification shows the US taking initiative and dedication to human rights law, bolstering international law legitimacy

Norton 16 [Hugo Norton, Africa Policy Analyst and Advisor at an economic consultancy firm, 7-19-2016, "It's Time for America to Join the ICC", Fair Observer, https://www.fairobserver.com/region/north\_america/its-time-america-join-icc-00164/#]/Kankee

Nevertheless, there are means to address these issues in a meaningful way. In order to dispel fears of an “African bias,” the ICC chief prosecutor, Gambian lawyer Fatou Bensouda, has sought to broaden the court’s scope by exploring alleged crimes in Palestine, opening an initial inquiry in Ukraine and requesting the ICC to commence a formal investigation into the 2008 Russia-Georgia war, while investigations relating to Afghanistan, Colombia and Iraq are ongoing. Truly reforming the ICC, however, will only be achieved once the US joins its ranks. From the outset, Washington’s refusal to ratify the Rome Statute sabotaged the ICC’s legitimacy and reach, condemning the court to run on one engine. While President Bill Clinton signed the statute in 2000, in 2002 the Bush administration “unsigned” it out of fear that US nationals, particularly military personnel, could be put on trial before the ICC. At a time when the war in Afghanistan was raging and the Pentagon was drawing up plans to oust Saddam Hussein from Iraq, the administration’s fears were fully warranted. Next, the administration went one step further and signed into law the American Service-Members’ Protection Act (ASPA), which explicitly protects US military personnel and government officials of any rank “against criminal prosecution by an international criminal court to which the United States is not party.” Numerous technicalities have also been invoked for the US’ defiance, such as Article 1, Section 8 and Article 3, Section 1 of the Constitution regarding the establishment of courts. Both sections can be interpreted as an explicit ban on international legal jurisdictions. Naturally, the US could resort to other legal instruments to arrest individuals such as Bashir. Washington could call for a UNSC resolution obligating all member states of the United Nation (UN) to arrest Bashir and submit him to the ICC’s jurisdiction; or invoke the 1948 UN Genocide Convention, which obligates member states to prosecute perpetrators of genocide, as well as the Nuremberg Charter which established that heads of states indicted by international courts no longer enjoy immunity. America’s role as self-proclaimed primary supporter of human rights makes it essentially unavoidable for the US to join the ICC. If the US insists on leading, then joining the ICC would show that it is serious in doing so. This move would represent the strengthening of the institution as well as of human rights in general. Thus, the US should at least embark on a course of legal convergence with the Rome Statute’s provisions by removing obstacles in domestic law and paving the way for full ratification.

#### One-sided finger pointing and double standards makes international law a politized weapon of war, and not universal law – ICC accession ends US hypocrisy and increases US standing

O'Toole 22 [Fintan O'Toole, Irish Times columnist and writer, 04-09-2022, "Fintan O’Toole: For Putin to pay for war crimes, West has to uphold same standards", Irish Times, https://www.irishtimes.com/opinion/fintan-o-toole-for-putin-to-pay-for-war-crimes-west-has-to-uphold-same-standards-1.4846102]/Kankee

On September 2nd, 2020 the US imposed sweeping sanctions against Fatou Bensouda and Phakiso Mochochoko. Who are these people? International terrorists? Drug lords? Human rights abusers? War criminals? The very opposite. Bensouda, a former minister for justice in Ghana, was the chief prosecutor of the International Criminal Court (ICC) that seeks to bring the perpetrators of war crimes to justice. Mochochoko, a lawyer and diplomat from Lesotho, was instrumental in the creation of the ICC in 2002 and heads one of its divisions. The US sanctioned them, and other unnamed ICC officials, under an executive order that declared their activities a “national emergency”. The emergency was the possibility that they might become “involved in the ICC’s efforts to investigate US personnel”. The fear, in particular, was that Bensouda might launch investigations into the possibility of direct and indirect US involvement in war crimes in Afghanistan and possible war crimes committed by Israel in Palestine. A year ago, Joe Biden’s administration quietly lifted the sanctions against Bensouda and Mochochoko, saying they were “inappropriate and ineffective”. But it did not soften its underlying stand, which is that, as Biden’s secretary of state Anthony Blinken put it, “we continue to disagree strongly with the ICC’s actions relating to the Afghanistan and Palestinian situations”. Calling Putin a war criminal, in other words, is easy; making him so is much more difficult A year on, and even before the emergence of direct evidence of the murder, rape and torture of Ukrainian civilians by Russian soldiers, Biden was calling Putin a “war criminal”. It is an immensely serious charge and almost certainly an accurate one. But it is undercut by the continuing refusal of the US to join the 123 states that are members of the ICC. The US is equally fierce in its insistence that the ICC cannot investigate any crimes committed by its citizens in countries (like Afghanistan) that do accept the ICC’s jurisdiction. At the end of last month, 39 of those member states, Ireland among them, formally asked the ICC “to investigate any acts of war crimes, crimes against humanity and genocide alleged to have occurred on the territory of Ukraine from November 21st, 2013 onwards”. ICC prosecutor Karim Khan has indeed begun to do so. If there is to be any prospect of bringing Vladimir Putin and his henchmen to justice for murder, rape and torture, it must lie with the ICC – a body whose authority the US refuses to accept. Calling Putin a war criminal, in other words, is easy; making him so is much more difficult. It requires the US and everyone else to apply to themselves the standards they wish to impose on Russia. It is far from obvious that this is going to happen. To point this out is not “whataboutery”. Let’s be very clear: no atrocity is diminished or rendered less depraved just because those who purport to be appalled by it may be hypocrites. Nothing ever justifies murder, rape or torture. That is the whole point of the idea that underlies the ICC: crimes against humanity. All atrocities are equally revolting because the lives and dignity of all human beings are of equal importance – whoever they are and whatever the identity of their attackers. They cannot be weighed against any notion that those who are committing them are on the right side. The supposed cause or motivation – and whether or not we agree with it – does not mitigate the crime in any way. In reality, though, “our” atrocities are not the same as “their” atrocities. “We” occasionally suffer an unfortunate lapse by a few junior soldiers from our impeccable standards that does not take way from the honour of our troops and our nation. “They” are barbarians and savages whose violation of civilised rules puts them beyond the pale. The US, alas, has been a primary practitioner of this double standard. It has managed to maintain its genuine outrage at war crimes by others all through its own moral morass in Vietnam, its support for hideously violent regimes in Latin America and Africa, its official sanction of torture in the “war on terror”, and the overwhelming evidence of atrocities in Iraq and Afghanistan. To take just one example: US commanders in Afghanistan knew the local warlords they armed and supported often kidnapped boys and kept them as sex slaves. But as Craig Whitlock puts it in his study of declassified American records, The Afghanistan Papers, “although American soldiers were sickened by the abuse, their commanders instructed them to look the other way because they didn’t want to alienate allies in the fight against the Taliban”. Would anyone doubt that, if these atrocities were being committed by the Taliban, they would have been publicised by the US and Nato as evidence of its criminal depravity? There is a lot of this double vision closer to home, too. Boris Johnson, who enthusiastically supports the idea that the ICC should prosecute Putin, has been pushing for an amnesty for crimes (including murder) committed by British soldiers in Northern Ireland. And many Irish people don’t have a big problem with Sinn Féin’s continuing glorification of the IRA’s campaign of violence, most of which (in particular the targeting of civilians by bombs) involved war crimes. All of this ambivalence helps Putin. In practical terms the US continues to undermine the very system (the ICC) that could prosecute him. It seems to have no idea as to who else might actually try to bring him to justice. And in the wider court of international opinion, it is all too easy for those (such as China and many African countries) who do not want to criticise Russia, to claim that such condemnations are too selective to be valid. The bodies of Bucha can be shoved behind that great mental screen: “Ah yes, but what about...” The Ukraine war is being fought on two fronts. It is a brutal physical battle against the invaders. But it is also a struggle of ideas and values in which the very notion of an international order based on universal laws is fighting for its life. So long as accusations of atrocity can be seen as weapons of war rather than assertions of universal values, impunity will seem like a good bet That struggle will not succeed if it is waged merely by pointing the finger at Putin’s wickedness. It has to be driven by a genuine and unequivocal recommitment to democracy, human rights and moral decency. Joe Biden could go a long way towards reanimating that commitment by announcing immediately that the US will join the ICC and support, without exceptions, the prosecution of all those who perpetrate and tolerate crimes against civilians. Otherwise, Putin will remain as confident as he always has been that he will get away with murder. So long as accusations of atrocity can be seen as weapons of war rather than assertions of universal values, impunity will seem like a good bet.

#### US accession ends the perception of international law being victors’ justice, showing no country is above international law

Marcetic 22 [Branko Marcetic, staff writer at Jacobin magazine, 4-11-2022, "Holding Putin Accountable Would Require an Actual Rules-Based World Order", Jacobin, https://jacobin.com/2022/04/vladimir-putin-rules-based-world-order-international-criminal-court-us-ukraine-russia-war-crimes]/Kankee

The International Criminal Court (ICC) is a prime example. The ICC was expressly created by the 1998 international Rome Statute to serve as an avenue of justice for exactly these types of offenses, since the existing International Court of Justice is for settling legal disputes between countries, and the European Court of Human Rights (which Russia withdrew from last month) is meant to be a last resort for people unable to get justice for human rights violations in their own country. But unfortunately, the way the ICC is structured makes it highly unlikely anything meaningful will happen to hold Putin to account. For one thing, three of the permanent members of the United Nations Security Council (China, Russia, and the United States, who are also three of the world’s most powerful countries) never actually ratified the Rome Statute (former president Bill Clinton signed it, but it was never ratified by the Senate). After all, if you know some kind of war is in your near-to-medium future, why open yourself to prosecution over it? Besides denting the court’s legitimacy, it also means there’s little that can be done about Russia. The only way to get a non-signatory country into the Hague is by a Security Council vote, which Russia would simply veto. You can blame that one on the leaders left standing after World War II, who instead of creating an actual democratic governance mechanism in which they’d be outnumbered and would find it much harder to get their way, decided instead to give themselves permanent veto power. To this day, relatively friendless Libya and Sudan are the only two non-signatories that have been taken to the Hague, since they don’t hold this extraordinary privilege. Go look at the ICC’s list of cases and you might spot a pattern: all of the defendants happen to be from the Global South, overwhelmingly Africa. Even in Libya, destroyed and plunged into murderous anarchy by a NATO war, only the Libyan perpetrators have a warrant out for their arrest. What they don’t tell you about the “rules-based international order” is that those rules only apply to countries without a whole lot of power. Then there’s that pesky issue of legitimacy. In society, a fundamental part of the rule of law is that it’s supposed to apply to everyone. You might agree in theory that someone who committed a murder should be arrested and prosecuted, but if a rich and powerful person routinely gets away with a whole slew of murders out in the open and nothing happens to them — or worse, they’re the ones leading the prosecution — you would probably start to lose faith in that system or even see it as fundamentally unfair, hypocritical, and politically driven, undermining its legitimacy. That’s basically what we have now, as US officials declare Putin a war criminal and call for the US government to assist a war crimes investigation into what happened in Bucha and elsewhere in Ukraine. While normally assistance in an investigation like this would be helpful, in this case, any US involvement, or even the perception there’s any, would make the process look indistinguishable from victor’s justice. Why? Because unfortunately, the United States not only wouldn’t ratify the Rome Statute on the basis that its nationals would be vulnerable to “politicized prosecutions” — making it, like Russia, effectively immune to its jurisdiction — but it’s been implacably hostile to the idea of being accountable to an international criminal court at all. Under George W. Bush, the US government curtailed support for the ICC, withdrew military assistance to countries that signed the Rome Statute, coerced governments into signing bilateral deals not to extradite Americans to the Hague, and most controversially, passed what some call the “Hague Invasion Act,” allowing Washington to use military force to liberate any US nationals who might be held there, a law that’s still on the books. Things got worse under Donald Trump, who sanctioned the ICC over its potential investigation and prosecution of crimes carried out by Americans and Israelis in Afghanistan and Palestine. So in the same way that years of Western hypocrisy on the issues of war and territorial sovereignty, some going on right now, undermined a unified global response to Putin’s war, there’s a good chance US involvement in a war crimes investigation against Russia would do serious damage to not just the court’s standing, but to the entire concept of international law, if it looks like simply a tool being selectively used to settle geopolitical scores. Unfortunately, given the way Western countries have been serially let off the hook for a variety of wars of aggression, this might still happen even without US involvement. In principle, it doesn’t have to be this way. The United States could both assist any war crimes investigation and lend it global legitimacy by finally ratifying the Rome Statute, becoming party to the ICC, and repealing the hostile stance to the body that dates all the way back to the Bush years. This would send a powerful signal that this isn’t just an opportunistic use of human rights as a geopolitical weapon, but that the United States is serious about international law. It would also neutralize Russian claims of hypocrisy, strengthen international law, and finish the nearly three-decade-old work of a Democratic administration, which played a key role in the negotiations that created the court in the first place. Of course, this is easier said than done. But it’s telling that this isn’t even being so much as called for by anyone with a meaningful platform in US political discourse, outside of some left-wing voices like Representative Ilhan Omar and Democracy Now!’s Amy Goodman and Denis Moynihan. In urging Biden to help with a war crimes investigation in Ukraine, former Democratic senator Chris Dodd and former Bush advisor John B. Bellinger III wrote that “The United States can help the court in appropriate cases while still strongly opposing ICC investigations (including of US personnel) that do not meet the court’s strict threshold requirements.” A commitment to impunity is a bipartisan value. It’s not hard to see why. Far from risking the prosecution of “peacekeeping” forces, as US officials claimed when justifying their refusal to submit to the court, being party to the ICC would mean US war criminals might face some actual justice. Just in recent weeks, we’ve learned the US combat strategy in Raqqa, Syria in 2017 increased civilian casualties there, that a group of Green Berets got off with a slap on the wrist after torturing an Afghan suspect to death, and that a US-targeted airstrike on an ISIS bomb factory carelessly killed eighty-five Iraqi civilians, wiping out a man’s whole family in one instance, and injured as many as more than five hundred. To put it plainly, the fear of war crimes prosecutions for things like this might force some actual restraint on the conduct of US foreign policy. So at least for the time being, we may be cursed to live in a world where international law continues to be selectively applied and mostly theoretical. And that’s a world where, unfortunately, countries have to depend on military deterrence in the absence of an actual system of justice, and great powers can feel free to launch illegal wars and commit various outrages, knowing they’re above whatever law exists. We might be able to create a different world. But first, we must at least try to imagine it.

#### Revoking the Hague Invasion Act shows international law and norms are above hegemonic influence

Murithi 19 [Tim Murithi, Extraordinary Professor of African Studies at the Centre for African and Gender Studies at the University of the Free State with a Ph.D in International Relations from Keele University, 2019, “Judicial Imperialism: The Politicisation of International Criminal Justice in Africa,” Institute for Justice and Reconscilliation, https://ijr.org.za/home/wp-content/uploads/2019/05/Judicial-Imperialism-PDF-2019.pdf]/Kankee

The US government’s Hague Invasion Act and its subversion of the legitimacy of the ICC As we saw earlier in this chapter, through a hegemonic failure to act dominant states may easily choose to violate international law, evade their international legal obligations or undermine international legal efforts. Despite the US government’s initial signing of the Rome Statute during the Clinton administration, it duly ‘unsigned’ the Statute during the Bush administration.42 The US government views the ICC system as a threat to its national security and military operations. Not satisfied with simply ‘unsigning’ the Rome Statute the US government went a step further and passed legislation that authorises an invasion of the Netherlands, and more specifically The Hague, to ‘liberate’ any American political, diplomatic or military personnel that may find themselves faced with prosecution on the ICC docket. Specifically, the American Service Members’ Protection Act (ASPA), dubbed the US Hague Invasion Act, was enacted on 2 August 2002 as United States federal law which aims ‘to protect United State military personnel and other elected and appointed officials of the United States against criminal prosecution by an international criminal court to which the United States is not party’.43 This legislation was introduced by US Senator Jesse Helms, a Republican from North Carolina, and US Representative Tom DeLay, a Republican from Texas, and was signed into law by US President George Bush. Specifically, the legislation authorises the US president to use ‘all means necessary and appropriate to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court’.44 The fact that the International Criminal Court is based in the capital city of the Netherlands, The Hague, has resulted in the legislation being dubbed the US Hague Invasion Act. The phrase ‘all means necessary’ is a catch-all phrase, also utilised in the context of UN Security Council resolutions, to denote the potential for military action and deadly force. The prospective collateral damage of such an incursion, which will potentially involve the loss of life of Dutch citizens, pushes the limits of credulity about the extent that a hegemon is prepared to go to remain above the international rule of law. The US Hague Invasion Act prohibits any branch of the US government from assisting the ICC or transferring classified intelligence and law enforcement information to the Court. Furthermore, the Hague Invasion Act prohibits any ICC officials from conducting investigations in the territory of the US. The Act also prohibits any military assistance to state parties to the Rome Statute, unless they have signed agreements not agreeing to hand over US personnel to the ICC. This piece of legislation is a stunning manifestation of the sheer audacity of a hegemonic power to proclaim and threaten to enforce its exemption from international criminal law through violent means. In his introduction of the legislation, US Senator Helms argued that ‘Americans should not have to face the persecution of the International Criminal Court – which ought to be called the International Kangaroo Court’.45 Helms further argued that ‘instead of helping the United States go after real war criminals and terrorists, the International Criminal Court has the unbridled power to intimidate our military people and other citizens with bogus politicised prosecutions’.46 Helms is, of course, accurate that the ICC will inevitably pursue ‘politicised prosecutions’, but he is erroneous to suggest that the US should remain above the international rule of criminal law. Historically, hegemonic powers, like the US, have been implicated in instigating, funding and supporting the projection of violence around the world in collusion with local despots – which has led to mass atrocities and violations of the provisions of the Rome Statute. In 2014, US Senator Dianne Feinstein released the Central Intelligence Agency (CIA) ‘Torture Report’ which documented how in the context of the post-9/11 world and the so-called ‘war on terror’ American intelligence and military operatives engaged in the wanton and lascivious torture of ‘suspects’. The CIA Torture Report, which was based on a Feinstein-led US Senate Intelligence Committee convened over a period of five and a half years, revealed how detained suspects ‘were water-boarded, wedged into coffin-shaped “confinement boxes” and force-fed through their rectums in lawless anonymous “black sites” around the world’.47 Furthermore, ‘one prisoner died of hypothermia after being forced to sit on a bare concrete floor without trousers’, and in another incident a prisoner ‘spent most of two days chained by his wrists to an overhead bar in a nappy’. The infantalisation of this particular prisoner is an apt metaphor for the way the US views and treats other countries not aligned with its interests. The paradox is that from 2001 onwards, the CIA’s brutal so-called ‘enhanced interrogation techniques’ did not produce intelligence that disrupted terror plots or aid its hunt for Osama bin Laden’ who was only captured and killed a decade later on 2 May 2011 in Pakistan, which endured a violation of its sovereignty, since it had not granted the US authority to make covert military incursions into its territory. The fact that 54 independent nation-states assisted the US in conducting extra-ordinary rendition through their territory suggests that the officials who permitted these actions violated the provisions of the Rome Statute.48 More specifically, the officials of these 54 countries are in violation of Article 7(1)(e) which stipulates that the ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’ and Article 7(1)(i) which proscribes the ‘enforced disappearance of persons’ is a crime against humanity. However, this proposition, and the responsible officials of these 54 countries, will not be tested through by a UNSC referral to the ICC, given the reality of the US dominance in the Security Council and the prohibitions of the US Hague Invasion Act. This proposition will never be tested at the ICC because of the reality of the geo-politicisation of the ICC. This is a matter that should shock the conscience of international lawyers, jurists and legal scholars about the system they proudly hold up as the beacon of human civilisation. This is perhaps the most significant violation of international criminal law that has been specifically acknowledged by the violating nation. The US government has indicated through its inaction that it will not pursue any prosecution of the alleged perpetrators of torture through its own national courts. Subsequently, the ICC should in theory be a court of last resort for the victims. Article 7(1)(f) of the Rome Statute stipulates that ‘torture’ falls under the category of a crime against humanity. Consequently, it is possible to envisage the prosecution of the US politicians, CIA and military operatives, at all levels of the government, who participated in the torture of other human beings. However, the fact that the US is a non-signatory (or relapsed signatory) of the Rome Statute, and the fact that the US will veto a UN Security Council referral of any US-related torture cases to the ICC, means that prospects for any form of justice being rendered to the victims will not be happening any time soon. This bold US selfdeclaration of the violation of international criminal law, in the form of the CIA Torture Report, reveals how the platitudes about upholding norms and principles of global justice are a sham when it comes to the specific case of the world’s most powerful country. The fact that the US government can self-exempt itself from the provisions of the Rome Statute, without the international system being able to do anything about it, renders hollow the injunctions of those who lament that other countries are not obeying and upholding the provisions of the Rome Statute. Samantha Power, the US Ambassador to the UN Security Council, stated in remarks relating to sanctioning Syria for the atrocities committed following the 2011 violent conflict, that: many Americans recognize, that while we are right to seek to work through the Security Council, it is clear that Syria is one of those occasions – like Kosovo – when the Council is so paralyzed that countries have to act outside it if they are to prevent the flouting of international laws and norms.49 Power’s empty rhetoric about the importance of upholding international laws and norms, despite her government’s welldocumented complicity in perpetuating and supporting countries that perpetuate violations of human rights, is symptomatic of the structural crisis of international criminal justice. The global hegemon that has, through the US Hague Invasion Act placed itself above the jurisdiction of the ICC, and the world’s leading violator of international criminal law has the temerity to regularly issue edicts to other countries about upholding the principles and norms of global justice. If anyone doubts the reality of the politicisation of international criminal justice, the US Hague Invasion Act provides ample confirmation beyond all reasonable doubt. The US Hague Invasion Act reveals the shaky edifice upon which the so-called norms of international criminal law are premised. It renders hollow the arguments of the lawyers, jurists and analysts who continue to proselytise that international law is devoid of politics. If anything, politics is at the core of international criminal law. The bilateral immunity agreements

#### Following ICC norms guarantees reciprocity, aiding rules of engagement and international stability - that aids US troop safety and economic growth

Townsend 20 [Eric Townsend, international criminal law scholar and associate professor at Elon University School of Law with a B.B.A. from Loyola University Maryland and a J.D. Loyola University New Orleans College of Law, 4-24-2020, "In My Words: A perilous showdown between the U.S. and the ICC", Today at Elon, https://www.elon.edu/u/news/2020/04/24/in-my-words-a-perilous-showdown-between-the-u-s-and-the-icc/]/Kankee

The response by the Trump Administration was as strong as it was predictable. Secretary of State Mike Pompeo threatened to take “all necessary measures to protect our citizens from this renegade, so-called court.” Because the United States is not a state party to the International Criminal Court, Trump has no obligation to cooperate. But we should. After all, international criminal law – whether we like it or not – protects American troops and American interests. The foundation for most international criminal laws, especially those governing war crimes—one of the four “core” crimes over which the ICC has jurisdiction is the concept of reciprocity. Our troops will refrain from engaging in unnecessary destruction and violence, because we have a legal guarantee that our enemies will do the same. In disregarding the rules of war, such as by enacting formal CIA policies to torture prisoners of war or by tweeting threats to destroy ancient cultural sites, we are inviting our enemies to do the same. We are increasing the threats posed to American troops on the ground and exposing our servicemembers to needless danger. Simultaneously, by disregarding international laws on war, we are making our own missions more difficult. It’s easier to play the game with a clear set of rules. Without rules, guideposts routinely shift, often leaving it impossible for either side of a conflict to emerge as a clear winner. Largely because of this, America has routinely found itself embroiled in conflicts from which it is difficult—and near impossible—to disengage. Cooperating with international laws also promotes American foreign policy interests. By routinely and publicly undermining international criminal law, the Trump Administration has provided our enemies with carte blanche to do the same. And in bullying international courts to prevent prosecutions of American citizens, Trump has likewise provided an instruction manual for authoritarian leaders, like Bashar al-Assad and Kim Jong-un, to evade justice. The level of international stability directly correlates to the number of nation states complying with international law. With more global stability comes more global trade and more nations in which American financial interests can flourish. While there may be money in war, there’s more money in peace. And we have put our support behind international courts before when they have furthered our geopolitical interests. The United States was a primary donor for the international court established to prosecute the Rwandan genocide—notably a conflict in which U.S. troops were not involved. Simply put, viewing international criminal law as a stick, rather than a carrot, is misguided. As the International Criminal Court moves forward, we know that Americans will find themselves the targets of a criminal investigation over which the U.S. government has no control. We also know that we have a president who, if past is prelude, will have no qualms with using force to keep Americans out of prison – even those who willingly committed war crimes. In the fight between the ICC and the United States, we will have to stay tuned to see whether justice will prevail over politics.

#### ICC strength aids conflict resolutions and democratic transitions – history proves

Roth 24 [Kenneth Roth, visiting professor at the Princeton School of Public and International Affairs, former executive director of Human Rights Watch, and a former federal prosecutor, 05-07-2024, "Biden Should Not Stand in the Way of the ICC", Foreign Policy, https://foreignpolicy.com/2024/05/07/biden-israel-hamas-icc-gaza-netanyahu-arrest/]/Kankee

Given the weakness of the jurisdictional argument, the administration is reportedly falling back on supposedly pragmatic appeals. “We are quietly encouraging the ICC not to do it. It will blow up everything,” a U.S. official told Axios. This is the latest variation of the old argument that justice impedes peace—which implies that a leader facing criminal charges is more likely to keep fighting than to accept the need for a settlement. But history shows that charges for war crimes often facilitate peace efforts by marginalizing an abusive leader. For example, in his book To End a War, the former U.S. diplomat Richard Holbrooke made clear that the Dayton Peace Agreement resolving the Bosnian conflict of the 1990s was possible only because the International Criminal Tribunal for the former nation of Yugoslavia had already charged the Bosnian Serb military and political leaders, Ratko Mladic and Radovan Karadzic, precluding their travel to Dayton without risking arrest. Holbrooke made his remarkable deal with the Serbian president, Slobodan Milosevic, who had not yet been charged. Charges against former Liberian President Charles Taylor, issued by the Special Court for Sierra Leone, led to his rapid loss of power and paved the way for the brutal Liberian conflict to end and a strong democracy to emerge. ICC charges against the leaders of the Uganda-based Lord’s Resistance Army, which was notorious for kidnapping children and making them become soldiers, forced the leaders into hiding, the organization to splinter, and its military presence to weaken substantially. ICC charges against Netanyahu could have a similar salutary effect. Today, Netanyahu is a major obstacle to a lasting cease-fire in Gaza. He has been taking extreme positions because he is beholden to two far-right ministers, Bezalel Smotrich and Itamar Ben-Gvir, if he hopes to stay in power and avoid possible prison time on corruption charges that predate the current conflict.

#### A strong ICC deters war criminals and terrorists via universal norms – otherwise there’s no deterrence for crimes against humanity

Fahmy 21 [Walid Fahmy, researcher at Pharos University, 2021, “The measures against the International Criminal Court (USA v. ICC): the perspective of International Law ,” RUDN Journal of Law, https://cyberleninka.ru/article/n/the-measures-against-the-international-criminal-court-usa-v-icc-the-perspective-of-international-law/viewer]/Kankee

Enhancing Justice and the Rule of Law What, then, would international rule of law mean? 'The distinction between three different definitions is helpful here. Firstly, the “international rule of law” can be interpreted as applying the rules of the rule of law to relations between States and other international law subjects. Secondly, the “rule of inter-national law” may favor international law over national law, for example by establishing the primacy of covenants on human rights over domestic legal arrangements. Thirdly, a “global rule of law” would signify the existence of a normative system that directly touches individuals through existing national institutions without formal mediation (Chesterman, 2008:355–356). Across transitional context criminal trials play a significant role. We convey public condemnation of criminal activity, offer a clear form of accountability for offenders and provide a measure of justice for victims by either reparations or joy in seeing the offenders held responsible. In particular, the criminal trial process is an important way of enhancing the Rule of law. Trials potentially generate an officially background record, individualize criminal liability rather than ascribe collective guilt, officially acknowledge the pain of the victims and theoretically remove terrorist groups. Holding criminals responsible and punishing them for their illegal activity has a possible deterrent effect and helps replace a system of entitlement with one of responsibility (Jallow, 2009:78). Proponents view the ICC as an essential step towards establishing a genuinely universal rule of law in which no individual criminal can escape responsibility for crimes and no victim can be denied justice merely because of the legal illusion of sovereignty. Some critics contend that the decline of sovereignty demanded by the ICC is actually corrosive of the international order if it were ultimately to limit the autonomy of certain “civilized” great powers thus depriving the United States the opportunity to manage processes in a so-called orderly fashion. The ICC is clearly imbued with a world order in which different rule of law models clash (Franceschet, 2004:32). The ICC aims to combat corruption and develop the rule of law by ensuring that the most egregious crimes do not go unpunished and by fostering respect for international law. The ICC 's central mission is to serve as a court of last resort with the power to prosecute people for genocide, crimes against humanity and war crimes when national jurisdictions are unable or reluctant to do so for whatever cause14 . Impunity reigns, without rule of law. The ICC and the broader Rome Statute scheme play a significant role in upholding the rule of law by punishing breaches of international legal norms and encouraging conformity to those norms, thus eliminating impunity. This role is critical given the nature of the specific norms that concern the Rome Statute — norms designed to prevent crimes that “threaten the world's peace, security and well-being. The crimes and omissions that come under its authority are so horrific, so damaging, that it is worth any effort to avoid them. Accountability is not only necessary for the sake of the past but also for the future. It provides the potential for the recurrence of conflicts and the repetition of violence where impunity is left unaddressed. In order to fulfill its mandate, the ICC needs the support and cooperation of States. The international community has on many occasions declared its determination to end impunity for the most serious crimes. Cooperation with the ICC is a concrete means of achieving this objective”15 . In conclusion, the system of the Rome Statute changed the perception of serious crimes under international law. The establishment of a permanent international court to try such crimes encouraged and empowered national courts to prevent impunity. As an outside body, the ICC faces particular challenges that many locals can view with skepticism. Nonetheless, if the public actually finds the tribunal to be a good illustration of equal and impartial justice, then it needs to be done effectively. Therefore, one must be realistic about the difficulties faced by the tribunals in credibly demonstrating to the local community that immunity is punctured for heinous crimes and that justice can be fair. But precisely because of these obstacles, if tribunals aim to create public confidence in justice and the rule of law, they must address public concerns regarding their work (Stromseth, 2011:435). The Erga omnes obligation to extradite or prosecute the Jus cogens crimes

#### International law helps prevent a litany of existential risks – ICC norm setting is key

Wittner 24 [Lawrence S. Wittner, Professor of History at the University of New York/Albany with a Ph.D. in History from Columbia University, 8-7-2024, "Let’s Think About How to Build a More Peaceful World", Foreign Policy In Focus, https://fpif.org/lets-think-about-how-to-build-a-more-peaceful-world/]/Kankee

Although the current U.S. presidential campaign has focused almost entirely on domestic issues, Americans live on a planet engulfed in horrific wars, an escalating arms race, and repeated threats of nuclear annihilation. Amid this dangerous reality, shouldn’t we give some thought to how to build a more peaceful future? Back in 1945, toward the end of the most devastating war in history, the world’s badly battered nations, many of them in smoldering ruins, agreed to create the United Nations, with a mandate to “maintain international peace and security.” It was not only a relevant idea, but one that seemed to have a lot of potential. The new UN General Assembly would provide membership and a voice for the world’s far-flung nations, while the new UN Security Council would assume the responsibility for enforcing peace. Furthermore, the venerable International Court of Justice (better known as the World Court) would issue judgments on disputes among nations. And the International Criminal Court―created as an afterthought nearly four decades later―would try individuals for crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. It almost seemed as if a chaotic, ungovernable, and bloodthirsty pack of feuding nations had finally evolved into the long-standing dream of “One World.” But, as things turned out, the celebration was premature. The good news is that, in some ways, the new arrangement for global governance actually worked. UN action did, at times, prevent or end wars, reduce international conflict, and provide a forum for discussion and action by the world community. Thanks to UN decolonization policies, nearly all colonized peoples emerged from imperial subjugation to form new nations, assisted by international aid for economic and social development. A Universal Declaration of Human Rights, adopted in 1948, set vastly-improved human rights standards for people around the world. UN entities swung into action to address new global challenges in connection with public health, poverty, and climate change. Even so, despite the benefits produced by the United Nations, this pioneering international organization sometimes fell short of expectations, particularly when it came to securing peace. Tragically, much international conflict persisted, bringing with it costly arms races, devastating wars, and massive destruction. To some degree, this persistent conflict reflected ancient hatreds that people proved unable to overcome and that unscrupulous demagogues worked successfully to inflame. But there were also structural reasons for ongoing international conflict. In a world without effective enforcement of international law, large, powerful nations could continue to lord it over smaller, weaker nations. Thus, the rulers of these large, powerful nations (plus a portion of their citizenry) were often reluctant to surrender this privileged status. Symptomatically, the five victorious great powers of 1945 (the United States, the Soviet Union, Britain, France, and China) insisted that their participation in the United Nations hinged upon their receiving permanent seats in the new UN Security Council, including a veto enabling them to block Security Council actions not to their liking. Over the ensuing decades, they used the veto hundreds of times to stymie UN efforts to maintain international peace and security. Similarly, the nine nuclear nations (including these five great powers) refused to sign the 2017 Treaty on the Prohibition of Nuclear Weapons, which has been endorsed by the overwhelming majority of the world’s nations. Behind their resistance to creating a nuclear weapons-free world lies a belief that there is much to lose by giving up the status and power that nuclear weapons afford them. Of course, from the standpoint of building a peaceful world, this is a very short-sighted position, and the reckless behavior and nuclear arrogance of the powerful have led, at times, to massive opposition by peace and nuclear disarmament movements, as well as by many smaller, more peacefully-inclined nations. Thanks to this resistance and to a widespread desire for peace, possibilities do exist for overcoming UN paralysis on numerous matters of international security. Unfortunately, it would be very difficult to abolish the Security Council veto outright, given the fact that, under the UN Charter, the five permanent members have the power to veto that action, as well. But Article 27(3) of the Charter does provide that nations party to a dispute before the Council must abstain from voting on that issue―a provision that provides a means to circumvent the veto. In addition, 124 UN nations have endorsed a proposal to scrap the veto in connection with genocide, crimes against humanity, and mass atrocities, while the UN General Assembly has previously used “Uniting for Peace” resolutions to act on peace and security issues when the Security Council has evaded its responsibility to do so. Global governance could also be improved through other measures. They include increasing the number of nations accepting the compulsory jurisdiction of the International Court of Justice and securing wider ratification of the founding statute of the International Criminal Court (which has yet to be ratified by Russia, the United States, China, India, and other self-appointed guardians of the world’s future). It won’t be easy, of course, to replace the law of force with the force of law. Only this May, the prosecutor of the International Criminal Court took a bold step toward strengthening international norms by announcing that he was seeking arrest warrants for top Israeli officials and Hamas commanders for crimes in and around Gaza. In response, the Republican-controlled U.S. House of Representatives passed the “Illegitimate Court Counteraction Act,” legislation requiring the U.S. executive to impose sanctions on individuals connected with the ICC. Despite the nationalist backlash, however, the time has arrived to consider bolstering international institutions that can build a more peaceful world. And the current U.S. presidential campaign provides an appropriate place for raising this issue. After all, Americans, like the people of other lands, have a personal stake in ensuring human survival.

#### Limiting Western hypocrisy on norms increases US influence

Barnes-Dacey and Shapiro 22 [Julien Barnes-Dacey, director of the Middle East and North Africa program at the European Council on Foreign Relations, and Jeremy Shapiro, research director at the European Council on Foreign Relations, 11-20-2023, "The West Should Give Up the Battle of Narratives", Foreign Policy, https://foreignpolicy.com/2023/11/20/west-global-south-narrative-rules-order/]/Kankee

Live your true life, all the self-help books tell us. Embrace who you are, own your faults, become better by turning them into strengths. It’s cheap pop psychology, but it might be liberating for repressed individuals and, we would argue, for Western civilization. It is time for the West to finally own its truth and set itself free. The horrific war in the Gaza Strip oddly represents an opportunity for this liberation. Israel’s collective punishment of Gaza is now forcing a reckoning, exposing Western claims about the sanctity of its loudly embraced global norms. Rather than retreating into a defensive battle of narratives, the West should see this as an opportunity to move beyond a discourse that has never held water. The West will have a better hope of cementing global influence if it is more honest about this reality, offering global partnerships based on deal-making and shared interests rather than infantilizing the global south with hollow talk of international rules. Since the intoxicating victory of the United States and its allies in the Cold War and the subsequent march of democracy through Eastern Europe and beyond, the West has embraced a comforting illusion about a liberal rules-based order. With the final triumph of liberalism over communism, the victorious armies of democracy told themselves that they could finally transfer their beautiful idea of rule of law to the international realm. International law could tame war, defend sovereignty, and protect human rights, all the same time. It was a wonderful vision, but it never had a chance. The temptations of power meant that the West repeatedly violated its own rules. Western actors invaded countries when they felt the need (Iraq), hired fancy lawyers to exempt themselves from the laws they expected others to follow (Kosovo), preached human rights while cutting deals with authoritarian regimes (Saudi Arabia), and set up an International Criminal Court to try African leaders (including those from Sudan) while refusing to recognize its jurisdiction over themselves (the United States). For the less powerful countries, the rules-based order based was always little more than hypocrisy on a global scale. All of this remained hidden for many years beneath the overwhelming global power of the West. Nobody outside the West ever really believed it, but staring down the barrel of U.S. military supremacy, many felt it was the better part of prudence to keep their doubts to themselves. But since at least the global financial crisis in 2009, the rising powers of the global south, a set of countries that can be roughly defined as “those countries that think the rules-based order is bullshit” have become increasingly vocal in their frustration about the hypocrisy at the core of the global order. They have taken particular issue with the West’s demand that they sacrifice core material interests in defense of this so-called order, a step that the West has always been wholly unwilling to do itself. So U.S. and European entreaties that global states cut financial and energy ties to Russia following the invasion of Ukraine have fallen on deaf ears, while Western attempts to rally international support behind Israel have faltered. The charges of hypocrisy often came in the form of self-serving Russian or Chinese propaganda, two states that have often been brutal in their own violations of international rules. Nor have countries of the global south been principled in many of their own positions. But this did not make the claim of Western hypocrisy any less true or resonant. At the end of day, it is hard to believe in a rules-based order whose rules you did not make; whose transgressions you do not get to police; and whose outcomes, coincidentally enough, always seems to align with the interests of the West. For these reasons, the edifice of the rules-based order had already basically crumbled by the start of the full-scale Russian invasion of Ukraine in 2022. Only the erstwhile liberal hegemonists of the United States and Europe had failed to notice. Many of them were thus a bit taken aback when their efforts to rally support for Ukraine in the name of the rules-based order met with a certain amount of derision in the global south. Serious people across the Western world wondered why they were supposedly losing the global south. They hatched plans to win the so-called battle of the narratives by countering Russian and Chinese propaganda and sharing control of the rules-based with those countries that they could no longer exclude. Now, the brutal Hamas attack on Israel and the even more brutal reprisals by the Israelis have once again exposed that Western attachment to its own rules is, at best, situational. Some enlightened quarters fear that this will set back the Western counterattack in the battle of narratives in the global south. Josep Borrell, the EU’s high representative for foreign policy, for example, has made the case that the West’s global standing will be seriously damaged if it doesn’t also hold Israel’s conduct of the war to the standards of international law. But that would be fighting the last war. The battle of narratives was lost years ago in the desert plains of Iraq, the alleys of Gaza, and the oil fields of the Niger Delta. Russian and Chinese counternarratives merely provided the vocabulary for countries of the global south to describe what they had long felt: that the rules-based order was merely a virtue shield for the Western power and control. The most recent war in Gaza, where Israel’s right to self-defense has involved holding 2 million people—more than 40 percent of whom are children—under collective punishment, has only made this defeat so self-evident that even the West can’t fail to notice. Still, from defeat springs opportunity. The West can finally put the battle of narratives into its bin of lost wars and move on. The global south may never have bought what the West was selling, but there is little evidence that those nations are any more taken in by Russian or Chinese hypocrisy, which is even more naked in its ambition. The countries of the global south have been very clear: They are not looking for a narrative from anyone. The global south is not the West’s to win or lose. As a recent European Council on Foreign Relations poll reveals, countries such as Brazil, India, Saudi Arabia, and South Africa want the freedom to deal with the United States, Russia, China, Europe, and anyone else on their terms. They are looking for geopolitical deals. But the same poll revealed that the West has a lot to offer. Russia offers little more than mercenaries, and the Chinese seem to be following the Western historical model of geopolitical domination through debt. Only the West offers a model of a vibrant and free society. On issues such as human rights, control over the internet, and security cooperation, clear majorities in key countries such as Brazil, India and South Africa prefer to work with the West despite its hypocrisy. More tellingly, clearer majorities from many of these countries would prefer to live in the West than in Russia or China. There is a reason why the United States and Europe have migration crises and Russia and China do not. Western geopolitical deals offer the hope of a development path toward Western standards of living and governance. Countries don’t want to be lectured by their Western partners about their various human rights failings, but they do want access to the Western concepts of governance, rule of law, and above all the living standards that those institutions enable. The West only needs to cease moralizing and focus on building out equitable partnerships, offering financial and technical assistance complemented by trade and investment opportunities, and they will be able to compete more than adequately with Russian and Chinese influence in most any part of the world. This is not an excuse to abandon core Western values. On the contrary, these values not only form the West’s moral identity, but also constitute its strategic interests. More widespread democratic values, greater protection of human rights, and a more just international system are indeed what the West wants and needs to achieve to ensure its own security and stability. But the hypocrisies and compromises the West has carried out regarding those values over recent decades mean that Western states now need to focus on the consistency of their own policies and demonstrate their willingness to pay a price for upholding proclaimed values. It will take considerable time and effort—and quite a few policy reversals—before the West can return to the battle of narratives. In the meantime, the United States and Europe need to stop infantilizing the countries of the global south. Forget the narratives and treat them like the grown-up middle powers that they have become. Mutually beneficial geopolitical deals will transmit Western values across the globe better than paternalistic lectures. The liberal powers can now own their truth: They are typical geopolitical hypocrites just like everyone else. So what? No one is expecting anything else. The truth shall set you free.

#### Double standards kill war crimes deterrence – equal justice via the aff strengthens the rule of law and makes prosecution more universal

Saddiqui 22 [Alishbah Saddiqui, researcher at the International Affairs Program at The New School, 5-14-2022, “Double Standards, Hypocrisy, and Impunity: The International Criminal Court’s Neocolonial Bias Case Study: Libya and Muammar Gaddafi,” New School, https://d1wqtxts1xzle7.cloudfront.net/95325450/ICC\_Libya\_copy-libre.pdf?1670313953=&response-content-disposition=inline%3B+filename%3DThe\_International\_Criminal\_Courts\_Neocol.pdf&Expires=1733361730&Signature=J38A74gCFASPKX12c1a3bz3Dsii1e53vrSxgiOtZ9TI-sO3Xl1V8BntOu70QxT4ngAA-ybIGQZduQhgrSliPjJ7wyy3RQlg-eW312tLn5FzBt1GqhI7wTza8Y5-T6~goTO0DSckoAQpX-inzaA-D4rbnjU~h749rYRcxxp3hnUtkF6BQ76i3VcHXxpVEW8BHDkfjk~J5Xz45J-97HJollwmLYuv0JNIssoUHnQ6xQMS2VLVWBjJVBUi6PKQKx~IGoGxn7YV8ibpK-2ih~MT9tMOUKeciXWpMQZsX9zIXsbWY4NIvBoYzQMFdC5HbDkBM5t1mb5wuHiWMF4Cujn4xXQ\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA]/Kankee

COUNTER-ARGUMENTS “Blind belief in authority is the greatest enemy of truth” ― Albert Einstein Supporters of the Court argue that it deters war criminals, enforces the rule of law, and offers justice to victims of atrocious crimes (Felter, 2022). While it is true that war criminals from certain regions may be deterred from committing atrocities, war criminals every where else are unbothered, especially in the West; there are almost no mechanisms in place to keep them accountable. And this is why the ICC’s double standard renders the rule of law irrelevant. Selective enforcement gives an image of the ICC simply being a political tool of the West; it becomes an illegitimate court. And while justice to victims of atrocities is extremely important, shouldn't that extend to all victims of atrocities? Are Iraqis, Palestinians, and Afghans not deserving of justice either? And what about the vast majority of Libyans who actually supported Gaddafi over the new Western backed regime, which if anything, has done far more harm to Libyans? Some claim that it is irrelevant that every convicted person by the ICC has been from Africa because the situations were referred to the ICC by African governments themselves (Allo, 2018). However, this leaves out the role of the UN Security Council referrals, as well as the fact that the prosecutor can launch an investigation proprio motu. Numerous crimes by Western states have originally been pursued by the ICC and then later dropped. At the very least, one must admit that African states tend to be ‘easy targets’ for the ICC. Another counterargument is that while African leaders have hostile views towards the ICC, citizens of their countries tend to be more supportive of it. “The opposition of many African leaders to the ICC ‘is not necessarily aligned with the desire of many Africans for fairness and accountability’” (Felter, 2022). But this is kind of an obvious statement. Ofcourse a population would like a mechanism in place that can hold rogue leaders accountable. However, what about the populations in other regions? The point of this paper is not necessary claiming that the ICC should halt its investigations into African countries, but that other countries, especially powerful Western countries should be getting the same attention from the ICC, but currently do not. CONCLUSION

#### War crime deterrence works long-term with strong norms – neg evidence ignores would-be war crimes ilaw has prevented in favor of anecdotes

Grono and Wheeler 20 [Nick Grono, former Deputy President and COO for the International Crisis Group, and Anna de Courcy Wheeler, former Research Analyst at the International Crisis Group, 9-26-2012, "The deterrent effect of the ICC on the commission of international crimes by government leaders", Crisis Group, https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders]/Kankee

There is, however, a much-overlooked middle ground. What we want to explore is the possibility that the risk of ICC prosecution may be one of a range of factors taken into account in the calculations made by government leaders determining how to respond to a challenge to their authority – be it a nascent rebellion, or proposed secession, or simply a vigorous political opposition. Our proposition is that where a regime still perceives room for manoeuvre then the prospect of such prosecution may be one of a range of domestic and international factors – such as the possibility of internal opposition, financial consequences, likelihood of military success, international disapproval short of prosecutions, and the possibility of sanctions and other coercive measures – that could impact upon its strategic calculations. There is some evidence that suggests national leaders are increasingly aware of the possibility of ICC prosecution, and that this can influence their decision-making calculus, for better or worse. And if ICC prosecution factors into a regime or leader’s determination to cling to power, it is not unreasonable to conclude that such a fear may also, in certain circumstances, act to curtail abuses and shift the calculus in favour of avoiding war crimes or crimes against humanity. Though there are plenty of examples in which the threat of criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities, this does not mean that deterrence has not worked or could not work. Those who argue against deterrence often focus on “specific deterrence”, that is, the possibility that prosecutions can deter leaders who have already committed war crimes or crimes against humanity from committing them in the future. But these are, in fact, the very situations where prosecutions are most unlikely to deter. In such situations, prosecution by the International Criminal Court will more likely represent an existential threat to a ruler, or ruling party, and is thus more likely to cause national leaders to seek to entrench themselves, and hence maintain or even escalate an abusive or criminal campaign. We have seen this in Sudan, where President Bashir’s indictment by the ICC has done little to halt attacks on civilians in both Darfur and, more recently, South Kordofan. Instead our focus should be on longer-term legal deterrence and the entrenchment of human rights norms. Over the longer term prosecutions can act to dissuade future generations of leaders from the commission of such crimes. Country Examples A central difficulty for those seeking to establish a deterrent effect for criminal prosecutions is that while it is easy enough to list cases where deterrence hasn’t worked, its very difficult to identify cases in which it has - a difficulty magnified in an international setting. It is of course a difficulty we face in conflict prevention more broadly. Successful conflict prevention, like successful deterrence, means, in effect, that nothing happens. And it is difficult to prove a counterfactual. But there is significant anecdotal evidence to suggest that the risk of prosecution by the ICC – which today is one of the few credible threats faced by leaders of warring parties – may influence their calculations and policy choices. The evidence of behavioural change due to ICC prosecution is twofold. There is evidence to suggest that in some situations, particularly those where conflict is ongoing and where war crimes or crimes against humanity have already occurred, the possibility of international individual criminal prosecution may cause the abusive leader to entrench himself, thereby prolonging the conflict and facilitating the further commission of atrocities. But there are other situations, notably where a leader is not facing an existential threat, where the possibility of an ICC prosecution could tip the cost-benefit scale away from a large scale criminal course of action. Uganda

#### Eliminating hypocrisy is key for universal norm setting

Knox 22 [Robert Knox, Senior Lecturer in Law at the University of Liverpool, 2022 “Imperialism, Hypocrisy and the Politics of International Law Robert Knox, Third World Approaches to International Law Review, cambridge.org/core/journals/international-review-of-the-red-cross/article/abs/debate-the-role-of-international-criminal-justice-in-fostering-compliance-with-international-humanitarian-law/DA8B8D5712F972898546485E6CF0032D]/Kankee

An examination of the dynamics in the Crimea situation further complicates such easy dismissals. Whilst there are clearly elements of ‘rhetoric’ in Russia’s arguments, the discourse of hypocrisy was deployed in a straightforwardly juridical way. The references to Kosovo and the International Court of Justice were premised on international law’s universality. If Kosovo is a legal precedent, then that argument must also be available in respect of Crimea. The accusation of hypocrisy was an assertion that international legal arguments must be available to all, not just hegemonic states.12 There was a further juridical function at play. By accusing the other side of hypocrisy, both the US and Russia attempted to prevent the other side from invoking international law. Insofar as hypocrisy was invoked, it was to point out the inconsistency in the interpretation (and application) of international law by one party. Given international law’s focus on state practice and opinio juris, establishing patterns of contrary conduct to a stated norm will always be an important part of interpretation. An accusation of hypocrisy can work to outright deny the existence of a particular legal norm, or simply to argue a particular attempt to interpret and apply the law cannot stand. On a surface level, therefore, we can think of four basic reasons that accusations of hypocrisy have power in international law. Firstly, a vital element of international law is the struggle to distinguish it from international politics. 13 Invocations of hypocrisy threaten this division by drawing attention to the ‘non-legal’ reasons that underlie legal arguments. Secondly, international law remains relatively decentralised and dependent upon the reciprocal recognition and enforcement of its norms by its participants. Accordingly, hypocrisy – which calls into question one party’s commitment to those norms – can be a powerful accusation. Thirdly, since international law famously lacks any centralised body for the creation of law, its key norm-generating apparatuses – custom and treaty – rely on those participants. Claims of hypocrisy, by drawing attention to the inconsistency between ‘saying’ and ‘doing’ fundamentally implicate state practice, opinio juris and treaty interpretation. Finally, international law continues to put store in the ‘good faith’ of its parties. The Vienna Convention on the Law of Treaties (VCLT) notes that the principle of ‘good faith’ is universally recognised, and states that treaties must be performed14 and interpreted,15 according to said principle. More generally, good faith is seen as one of the ‘general principles of law recognized by civilized nations’ mentioned in Article 38 of the Statute of the International Court of Justice. Hypocrisy, as an accusation of bad faith, represents a legal challenge to state behaviour. Far from an irrelevant consideration to legal argument proper, accusations of hypocrisy touch upon fundamental issues of international law. An invocation of hypocrisy represents an attempt to cast doubt on the strength of an opponent’s legal argument, by referencing their own standards and conduct. As such, an accusation of hypocrisy demands a response, and that response is often a counter-accusation of hypocrisy. This suggests that there might be some deeper connection between ‘hypocrisy’ and international law. In order to understand this connection it is necessary to think more deeply about the nature of hypocrisy itself. 3 The Meaning of Hypocrisy

#### The US is key – they obstruct foreign and domestic ICC cooperation/information gathering, making international prosecution more selective and more difficult

Jones 21 [Nicole Jones, J.D. Candidate at the University of Wisconsin Law School, 2021, “SANCTIONING THE ICC: IS THIS THE RIGHT MOVE FOR THE UNITED STATES?” Wisconsin International Law Journal, https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2021/12/39.1\_175-204\_Jones.pdf]/Kankee

C. US CIRCUMVENTION OF THE ICC Since the creation of the ICC, the United States has made a number of attempts to stay out of reach of the ICC’s jurisdiction. One of the first attempts was the enactment of the American Servicemember’s Protection Act, hereinafter called ASPA.56 The ASPA was passed and signed into law on August 2, 2002. The ASPA precludes US participation in U.N. peacekeeping activities unless one of the following conditions exists: US soldiers are expressly exempt from ICC jurisdiction by U.N. resolution, the countries in which the troops are operating are outside the jurisdiction of the ICC, the troops are in countries that have concluded bilateral agreements with the United States exempting them under Article 98(2) of the Rome Statute, or the national interests of the United States justify participation.57 ASPA also prohibits other forms of cooperation with the ICC by US courts, local governments, and US agencies. It prohibits any federal, state, or local government from providing support to the ICC; 58 extraditing any person to the ICC; 59 using US funds to assist in the investigating, arresting, detention, or prosecuting of any US citizen by the ICC; 60 and prohibiting any investigative activity of the ICC in the United States and its territory.61 ASPA further prohibits the transfer of any classified national security information and law enforcement information to the ICC.62 To put the United States even further from the reach of the ICC, one of the ASPA exceptions listed above is that a country can sign a bilateral agreement (BIA) in order to exempt all US troops from ICC jurisdiction.63 This is another attempt at placing the United States in a place of immunity. In August 2002, with the enactment of the ASPA, the United States began actively seeking these agreements with both parties and nonparties to the Rome Statute.64 The thought behind these BIAs is attributable to Article 98(2) of the Rome Statute. Article 98(2) reads: The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.65 Essentially, this portion of the Rome Statute specifies that if a State has already entered into other treaty agreements with other States, the ICC cannot proceed with a request for surrender if that State has already agreed to ask for permission before surrendering a person. Before the adoption of the Rome Statute, many States had already entered into other treaty agreements such as extradition treaties or Status of Forces Agreements (SOFAs).66 SOFAs are mostly concerned with the legal issues that come with allowing foreign militaries to operate in a host country.67 The Rome Statute aimed to avoid conflicts with already existing State agreements.68 The international agreements mentioned in Article 98(2) are what the United States claims to include BIAs.69 There are criticisms of this interpretation and experts claim that “international agreements” was meant to encompass existing agreements not future ones.70 Despite growing skepticism over their validity, the United States has been successful in obtaining signed BIAs. Over ninety countries have signed BIAs since the United States enacted the ASPA.71 Over forty of these countries are States Parties.72 There are three different types of BIAs depending on the State’s wishes. The first type of BIA binds both parties to an agreement not to turn over each other’s nationals to the ICC without the consent of the other party.73 The second type involvesthe United States retaining the ability to turn over the other party’s nationals to the ICC, but it is not reciprocated for US nationals.74 The last type is for states that have not ratified or signed the Rome Statute.75 These BIAs contain a provision “requiring those states not to cooperate with efforts of third states to surrender persons to the [ICC].”76 In addition to the ASPA and corresponding BIAs, the United States has taken other measures to politically deter the ICC from investigating crimes that implicate US nationals. On April 4, 2019, the Trump Administration revoked the visa of the prosecutor initiating the prosecution of crimes committed in connection with the armed conflict in Afghanistan.77 Not one month before, Secretary of State Mike Pompeo announced that, “except to the extent otherwise required by the U.N. Headquarters Agreement, the United States would impose visa restrictions on ‘those individuals directly responsible for any ICC investigation of US personnel.’”78 Only one week after the prosecutor’s visa was revoked, the request to investigate the situation in Afghanistan was denied.79 The actions taken by the Trump Administration and its predecessors, are strong-arm attempts to politically influence the investigations that the ICC approves in order to avoid possible prosecution of American citizens involved in States party to the Rome Statute. There is no doubt that there are more attempts to come as the ICC undertakes the Afghanistan investigation. Given the history of the relationship between the United States and the ICC, it is difficult to think of the future ahead of the ICC as it investigates the atrocities committed in Afghanistan. Despite the constant pressure from the United States against these investigations and the ICC itself, Prosecutor Bensouda and the ICC have decided to continue on their course to find justice for the people involved in the atrocities committed in the armed conflict in Afghanistan. II. ICC INVESTIGATION INTO AFGHANISTAN

#### A post-ICC world is a green-light for crimes of aggression, genocide, and human rights violations

Sadat 20 [Leila Nadya Sadat, James Carr Professor of International Criminal Law and Director at the Whitney R. Harris World Law Institute at the Washington University School of Law 2020, “REFORMING THE INTERNATIONAL CRIMINAL COURT: “LEAN IN” OR “LEAVE” Washington University Journal of Law and Policy, https://journals.library.wustl.edu/lawpolicy/article/id/1021/]/Kankee

II. WHY THE ICC REMAINS IMPORTANT AND HOW IT CAN BE REFORMED Given the avalanche of criticism recently directed at the Court, it is easy to lose sight of the objectives that animated the delegates to the Rome Diplomatic Conference in 1998. Additionally, the rise of global authoritarianism makes it tempting to conclude that even if the need for the Court remains the same as it did in the 1990s, the project is just too difficult to undertake in the current political climate. An assessment was made in 1998 that one of the factors contributing to the extraordinary number of civilian deaths and atrocity crimes committed since World War II was the impunity with which those crimes could be committed. While international criminal justice was never envisaged as a panacea to war in the commission of atrocities, its absence was seen as a “green light” to would-be perpetrators. As former High Commissioner for Human Rights José Ayala Lasso observed in 1996, following the war in the former Yugoslavia and the Rwandan genocide, “we must rid this planet of the obscenity that a person stands a better chance of being tried and judged for killing one human being than for killing 100,000.”54 Although the ICC has had difficulties fulfilling the expectations of its founders, the institution is still relatively young, and the atrocities it was intended to combat result from centuries-old ways of thinking about state power. Although the Court’s performance may be subpar in some respects, the recent conviction of Bosco Ntaganda,55 the Court’s successful potential intervention into the situation of the Rohingya in Bangladesh56, and the Appeals Chamber’s decision on immunities in the al-Bashir case57 are all recent positive developments. There are also serious and concrete efforts at reform being made within the ICC itself, and by outsiders hoping for its success. This suggests that abandoning the effort is the wrong strategy. At a time of rising authoritarianism, during which some world leaders appear to be countenancing high levels of civilian casualties in wartime, acts of aggression, and life tenure for themselves, and evoking nationalist and sovereigntist arguments to justify the commission of crimes,58 abandoning the ICC sends the wrong signal. As James Goldston recently wrote, [L]etting [the ICC] die would deliver a huge blow to the fight against impunity. Flawed as it is, the ICC remains a capstone of our centuries-long search for a world in which the law prevails over brute force. Giving up on it now would set back that struggle immeasurably and would be a grave disservice to the many courageous activists who have given their lives for the cause of fighting crimes against humanity and genocide.59 A. What Reforms Might be Useful

#### US ratification outweighs – other superpowers aren’t actively destroying the ICC

Sadat 20 [Leila Nadya Sadat, James Carr Professor of International Criminal Law and Director at the Whitney R. Harris World Law Institute at the Washington University School of Law 2020, “REFORMING THE INTERNATIONAL CRIMINAL COURT: “LEAN IN” OR “LEAVE” Washington University Journal of Law and Policy, https://journals.library.wustl.edu/lawpolicy/article/id/1021/]/Kankee

3. Striving for Universality of Ratification, and Increased State Support The world of 2020 is not the world of 1998. The 1990s were a time of conflict, but also of hope following the end of the Cold War, seeing a new emphasis on human rights and international law.94 Twenty years later, the cold war seems resurgent as the Security Council is paralyzed by bitter disagreements between the great powers, particularly the Russian Federation, China, and the United States. This has made action on some of the worst atrocity situations in the world (Syria, for example) impossible, leading to establishment of other mechanisms by the General Assembly like the International, Impartial and Independent Mechanism for Syria.95 Ratifications of the Rome Statute have slowed considerably, leaving seventy States and many major powers outside the Rome Statute system, a situation that is unlikely to dramatically improve soon. As noted above, two States that have been the subject of preliminary examinations have withdrawn from the Statute in response,96 which is their sovereign right, but worrying. Talk of a “mass exodus” of African Union members has punctuated discussions about the Court at its annual Assembly of States Parties meetings for the past few years,97 sparked by indictments of African leaders who fought their battles both in and outside the courtroom,98 attacking the Court politically as well as the specific cases against them, and even, as discussed below, attempting to amend or reinterpret key Rome Statute provisions in their favor to preserve their immunity from the Court’s jurisdiction.99 The hostility of the United States has also posed a major challenge for the Court, as noted above.100 Although instrumental in the establishment of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) in the 1990s, and relatively supportive in terms of funding, intelligence sharing, and the secondment of personnel, the U.S. government has historically been on the fence about the establishment of a permanent international criminal court.101 While a lack of U.S. support may not be fatal to the Court, it has weakened it. It has jeopardized the ability of countries to cooperate with the Court (due in part to the Article 98 Agreement campaign, which targeted both State and non-States Parties). It also deprived the Court of financial and logistical support. Some argue that the Court is not evenhanded because it cannot compel U.S. persons to appear before it even though the United States has participated in Security Council referrals to the Court in three cases involving non-States Parties (while exempting or attempting to exempt its own nationals from the Court’s jurisdiction): Sudan,102 Libya103 and Syria.104 This gives rise to the appearance—and perhaps the reality—of double standards, which erodes the Court’s perceived legitimacy. The Prosecutor’s request to open an investigation into the situation in Afghanistan, which implicated U.S. persons and policies, obviated some of the critique directed towards the ICC itself, but led to other difficulties as the Court found itself on the receiving end (again) of blistering attacks from the U.S. government.105 There is also speculation that the Pretrial Chamber’s decision finding that the investigation could not be opened “in the interests of justice” was a direct result of U.S. pressure, undermining the Court’s legitimacy and independence. The U.S. attacks on the Court harm not only the ICC, but the United Nations more generally, given the Rome Statute’s importance within the United Nations system. It also divides the United States from some of its closest allies, nearly all of whom are States Parties, including Britain, Canada, France, Japan, and South Korea. The absence of Russia, China, and India is equally problematic, but for different reasons; these are populous, powerful and influential States, they are nuclear-armed, and, like the United States, two can refer situations to the Court and, under Article 16 of the Rome Statute, suspend an investigation in their capacity as members of the U.N. Security Council.106 Unlike the United States, their opposition has not included an aggressive campaign against the Court for the most part, but in non-ratification of the Statute. The Russian Federation took this a step further, however, by repudiating its signature (like the United States107) on November 16, 2016, following the publication of a report by the Prosecutor referring to Russia’s annexation of Crimea as an occupation.108 Following the indictment of President Omar al-Bashir of Sudan in 2009, members of the African Union (AU), angered by the perception that the Court was “targeting Africa,” invoked some of the arguments the United States had offered at Rome, as well as their own concerns, and launched a new campaign against the Court. Sudan asserted that the Court was a “political organ of the EU . . . built to indict Africans,” and that it would not comply (even though the Security Council had referred the situation) since Sudan was not a “party to the Rome treaty.”109 The AU campaign involved a refusal to arrest Omar al-Bashir during his international travels (including to ICC States Parties);110 an effort to persuade the Security Council to defer the Sudan case (and later the Kenya cases, which also involved indictments of a head of state); attempting to amend the Statute to permit the General Assembly (as opposed to the Security Council) to suspend an investigation or prosecution;111 long sessions at the ICC Assembly of States Parties on “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation”112 (and similar topics such as “Africa and the ICC” in subsequent years); the adoption of Rule of Procedure and Evidence 134 quater to permit heads of state to be excused from trial and represented by counsel only;113 and the adoption of a new treaty, the Malabo Protocol,114 providing for immunity for heads of state in contravention of customary international law and the Rome Statute. In a recent decision, the ICC Appeals Chamber found that States are required to arrest al-Bashir and to cooperate with the Court, rejecting his claims for immunity.115 Yet that, too, has generated significant dissent.116

#### The aff prevents Trump from invading the Netherlands to attack the ICC

Verma 17 [Mrinal Verma, Co-Founder of a Corporate Advisory company with a LL.M (Advanced) in Public International Law from Leiden University, 1-30-2017, "The US and the ICC: Prospective Revitalization of the ‘Hague Invasion Act’ Under the Trump Administration", SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2926463]/Kankee

THE POSSIBILITY OF USE OF THE ASPA UNDER PRESIDENT DONALD J. TRUMP: For the past several years there has been a more pragmatic approach to the ICC in U.S. politics. The turning point was the situation in Darfur, where the U.S. abstained from the vote on referral to the ICC in the U.N.S.C.53 Their abstention was a small light in the darkness, effectively acknowledging that the ICC has a significant role in international justice. This was followed by a campaign that the U.S. participated in which encouraged countries to follow I.C.C arrest warrants for the proper functioning of the court. 54 The recent election of the U.S. President has changed the dynamics of American politics completely with his strong policies focusing on the idea of ‘America First.' Since his Inauguration on 20th January 2017, the effects of his executive orders can be seen in international politics already. Citing national security, the president passed an order on the 27th of January 2017, which prohibited immigration from 7 predominantly Muslim countries for 90 days.55 Apart from this, he has even fired the acting Attorney General Sally Yates for stating that the order was illegal and that the U.S. Justice Department would not defend him from legal challenges.56 Seeing extreme policies and his general dissent for International Law, the ASPA is no longer out-dated law, lying forgotten in archives somewhere. With the ICC beginning trials in Afghanistan, if pre-trial chamber considers the evidence adequate, there is a real possibility of American soldiers being tried for crimes that they have committed in Afghanistan. This would be motivation enough for the newly elected President to use §7427 to ensure that the American soldiers are released, even if it meant violating International Law and NATO Treaties. CONCLUSION With the newly elected president bring rapid change to American policies, an unfortunate reality, in this author’s opinion, is beginning to dawn. The pre-trial investigation for crimes in Afghanistan is already underway with evidence of crimes by American Soldiers having come to light. If the pre-trial chamber approves this case and ICC begins its prosecution of war crimes committed in Afghanistan, U.S. soldiers will be prosecuted.57 Although the possibility of the use of §7427 in the ASPA is not very high, with Article 17 allowing the U.S. to state that they are investigating the crimes domestically, the chance is more than it was under the government of President Obama. This crudely made piece of legislation has the remarkable possibility of being revived as though it had remained in the shadows waiting for the day that the U.S. would need its ultimate weapon against the International Community’s efforts to prosecute crimes. The change that the United States had, towards the I.C.C under President Obama may be tarnished yet again by a change in the political scenario. Unfortunately, unless the government under President Trump decides to support the ICCs efforts or prosecutes their accused persons on their own, domestic legislation may again overshadow efforts of International Criminal Justice. The use of this act may bring about even more accusations of violations of International Law, with the only option with the president, being the invasion of The Hague, Netherlands — the headquarters of the I.C.C. Ironically, this would in turn not only violate Article 2(4) of the UN and because for invocation of Article 5 of the NATO treaty; it would also bring actions of the President under the very definition of aggression that the U.S. did not want. Rather than ratifying the statute and influencing the deliberations on this definition at the Kampala Conference in 2010, the irrational hatred towards the I.C.C. during the era of President Bush, lead to the creation of an Act, which stopped this from happening. Although the possibility isn't high, it once again does exist, invoking cause for concern. The I.C.C. is a remarkable effort of the international community to forward the cause of justice, and it should not be brought down by the actions of one country, refusing to accept limitations on their global military endeavours.

#### A material breach removes party status, meaning durable fiat is inclusive of following bylaws of treaties as the US would no longer be party to the treaty

UN 69 [United Nations, 05-23-1969, Vienna Convention on the Law of Treaties,” UN, https://legal.un.org/ilc/texts/instruments/english/conventions/1\_1\_1969.pdf]/Kankee

Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. 2. A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State; or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. 3. A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty. 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach. 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties. Article 61 Supervening impossibility of performance

#### No circumvention – party status is dependent on good faith execution of the treaty.

UN 69 [United Nations, 05-23-1969, Vienna Convention on the Law of Treaties,” UN, https://legal.un.org/ilc/texts/instruments/english/conventions/1\_1\_1969.pdf]/Kankee

Article 18 Obligation not to defeat the object and purpose of a treaty prior to its entry into force A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. SECTION 2. RESERVATIONS Article 19 Formulation of reservations A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty. Article 20 Acceptance of and objection to reservations 1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides. 2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties. 3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization. 4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides: (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States; (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State; (c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. 5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later. Article 21 Legal effects of reservations and of objections to reservations 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State. 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se. 3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. Article 22 Withdrawal of reservations and of objections to reservations 1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. 2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time. 3. Unless the treaty otherwise provides, or it is otherwise agreed: (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State; (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation. Article 23 Procedure regarding reservations 1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty. 2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation. 3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation. 4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing. SECTION 3. ENTRY INTO FORCE AND PROVISIONAL, APPLICATION OF TREATIES Article 24 Entry into force 1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree. 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States. 3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides. 4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text. Article 25 Provisional application 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES SECTION 1. OBSERVANCE OF TREATIES Article 26 “Pacta sunt servanda” Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 27 Internal law and observance of treaties A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46. SECTION 2. APPLICATION OF TREATIES Article 28 Non-retroactivity of treaties

#### This is specifically true for the Rome Statute

Christmas 20 [Sandy Kurnia Christmas, Faculty of Law Universitas Diponegoro, “Impact of Withdrawal State Parties in 1998 Rome Statute of the Existence of International Criminal Court,” NAGARI LAW REVIEW https://d1wqtxts1xzle7.cloudfront.net/87861235/54-libre.pdf?1655868168=&response-content-disposition=inline%3B+filename%3DImpact\_of\_Withdrawal\_State\_Parties\_in\_19.pdf&Expires=1733361780&Signature=BafLkmI-bGaLC97suqdpZNyn-yF4JDyKzmHjH1HVeI6ZMQqnq5ZwpxK848l4dH0Xm3WLCnroCueHWdMI8U0S-GU7Ovzf1HwSV7EUpEUQMIwrm826Ldzgx710jmuvXwxcufWyfv4lir6MkLnn-Z0pX71QYQvfvznzqspsd0zrgXmMY2H2GGG0Tm1gnn-8ua4lSaK2fgxt6TvmupHU2~hOpxNqGLobJ9omLcMDvbjIrcD5PoBT9634Ije4Imaucbv6K4Yh-0A~9l060Wabo7Yj1t5zy6BCh4joQjh6pLmoAJGTV0C1lzmfflMIejuErhhShrWaQXszePuwabqiH3G6Xg\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA]/Kankee

\*Pacta Sunt Servanda: agreements must be kept

Reciprocity for its support of the ICC can also be in the form of collaboration to help handle cases that are investigated by the ICC. But it is this failure to cooperate that is the reciprocal constraint that does not work effectively. This is because the ICC has never responded to reports sent by these countries (especially Africa) to the ICC, so on that basis countries respond to their mutual relations with the ICC only to the extent of reciprocity that does not have a positive impact on them. Even though the State Party which withdrew in this regard had implemented the Rome Statute in 1998 well, its decision not to cooperate with the ICC basically violated the principles of international law in the principle of Pacta Sunt Servanda where the agreement was binding and had to be carried out in good faith. The cooperation between countries that withdraw from the ICC cannot be implemented based on discriminatory ICC treatment, so they refuse to cooperate. According to the Theory of Working of the Law in Society emphasizes the functioning and effectiveness of law is in the balance of the three roles. The existence of injustice of the ICC as a regulatory agency that carries out its laws that are considered discriminatory by the four countries has caused a balance between the regulatory implementing agency and the stakeholders not going well. ICC as a sanctioning institution is considered to have committed acts of discrimination in carrying out its legal jurisdiction. This contradicts the definition of the implementing agency which is a strict implementing agency in carrying out the instructions contained in the legislation without discrimination (equal justice under law). The operation of the law against the implementing agency of this regulation is seen from the strict implementation of implementing the law without discrimination, so it can be said if the ICC is not successful in implementing its law. Although in some of these countries the withdrawal was indicated as a form of avoiding responsibility for ICC investigation, but according to Article 127 of the Rome Statute in 1998 the country that withdrew could not influence its cooperation with the ICC which began before the withdrawal became effective. There are three reasons for the ineffectiveness of the law according to Anthony Allot, namely: there are limitations in expressing legal norms; there is a conflict between the objectives of the legislator and the community's response in carrying out the law; and the existence of an inadequate process of implementing legal norms against legal comission.21 Based on the analysis of the theory, it has an impact on the existence of the ICC. This impact at least affects the existence of the ICC in the future regarding whether the court is still worthy of being called an independent institution or political interest. Juridical impact on the ICC due to withdrawal is the limitations of the ICC in investigating and prosecuting future cases because they are no longer bound to the Rome Statute of 1998. The limitations of the ICC only apply to countries that have officially withdrawn, and this means they are not the entry into force of the ICC jurisdiction for that country. Article 11 of the Rome Statute of 1998 states that the ICC only has jurisdiction in connection with crimes after the entry into force of this Statute for a state party. This means that the limitations of the ICC in investigating and prosecuting cases in the future are due to the application of the temporal jurisdiction of the ICC which has no power after the withdrawal of ratification. The next juridical impact on the ICC is the potential for crimes committed by state officials with impunity in the future because only the 1998 Rome Statute can exclude the right to immunity committed by State Officials. After the withdrawal is effective, it is not impossible that a country that is not a state party has the potential to commit a crime due to the absence of ICC jurisdiction over their country. The political impact on the ICC is an indication of failure to cooperate with other parties. This failure can be said to be the country's non-compliance with the ICC. This happened to South Africa before withdrawing, who refused to cooperate with the ICC because it was considered to set a double standard that reflected the injustice of the court. In practice, the successful implementation of the ICC depends on state cooperation in complying with arresting and surrendering criminal offenders. So this implies that the ICC does not have the power to force state compliance with its requests (Banteka, 2016). Politically, this withdrawal also has an impact on the reduced interest of countries that will ratify the 1998 Rome Statute. This is a consideration of countries that have not ratified the 1998 Rome Statute because of the influence of the withdrawing country on the grounds that the ICC applies its legal system which only based on political interests. The diminished interest of countries in the 1998 Rome Statute was also due to their fear of the jurisdiction applied by the ICC that could intervene in the country's sovereignty.22 Because basically, the concept of sovereignty becomes a characteristic in international relations and relations between nations, which is the reason that sovereignty will create a bond in international law.23 An example of a country that originally wanted to join the ICC but was canceled was Malaysia on 5 April 2019, due to the opposition politicization that took place in Malaysia which raised concerns that if Malaysia continued to ratify the 1998 Rome Statute it would become the next ICC's investigation target. This is considered to be able to trigger intervention by the ICC, although in international law prohibited the intervention measures for interference in domestic affairs and threatened state sovereignty.24 Related to this withdrawal also has an impact on State Parties, although this withdrawal has no impact on ICC cooperation, but legally for the country there are at least a number of impacts that occur such as: the inactivity of the ICC's jurisdiction after effective withdrawal takes effect. This is related to the loss of a country's attachment to international treaties, which legally the jurisdiction of the ICC is limited to the territory of a State Party in accordance with the legal status and power of the court in Article 4 paragraph (2) of the Rome Statute of 1998. The release of a country's attachment from the ICC can also indicate the implementation of the law implementing the 1998 Rome Statute may be revoked; and no legal obligations to the ICC after effective withdrawal takes effect. 4. Conclusion Withdrawal of an international treaty is an action to break away from the treaty, so that the jurisdiction of the international treaty no longer applies to that country. In the case of the withdrawal of South Africa, Burundi, Gambia and the Philippines, which became state parties, then withdrew from the 1998 Rome Statute, raising questions about the concept of protection and actual enforcement of human rights, because the ICC is considered an international institution representing countries to be able to provide protection and enforcement of human rights. The operation of the law at the ICC must be based on reciprocal responses to legal regulations, institutions, and role holders. The lack of response and reciprocity between the ICC as a sanctioning institution and the country withdrawing as the holder of the role makes the legal balance not run well. According to Seidman in the theory of the operation of law in the community, for state parties as the role holder what the desired role holder has in return to the sanctioning implementing agency is the fair use of law against all countries, this implies that these functions must operate without discrimination. The position of the ICC as a sanctioning implementing agency should be able to provide solutions for other countries because the ICC is considered to have legal power. The impact of withdrawal basically implies criticism of the legal system run by the ICC. Based on this research, the existence of evidence related to the operation of the legal system applied by the ICC so that the impact on the withdrawal of several state parties should not occur again. ICC is expected to be able to become a permanent international justice institution and be able to maintain its independence as the only permanent judicial institution that is specialized in cracking down on perpetrators of serious crimes, and able to bring about justice for the international community. This independence is needed to maintain the dignity of this institution so that it can carry out its objectives in breaking the chain of impunity to be realized. For state parties, especially for countries that are still members of the ICC are related to the pattern of their cooperative relations with the ICC in conducting investigations. The State Parties are expected to be able to carry out their obligations according to the rights and obligations they are responsible after ratifying the 1998 Rome Statute. The collaboration is expected to be based on the principles of international treaty law.

### Contention 2: War Crimes (ICC)

#### US war crimes are plenty, and are not properly punished or investigated

Yesko 24 [Parker Yesko, reporter for The New Yorker with a Master of Journalism from the UC Berkeley Graduate School of Journalism and a BA in Political Economy from Georgetown University, 9-10-2024, "The War Crimes That the Military Buried", New Yorker, https://www.newyorker.com/podcast/in-the-dark/the-war-crimes-that-the-military-buried]/Kankee

War entails unspeakable violence, much of it entirely legal. And yet some violence is so abhorrent that it falls outside the bounds of law. When the perpetrators are U.S. service members, the American military is supposed to hold them to account. It is also supposed to keep records of wrongdoing in a systematic manner. But the military has failed to do so, leaving the public unable to determine whether the military brings its members to justice for the atrocities they have committed. To remedy this failing, the reporting team of the In the Dark podcast has assembled the largest known collection of investigations of possible war crimes committed in Iraq and Afghanistan since 9/11—nearly eight hundred incidents in all. Much of the time, the reporting concluded, the military delivers neither transparency nor justice. The database makes it possible, for the first time, to see hundreds of allegations of war crimes—the kinds that stain a nation—in one place, along with the findings of investigations and the results of prosecutions. The picture that emerges is disheartening. The majority of allegations listed in the database were simply dismissed by investigators. Those which weren’t were usually dealt with later, by commanders, in a justice system that can be deferential to defendants and disbelieving of victims. The database began with In the Dark’s reporting on the killings of civilians in Haditha, Iraq, on November 19, 2005. That morning, a squad of Marines, led by Sergeant Frank Wuterich, was hit by an improvised explosive device, which killed a beloved lance corporal. In the hours that followed, Marines killed men, women, and children on the street and in nearby houses. Four of those Marines, including Wuterich, were charged with murder. Three of their cases were later thrown out, and, when Wuterich went to trial, he was allowed to plead guilty to a single count of negligent dereliction of duty. A judge demoted Wuterich in rank. “Essentially a parking ticket,” Wuterich’s lawyer, Haytham Faraj, said of the sentence. “It’s meaningless.” We wanted to understand how such a large and well-publicized war-crimes prosecution had reached a conclusion of such little consequence. Was this an anomaly or was it typical of the military-justice system? We began by filing requests with the military under the Freedom of Information Act (FOIA). In 1974, following the massacre of hundreds of civilians in My Lai, Vietnam, and the failed prosecutions of some two dozen Army service members for the killings, the Department of Defense began requiring each branch of the military to maintain a “central collection of reports and investigations” of allegations of war crimes by its members. However, when we filed public-records requests for the contents of each branch’s collection, we got little in return. The Department of the Navy, which includes the Marine Corps, sent us a letter saying that it had located its “depository” but that “the depository did not contain any records.” With no other option, we started combing through archived news articles, human-rights reports, legal and medical journals, and a staggering repository of records about torture and detainee abuse that the A.C.L.U. had obtained during fourteen years of litigation. We looked for incidents such as the indiscriminate shooting of civilians, the killing or torturing of wounded enemies, and the abuse or willful neglect of detainees, all textbook examples of war crimes. We limited our search to events that were broadly comparable to Haditha: allegations of violence perpetrated by U.S. service members or deaths in U.S. custody that happened in Iraq and Afghanistan after September 11, 2001. We excluded nonviolent incidents, such as thefts of artifacts, and killings by drone strikes, which aren’t typically treated as crimes. As we unearthed information about new incidents, we filed FOIA requests for related records. In response, we were often told that, unless we could provide names, especially those of the perpetrators, agencies couldn’t carry out searches for documents. When we provided names, some departments refused to release records, citing the privacy rights of the people we had identified. We learned that many cases were handled nonjudicially—essentially as personnel matters—and that those records were exempt from FOIA. Cases that ended in acquittal or dismissal were also exempt from FOIA, and the files often destroyed. Many of the most basic records that would be easily obtained in any civilian courthouse in America are beyond reach in the military-justice system. With the assistance of an experienced FOIA litigation team, we repeatedly sued the military. Over four years, the agencies released enough documentation to us that, assisted by other source materials, we were able to put together a collection of seven hundred and eighty-one possible war crimes, perpetrated against more than eighteen hundred alleged victims, that the U.S. military took seriously enough to investigate. To analyze the database, we consulted John Roman, a researcher at NORC at the University of Chicago, who specializes in quantitative analysis of the civilian criminal-justice system. He was dismayed by the results. “It’s to the point where you have to question a little bit whether justice is a priority here or if something else is a bigger priority than justice,” Roman said. Of the seven hundred and eighty-one cases we found, at least sixty-five per cent had been dismissed by investigators who didn’t believe that a crime had even taken place. Soldiers would return to the United States and confess—to women, health-care workers, job interviewers—that they’d murdered civilians or prisoners, but military investigators would find that the allegations couldn’t be substantiated. Detainees at Abu Ghraib prison reported abuse by their guards, but investigators did not find sufficient evidence to confirm that it had happened. Civilians driving distractedly or too fast were shot dead approaching traffic checkpoints, and investigators deemed these killings acceptable escalations of force. Young men were found unresponsive at Camp Bucca prison, and their deaths were attributed to natural causes. In a hundred and fifty-one cases, however, investigators did find probable cause to believe that a crime had occurred, that the rules of engagement had been violated, or that a use of force hadn’t been justified. These include the case of soldiers raping a fourteen-year-old girl and subsequently murdering her and her family; the alleged killing of a man by a Green Beret who cut off his victim’s ear and kept it; and cruelty toward detainees at Abu Ghraib prison and at the Bagram Air Base detention facility. They were offenses that even a military-justice system vexed by the difficulty of collecting evidence in war zones and forgiving of deadly errors in judgment had identified as warranting prosecution or punishment. Yet, even in these cases, meaningful accountability was rare. We identified five hundred and seventy-two alleged perpetrators associated with these hundred and fifty-one criminal cases. Only a hundred and twenty-seven of them were convicted. The records show that they rarely received lengthy prison terms. Much more often, their cases were dealt with by commanders, who have broad discretion to punish their troops with extra duty, demotions, or reprimands, circumventing formal prosecution altogether. (The commanders themselves almost never seemed to face consequences for the misdeeds of their subordinates.) Fewer than one in five alleged perpetrators appear to have been sentenced to any type of confinement, and the median sentence was just eight months. “The conviction rates and the rate of sentencing for these kinds of very serious person crimes is just far below what you would see in the civilian system,” Roman said. We sent summaries of our findings to the Army, the Navy, the Marine Corps, and the Air Force, and requested an opportunity to present their leaders with the details of our analysis. None took us up on the offer. The Army replied that it “holds Soldiers and Army Civilians to the highest standards of personal conduct.” The Marine Corps didn’t respond. What we’re publishing is not a complete record of the atrocities committed by the military since 9/11; it would be impossible to know them all. This is a repository of the seven hundred and eighty-one possible war crimes investigated by the U.S. military that we were able to identify. You can explore an index of information about the incidents, investigative findings, adjudicative outcomes, and our source materials. Below, we’ve displayed detailed accounts of the hundred and fifty-one cases that investigators determined to be criminal. Each has its own story, but many start and end the same way: with a horrific act perpetrated by members of the military which was then punished lightly or not at all.

#### Lack of ICC punishment sets precedent for US troops that innocent lives don’t matter

Nouri 22 [Selma Nouri, researcher with a BA from the University of Virginia, 06-16-2022, "Double Standards in International Law: Did the U.S. Get Away with War Crimes in Afghanistan?", Columbia Undergraduate Law Review, https://www.culawreview.org/journal/double-standards-in-international-law-did-the-us-get-away-with-war-crimes-in-afghanistan]/Kankee]/Kankee

Following the withdrawal of U.S. troops from Afghanistan, a substantial portion of media coverage and political debate focused on the glaring economic costs of the war. After nearly 20 years of military involvement, the United States is estimated to have spent over two trillion dollars in the region. [1] However, this economic cost pales in comparison to the human cost of war. Reports estimate that, as of April 2021, more than 71,000 innocent Afghan and Pakistani civilians had been killed as a direct result of the Afghanistan War. [2] In fact, despite the U.S. government’s claim that it was only targeting terrorists and enemy combatants, many of the victims of U.S.-led airstrikes were innocent civilians. Reports show that, in 2017, the U.S. relaxed its regulations on airstrikes, resulting in a nearly 330% increase in the number of civilian casualties. [3] The large number of innocent civilians killed during the U.S. involvement in Afghanistan raises critical questions regarding the authority of international law in relation to acts of war. The Hague and Geneva Conventions of the late nineteenth and early twentieth centuries provided a shared international understanding of what constitutes an improper act of war. The Hague Conventions of 1899 and 1907 were the first “multilateral” or multi-state treaties created to address the proper conduct of warfare, prohibiting two warring parties from engaging in inhumane means and methods during war. Articles 23 and 25 state that any military or government cannot “employ arms, projectiles, or material calculated to cause unnecessary suffering.” [4] The laws also forbid states from “attacking, destroying, or bombarding” any “towns, villages, dwellings, or buildings” that are undefended. [5] The 1949 Geneva Conventions were created to supplement these laws by legally protecting the dignity and lives of innocent civilians who are not directly taking part in the violence. [6] The fourth 1949 convention, in particular, focuses on how not only the life but “the dignity” of all human beings must be respected, even in the midst of war. [7] Therefore, under these conventions, any unjustified killing of innocent civilians or unnecessary destruction of property is considered a violation of international law, even though not all violations are considered “war crimes.” While not all states have ratified both the Hague and Geneva conventions, the United Nations (UN) argues that the rules outlined in them have inherently become a part of “customary international law.” [8] Therefore, all states are bound by them, regardless of whether or not they have “ratified the treaties themselves.” [9] This is critical to assessing the legality of U.S. actions in Afghanistan. Despite having ratified both conventions, the United States repeatedly violated them during the War in Afghanistan. For example, in 2021, the United States admitted to a drone strike that mistakenly killed 10 Afghan civilians, including an aid worker and seven children living in a “dense residential block.” [10] When the attack was first reported, however, the United States had denied any claims of wrongdoing, claiming it to be a “righteous strike” targeting a “suspicious” vehicle that they believed was carrying an “ISIS bomb.” [11] The military also alleged that the strike had only killed around three civilians. [12] It was not until the New York Times published declassified footage of the strike that the truth was revealed: the driver of the “suspicious” vehicle was Zemari Ahmadi, an Afghan aid worker who had spent his entire day “transporting colleagues to and from work.” [13] Further investigation of the video also revealed that at least one child had been near the site of the strike only two minutes prior. [14] Despite being in clear violation of both Articles 23 and 25 of the Hague Conventions, which state that it is forbidden to cause “unnecessary suffering” or attack villages and dwellings that are undefended, none of the U.S. military officials involved with the strike were punished for their deadly actions under the stipulations of these Conventions. [15] Only the innocent victims and their families had to pay the price for the U.S. military’s “mistake.” This, unfortunately, is not an isolated case. Many deadly strikes, in undefended homes and densely populated neighborhoods, occurred throughout the War in Afghanistan. For example, in 2008, an airstrike “against a target of opportunity” killed 47 civilians who were traveling to attend a wedding in the Nangarhar province of Afghanistan. [16] Among those killed were 39 women and children, including the bride. As in the case of Mr. Ahmadi in 2021, the United States had initially denied any wrongdoing, stating that no civilians had been killed. It was not until further investigation of the incident occured that the truth was revealed. Once again, the United States government had acted with impunity and a reckless disregard for the value of innocent lives. [17] Similar to the case with Zemari Ahmadi, U.S. officials were never punished for violating international law. A formal mode of punishing perpetrators of international war crimes is through the International Criminal Court (ICC). Following the ratification of the Rome Statute, the Court was officially established in 2002 to investigate, try, and charge individuals responsible for war crimes, genocide, crimes against humanity, or the crime of aggression. [18] Those initially in support of creating the ICC hoped that it would “deter-would be war criminals, bolster the rule of law, and offer justice to victims of atrocities.” [19] However, this has clearly not been the case. Since its ratification, the Court has received criticism for its failure to adjudicate claims made against major powers like the United States, China, and Russia [20]. Moreover, the Court is accused of having unfairly “singled” out Africa, prosecuting a number of African leaders while failing to take into account the atrocities committed by major world powers. [21] These criticisms are especially relevant when comparing the atrocities committed by the United States in Afghanistan to those committed by states that are currently under investigation by the ICC as violations of international law. For example, in 2011, the ICC opened an investigation against the Libyan government for alleged “war crimes” and “crimes against humanity” committed by the “highest level” of Libyan authority. [22] The United Nations Security Council referred the situation to the ICC, condemning the Libyan government for using “violence and force” against innocent civilians and violating human rights. [23] The same accusations could be leveraged against the United States for the crimes they have committed against innocent civilians in Afghanistan. However, the ICC continues to turn a blind eye to crimes committed by the American government - deliberately excluding the United States from any investigations into alleged war crimes. Similarly, in 2005, the ICC opened an investigation in Darfur, Sudan regarding alleged war crimes, crimes against humanity, and genocide. [24] Like the United States, Sudan is not a state party to the Rome Statute, yet it is still being investigated for crimes such as “outrage upon personal dignity” and “torture.” [25] The same accusations, however, can be leveraged against the United States for the alleged killing and torture that took place at Bagram, a former U.S. detention site in Afghanistan. In 2005, a New York Times report revealed the atrocities that occurred against unarmed Afghan civilian prisoners by U.S. armed forces at the detention center. [26] The report claimed that the prisoners were “chained to the ceiling” and “beaten to death.” [27] Despite these atrocities, however, unlike the Sudanese government, the U.S. was never prosecuted or formally condemned by the ICC. In 2021, the ICC decided to “deprioritize” an investigation of the crimes committed by the United States in Afghanistan, choosing to focus instead on the crimes committed by the Taliban and Afghan leaders. [28] This decision by the ICC highlights a double standard in its enforcement of the rule of law. By “deprioritizing” crimes committed by the United States, the ICC is encouraging major powers to continue disrespecting international law without any fear of the consequences. Even if the ICC is unable to convict powerful leaders from countries like the United States, Russia, or China, it should at least investigate and condemn their actions. By failing to even acknowledge the crimes committed by the United States, the ICC is communicating to the world that the dignity and lives of innocent civilians do not matter if major world powers are responsible. As long as international legal organizations such as the ICC continue to allow the U.S. and other major powers to undermine international law, innocent civilians will continue to be the ones who suffer as a consequence of crimes that go unpunished. Upholding equal enforcement of international law is especially pertinent given the unfolding tension in Ukraine. Many in the United States and Europe have accused Russia of committing war crimes due to the Russian military’s alleged use of “cluster munitions,” deadly weapons that can “scatter hundreds of submunitions over large” urban areas, killing many at a time. [29] Cluster munitions have been banned by most countries and strongly condemned by international organizations such as the UN. [30] However, during the War in Afghanistan, the United States repeatedly used cluster munitions, dropping nearly 1,228 cluster bombs between 2001-2002. [31] Despite this fact, the United States has never been held legally accountable for doing so. By allowing powerful countries such as the United States to undermine international law, guardians of human rights such as the United Nations and the International Criminal Court not only condone the suffering of innocent people, but erode the very power and authority of their claims. This is, once again, exemplified by Russia’s recent invasion of Ukraine. Failing to hold all states equally accountable for violations of international law enables powerful leaders such as Russian President Vladimir Putin to ignore the policies and laws established by the international community. Until all powers, including the United States, are uniformly held accountable for their crimes, international law will remain ineffective. Why should powerful leaders abide by the laws when others are excused? Justice can never be achieved when a double standard exists. While powerful leaders roam free, innocent civilians will continue to pay the price.

#### ICC involvement is the US preventing instead of abetting war crimes

Jones 21 [Nicole Jones, J.D. Candidate at the University of Wisconsin Law School, 2021, “SANCTIONING THE ICC: IS THIS THE RIGHT MOVE FOR THE UNITED STATES?” Wisconsin International Law Journal, https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2021/12/39.1\_175-204\_Jones.pdf]/Kankee

IV. CONCLUSION The ICC was created to end war crimes and ultimately prevent them. It does this through investigations that can lead to arrest warrants and hopefully with enough support, obtain convictions of war criminals who commit atrocities. It has been quite successful so far, but it needs support from outside countries every step of the way to bring these criminals to justice. The recent actions of the United States will most certainly hinder this process and it could mean the end to a proper investigation into the war crimes committed in Afghanistan. Even though the sanctions program aligns with the US view of the ICC, it doesn’t seem to be meeting the goals of either entity. The United States has continually held itself out to be a defender of justice in the face of war criminals, but by directly opposing the ICC, it ultimately opposes the goal of the ICC which is to defend the victims of war crimes. This opposition may have been here from the very beginning, but it is not too late to change the foreign policies of the United States and once again be the defender of those who cannot defend themselves. Changing how the United States views the ICC will be a great step in the right direction to really establishing a zero-tolerance policy on war crimes and crimes against humanity. Additionally, the sanctions program is an obstruction to US citizens’ First and Fifth Amendment rights. By listing individuals in the sanction program, it prevents US citizens from supporting the ICC in almost any fashion. This sanctions program is not an appropriate use of executive power and should not be how the United States reacts to an investigation into the atrocities committed in the armed conflict of Afghanistan.

#### US war crime unaccountability harms US legitimacy

Corn and VanLandingham 20 [Geoffrey S. Corn, Gary A. Kuiper Distinguished Professor of National Security at South Texas College of Law Houston, and Rachel E. VanLandingham, Professor of Law at Southwestern Law School in Los Angeles, California, 2020, "Strengthening American War Crimes Accountability", American University Law Review, https://aulawreview.org/blog/strengthening-american-war-crimes-accountability/]/Kankee

Introduction The United States faces periodic and appropriate criticism for failing to hold its service members accountable for their battlefield criminality.1 An example of impunity that prompted such condemnation occurred in 2019, when President Donald J. Trump granted pardons to military personnel either convicted of or facing charges for offenses that qualify as war crimes.2 These pardons exacerbated a prevalent impression that America is indifferent to its own battlefield misconduct. This perception of impunity degrades U.S. legitimacy. Additionally, the underlying truth it reveals—that the U.S. military has not been fulfilling its responsibility to appropriately punish war crimes—frustrates the governing legal regime’s humanitarian goals, challenges the military’s attainment of operational and strategic objectives, and harms individual service members. This negative impression of America’s treatment of war crimes contrasts starkly with our modern military’s self-perception as a professional force, one that justly punishes those who fail to follow the laws of war.3 It also contrasts with most Americans’ belief that our military predominantly complies with the laws of war and that they should so comply—and that the widespread atrocities by U.S. forces in Vietnam have been left behind.4 On the other hand, criticism of how the United States handles war crimes that its own service members commit seems rather consonant—disconcertingly so—with American society’s view regarding punishment of its service members for war crimes. Today, many Americans—with President Trump egging them on—seem to support impunity for war crimes that U.S. service members commit.5 These seemingly opposing views reflect that the American public fails to appreciate that accountability for war crimes is essential for the compliance it desires. We therefore strongly set out this link in detail in the first part of this Article.6 Away from the din of public opinion and President Trump’s tweets, the reality of U.S. military accountability for serious violations of the laws of war—typically referred to as war crimes—is nuanced. The current, perhaps endemic, political pressure to avoid domestic prosecutions of service members for war crimes, combined with certain systemic flaws, create a sinister war crimes accountability deficit. This deficit is sinister not only because it quietly corrodes the military’s internal discipline and moral compass, but also because it degrades the United States’ compliance with its state responsibility obligations to ensure such accountability7 and provides ammunition for those generally critical of military tribunals.8 Plus, this accountability deficiency dilutes the important signaling effects regarding U.S. commitment to accountability for war crimes that military adjudicatory processes can and should have.9 Current structural defects outlined in this Article exacerbate the inherent challenges of ensuring accountability for battlefield crimes, contributing to this deficit.10 While these existing challenges are often practical, such as limited availability of evidence, political pressure (of a type not unique to America) often accompanies such prosecutions.11 For example, many Americans felt that Lieutenant William L. Calley’s horrendous actions were either justified, or that he was simply a scapegoat for the 1960s My Lai tragedy (during which a U.S. Army platoon massacred hundreds of Vietnamese civilians) and that he should not have been prosecuted for murder.12 More recently, the U.S. President and Commander-in-Chief demonstrated similar politicized misunderstanding of the need for war crimes accountability. During his Administration, President Trump publicly condemned the prosecution of American military “heroes” for their alleged war crimes.13 Worse, he pardoned war criminals both after their military convictions14 as well as during the court-martial process.15 These actions were predicated not on mercy, but on the perversion of the entire war crimes accountability regime, seemingly in order to score political points. Clarifying the need for accountability, as well as strengthening the mechanism for achieving it, will help counter the harm that such actions have inflicted on our armed forces. This Article provides necessary awareness and outlines a path forward. It first identifies several structural legal defects, starting with military law’s failure to criminalize war crimes as war crimes. While the statutory enumeration of military criminal offenses found in the Uniform Code of Military Justice16 (UCMJ) provides general authority to prosecutors to charge serious violations of the laws and customs of war, it does not delineate any specific war crimes17—and hence none are ever charged.18 Without specified war crime offenses, the U.S. military turns to what are often referred to as “common law crimes”—ordinary, non-war-related crimes such as murder, assault, battery, arson, theft offenses, and rape—to prosecute service members for what are more logically understood and characterized as war crimes.19 In the U.S. military system, the same generic murder offense used to convict a service member of murdering his or her spouse in downtown Los Angeles is used to prosecute a service member for killing a prisoner of war in U.S. custody in Iraq. This approach fails to capture the full harm of the war crime, thereby degrading the law’s retributive, deterrent, and international signaling effects.20 This approach also feeds the perception that war crimes go unpunished within the U.S. military, given that service members are never convicted for war crimes as such. This failure to prosecute U.S. soldiers’ war crimes as war crimes undermines the legitimacy of U.S. military operations by contributing to the impression that U.S. military personnel benefit from war crimes impunity.21 We propose an easy fix: the United States should utilize the same enumerated war crimes already used to prosecute its enemies at Guantanamo Bay, Cuba through the Military Commissions Act of 200622 (MCA) to prosecute U.S. service members for identical criminal conduct on the battlefield.23 However, delineating offenses alone is insufficient for just and thorough fulfillment of this nation’s obligations to its service members. This Article also assesses issues stemming from the lack of incorporation of specifics of the laws and customs of war—modernly often referred to as the law of war, the law of armed conflict (LOAC) or international humanitarian law—and its battlefield setting into the UCMJ. We accordingly propose adding tailored defenses to accompany the enumerated war crimes transplanted from the MCA.24 A handful of scholars have previously expressed alarm at the lack of UCMJ war crimes; we both echo their concern and go further to comprehensively contextualize this defect within the norms of the LOAC, emphasizing the law’s requirement of responsible command.25 Part I outlines the criticality of compliance, focusing on why accountability for war crimes is a necessary predicate of compliance; this Section also emphasizes the duties that flow from responsible command while highlighting internal benefits of the doctrine.26 Part II highlights the asymmetry between the UCMJ’s lack of war crimes in its punitive articles and the MCA’s enumerated list applicable to captured alien “unprivileged belligerents” subject to military commission jurisdiction.27 Here we recommend both incorporating the latter into the former, and extending command responsibility liability to U.S. commanders. Part III identifies additional deficiencies in current U.S. military criminal law regarding war crimes; this Part demonstrates why court-martial jurisdiction should be exercised over not only U.S. service members, but all captured enemy belligerents, both privileged and unprivileged.28 Our conclusion notes that enactment of UCMJ-enumerated war crimes and defenses, coupled with delineation of appropriate court-martial jurisdiction over those whom the LOAC was designed to apply—both U.S. service members and enemy belligerents, lawful and unlawful—will together offset any necessity to invoke military commission jurisdiction for captured personnel, helping to end the ill-conceived military commission system at Guantanamo Bay and close the American war crimes accountability deficit. I. U.S. Approach to Military War Crimes Accountability

#### Accountability is key to combat effectiveness

Corn and VanLandingham 20 [Geoffrey S. Corn, Gary A. Kuiper Distinguished Professor of National Security at South Texas College of Law Houston, and Rachel E. VanLandingham, Professor of Law at Southwestern Law School in Los Angeles, California, 2020, "Strengthening American War Crimes Accountability", American University Law Review, https://aulawreview.org/blog/strengthening-american-war-crimes-accountability/]/Kankee

3. Pragmatic necessity Avoiding criminal charges for failure to exercise one’s responsible command duties is hardly the only dynamic, or the most important one, that incentivizes military commanders to ensure that their subordinates both comply with the LOAC and are held accountable when they do not. Instead, the recognition and appreciation of the reality that adherence to the law is essential to combat effectiveness is the most powerful incentive for LOAC compliance and accountability.60 As others have noted: General George Washington stated at the beginning of the Revolutionary War that [the war] would be “carried on agreeable to the rules which humanity formed” and that both sides should “prevent or punish every breach of the rules of war within the sphere of our respective commands.” [He] believed in punishing war crimes because he instinctively understood that impunity for violations corrodes confidence in leadership; challenges the moral foundation of the men and women put under arms; increases the enemy’s will to resist; and undermines the broader legitimacy of military action.61 Throughout history, the notion of military command has included mechanisms for the imposition of discipline for subordinates’ criminal misconduct.62 The fairness and legitimacy of these processes has varied widely among armed forces and has evolved substantially over time.63 However, the common thread that runs through this history is the recognition that accountability contributes to unit effectiveness because it buttresses the expectation that commanders’ orders will be followed, even when subordinates face enormous risk.64 As others have noted, “[m]isconduct on the battlefield loses wars.”65 To prevent the breakdown of good order and discipline, it is axiomatic that misconduct must be dealt with swiftly—and fairly, as unjust punishment is equally corrosive to good order and discipline.66 This recognition is found in examples of misconduct punishable as military crimes dating back to the Roman Legions; professional militaries have utilized military penal codes since at least the fourteenth century to delineate specific consequences for misconduct by members of armed forces.67 In addition to good order and discipline, there are other equally pragmatic incentives for military commanders to ensure appropriate accountability for war crimes. One is the reward of compliance itself: without accountability there is less compliance, and law of war compliance ultimately not only helps reduce suffering in armed conflict, but it also helps win wars—not only because well-disciplined troops are more likely to respect the obligations imposed on them by superiors more reliably, but also because LOAC compliance enhances the legitimacy of military and national action.68 In contrast, violations of the LOAC invigorate the enemy,69 degrade domestic and international legitimacy,70 and undermine the potential for a lasting peace.71 LOAC adherence “differentiates war from riot, piracy, and generalized insurrection.”72 Legitimacy is an even more significant interest in modern armed conflicts in which victory is rarely defined as complete submission of an enemy. Victory today is substantially more nuanced, involving political, diplomatic, and military end states. In the context of most contemporary armed conflicts, both domestic and international legitimacy of a nation’s conduct—by and through its armed forces—is greatly influenced by perceptions of its adherence to the LOAC.73 The perception of disregard of the law and impunity for its violators can cause strategic losses on and off the battlefield.74 This relationship between law, legitimacy, and operational and strategic success is reflected by the elevation of legitimacy to the status of a principle of military operations in U.S. military joint operational doctrine. This recently recognized military principle emphasizes that it is the reality and perception of legal compliance that provides that critical legitimacy, specifically noting that: Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic population, governments, and civilian populations in the OA [Operational Area], and nations and organizations around the world.75 4. Moral imperative Another often overlooked reason for ensuring full accountability for war crimes is the preservation of the morality of service members ordered by their state or other authority to engage in armed conflict. Simply put, adherence to the law of war, including accountability for those who fail to adhere, helps military commanders maintain their subordinates’ sense of humanity and decency. Democracies ask their service members to wield great violence on their citizens’ behalf; they expect them to do what is normally unthinkable while respecting the legal and moral lines of permissible conduct established by international law.76 Commanders bear an obligation to protect these women and men from not only the physical, but also the moral and psychological risks of mortal combat so they are able to return home and resume healthy lives. As James McDonough explained in his seminal memoir of his time as an infantry platoon leader in Vietnam: I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader . . . . War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed.77 The LOAC helps commanders maintain these lines and preserve moral clarity by providing the framework for morally correct and humane behavior even in the most austere, violent, and challenging of conditions.78 Failure to hold transgressors accountable not only makes future LOAC compliance less likely, but it is also morally corrosive to those who witnessed or know of the violation and subsequently observe impunity. It also diminishes the value of those who forego the temptation to cross into the realm of illegality, even at great risk to themselves and their subordinates. As Retired U.S. Marine Corps General John R. Allen eloquently stated in a 2016 speech: The tool that helps preserve each soldier’s moral compass, the tool that allows them to wreak destruction, to engage in warfare that, despite our best efforts, lawfully kills and maims innocent men, women and children, and yet allows them to be able sleep at night, and to look themselves in the eye every day for the rest of their lives—is this body of law.79 Effective law requires accountability: “[j]ust and fair consequences for violations safeguard overall fidelity to the law, contributing to the good order and discipline of military units.”80 Furthermore, accountability for violations, and hence overall compliance with the LOAC, lays the moral foundation of the U.S. armed forces—“[w]e obey LOAC because we cannot allow ourselves to become what we are fighting and because we cannot be heard to say that we fight for the right while we are seen to commit wrongs.”81 B. Why Military Instead of Civilian Prosecutions for War Crimes

#### Ratification allows ICC prosecution for US troops, ending US impunity from immunity

Scheffer 23 [David Scheffer, former U.S. Ambassador at Large for War Crimes Issues and Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University, 7-17-2023, "The United States Should Ratify the Rome Statute", Lieber Institute West Point, https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/]/Kankee

A quarter century ago today the Rome Statute of the International Criminal Court (ICC) was completed following years of negotiations. I led the U.S. delegation in those talks. The Clinton Administration decided not to support the final text of the treaty on July 17, 1998, but after two more years of talks on supplemental documents, I signed the treaty on behalf of the United States on December 31, 2000. Despite the fact that 123 nations, including almost every American ally, have joined the ICC, the United States has not yet ratified the Rome Statute and thus has not become party to the ICC. That fact need not be the final chapter. The time has finally arrived to acknowledge some evolutionary developments and move towards American ratification of the treaty. There is longstanding American policy that while the United States remains a non-party State to the Rome Statute, the ICC has no jurisdiction over U.S. nationals for actions undertaken even on the territory of a State Party of the Rome Statute. The same standard would apply to any other non-party State (like Russia) and its nationals acting on State Party territory (or territory of a non-party State—like Ukraine—that has fallen under the jurisdiction of the ICC voluntarily or because of a UN Security Council mandate). I term this the “immunity interpretation,” which makes it difficult for the United States to fully embrace the ICC’s investigations of Russian suspects for atrocity crimes (war crimes, crimes against humanity, genocide) committed in Ukraine. The immunity interpretation reached its peak under the Trump Administration, with the threat and, in two cases, imposition of sanctions against key personnel of the ICC and foreigners. President Joe Biden repealed the executive order authorizing such sanctions on April 2, 2021, though Secretary of State Antony J. Blinken stated, “We maintain our longstanding objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel.” The immunity interpretation, however, is archaic, counter-productive, and largely rejected worldwide. I should know, as I presented the immunity interpretation before the 1999 annual meeting of the American Society of International Law. While the position articulated some logical premises, it also defied the core principle of criminal law, which is territorial jurisdiction. It ignored the decision-making authority of a sovereign government when entering a treaty regime, including to confer criminal jurisdiction to an international court. In December 2019, during a hearing on the Afghanistan situation before the ICC Appeals Chamber, I spoke as an amicus and publicly rejected the immunity interpretation, whatever its original merit, as an argument that has been overtaken by customary international law. I elaborated on the point in a May 2021 article. After three decades of rapid development in international criminal law and in tribunal-building and jurisprudence to enforce the law, it is implausible that a non-party State can invade a State Party, commit atrocity crimes that fall within the jurisdiction of the Rome Statute, and essentially enjoy immunity for doing so. To do so rewards the non-party State with impunity while rendering meaningless the State Party’s membership in the ICC. Professor Leila Sadat has persuasively countered the immunity interpretation by focusing on the conferral authority of governments in her forthcoming article in the Notre Dame Law Review. In Washington, D.C., I have attended meetings recently where retired senior officials of the U.S. Government, particularly having held legal positions, have reversed their own positions and believe the United States should abandon the archaic immunity interpretation. Granted, the Russian invasion of Ukraine has proven to be an inflection point on the issue. At some stage the hypocrisy of the matter must be acknowledged. It simply is implausible to keep arguing the immunity interpretation with a straight face when the criminal assault against Ukraine and its people is so blatant, so widespread, so deadly, so destructive, and so persistent and while the U.S. Congress and the Biden Administration have evolved to support efforts, such as the ICC investigations, to hold Russian officials accountable under international criminal law. The ICC cannot exercise jurisdiction over Ukraine for the crime of aggression because of the constraint built into Article 15bis(5) of the Rome Statute. This creature of the Kampala Amendments process in 2010, at the time strongly supported by the United States and some other major powers, reads, “In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.” Consider for a moment how surreal that sounds, particularly if one recites it to the mother of a young girl who died from the impact of a Russian missile fired from across the border in Russia and hitting a civilian neighborhood in Ukraine. There is a solution to the particular problem of the crime of aggression. Official U.S. statements condemning the Russian aggression against Ukraine ring rather hollow when the Biden Administration fails to support the creation, through a procedure involving a UN General Assembly resolution and a treaty between the United Nations and Ukraine, of an international Special Tribunal for Ukraine on the Crime of Aggression that can deny head of state immunity. Instead, the United States has opted for “an internationalized national court” in the Ukrainian legal system some day for the crime of aggression—a weak option that invites head of state immunity and hardly deters massive and continuous acts of aggression by Russia against Ukraine. Recently, I attended a closed-door meeting in Washington with a senior government lawyer and, when asked, that official simply could not answer the question of why the Biden Administration would continue to uphold the longstanding and awkwardly hypocritical immunity interpretation, particularly in light of both the Russian actions against Ukraine and the Administration’s support for new laws that enable U.S. cooperation with the ICC to investigate Russian conduct. It also proves difficult to explain the ICC’s investigation, without any noticeable U.S. objection, of Myanmar officials, whose country is a non-party State, for atrocity crimes against the Rohingya who were persecuted and forcibly deported onto the territory of neighboring Bangladesh, a State Party, beginning in 2017. I firmly believe that whatever the merits of the immunity interpretation 25 years ago, it has been overtaken by the march of customary international law combining both state practice and opinio juris, by judicial decisions, by persuasive scholarly work, by a renewed recognition of fundamental principles of criminal law and of sovereign decision-making, and frankly by common sense. Related to the immunity interpretation is the debate playing out in Washington over the implementation of ICC cooperation legislation that President Biden signed into law on December 29, 2022. Administration officials have delivered tortured testimony before Senate committees in recent months when confronted by Senators over the failure of the Administration to follow through on cooperation efforts with the ICC that are mandated by U.S. law regarding the Court’s investigation of Russian atrocity crimes in Ukraine. In a recent Senate Appropriations defense subcommittee hearing, Senators Lindsay Graham (R-SC) and Dick Durbin (D-IL) pressed Secretary of Defense Lloyd Austin on the Pentagon’s resistance to the legal mandate. Austin said that he was concerned about the issue of reciprocity. Such views are old think and reflect the concern that someday the tables will be turned and the ICC will be investigating and prosecuting U.S. actions and that we would not want other governments to cooperate with the ICC in its investigative work. The cooperation train left the station decades ago. All of America’s allies, with the exception of Israel and Turkey, are States Parties to the Rome Statute and are obligated to cooperate with ICC investigations. But there is no comparison in modern times with what is transpiring in Ukraine. Ambassador-at-Large for Global Criminal Justice Beth Van Schaack answered Austin quite effectively when asked on the PBS NewsHour recently. She said, “I think there is virtually no equivalency or comparison to what Russia has done here to anything that might involve U.S. personnel or service members. We have a full-scale war of aggression being committed through the systematic and widespread commission of war crimes, crimes against humanity. There’s no comparison here. And so I do not see a concern that this would set any sort of a precedent that might redound badly to the United States.” Austin’s statement also reflects a presumption that should be challenged. During the Clinton Administration, my instructions as the U.S. chief negotiator of the Rome Statute were based on the intent of building an international criminal court which the United States one day would join. The instructions were not to negotiate for six years to build a court that the United States would never join. When I signed the Rome Statute, the intent was to signal that the United States would remain on deck with the treaty and work towards one day joining the Court, not to stand in permanent opposition to it. President Bill Clinton conceded in his signing statement that the treaty would not (during Clinton’s remaining three weeks in office) and should not be submitted by his successor to the Senate until “fundamental concerns are satisfied,” a primary one being to “observe and assess the functioning of the court.” That opportunity to “observe and assess” began on July 1, 2002, when the ICC became operational following ratification of the Rome Statute by 60 nations. We have had 21 years to “observe and assess” and while there are some imperfections in the workings of the ICC, as there are with every legal system, the ICC’s professionalism and track record merit Washington’s respect. In any event, U.S. policy towards the ICC today should not be premised on, structured, or implemented as if the United States intends to be a permanent non-party State. Such isolation was never the Clinton Administration’s position and never reflected my negotiating instructions. The immunity interpretation was not advanced by the United States in order to permanently keep the United States out of the ICC, but rather to explain its status and non-exposure to ICC jurisdiction until Washington ratified the treaty. Otherwise, why did we negotiate and sign the treaty? Rationalizations for permanent non-party status may attract the support of those seeking that outcome, but such thinking defies all that was negotiated into the Rome Statute and its supplemental documents to protect U.S. interests, including due process protections, complementarity, Security Council backstop under Article 16, precise definitions of the crimes, judicial oversight of the Prosecutor’s investigations, tough admissibility standards, high approval requirements for amendments, precise rules of procedure and evidence, comprehensive elements of crimes, and much more. If the United States were to become a State Party of the Rome Statute, the immunity interpretation would become irrelevant—a non-issue—for the United States even if Washington wished to argue its merits for Israel, Turkey, Pakistan, North Korea, China, Iran, Myanmar, Libya, Egypt, Russia, Belarus, India, Saudi Arabia, Indonesia, Cuba, and other non-party States. Those who express concerns about “reciprocity” unfortunately convey an intimidated attitude about the ICC. Rather than be on the defensive about the ICC, the U.S. Government and particularly the Pentagon should take the offensive and recognize how the ICC in fact advances critical U.S. values, particularly against an aggressor State like Russia. The United States can weigh in and influence gravity requirements at the ICC and how the Prosecutor can best utilize his discretion, not to mention placing an American judge on the bench and perhaps one day greeting an American chief prosecutor. Washington can use its diplomatic clout to advance ICC investigative and prosecutorial objectives globally and in ways that are compatible with U.S. foreign policy and global security needs. The ICC should become part of this nation’s lawfare strategy. In other words, Washington should weaponize the ICC for worthy objectives—such as justice in Ukraine and Darfur—that reflect critical American values rather than taking an anemic defensive posture towards the Court.

#### Studies prove ratification reduces war crimes through prosecution threats and loss of diplomatic capital

Appel 18 [Benjamin J. Appel, educator at the Department of Political Science at Michigan State University, 2018, “In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?” Journal of Conflict Resolution, https://unlv-primo.hosted.exlibrisgroup.com/permalink/f/6tvje6/TN\_cdi\_proquest\_journals\_1976095460]/Kankee

The International Criminal Court (ICC) aims to prevent and deter individuals from committing grave violations of international law. According to its proponents, the establishment of the Court has ushered in a new era of international justice. In contrast to other international legal instruments, such as human rights treaties, the Court has the authority to investigate and prosecute individuals suspected of committing genocide, war crimes, and crimes against humanity. As a result, the Court’s supporters claim that the ‘‘culture of impunity’’ that has allowed human rights abusers to freely commit atrocities without fear of sanction has come to an end. Despite its potential to do this, the question remains: has the ICC contributed to the prevention of gross human rights abuses? Scholars and policy makers are divided on this question. Many champion the establishment of the Court and its ability to deter potential perpetrators from committing human rights violations by prosecuting offenders (Akhavan 2009; Schabas 2011; Scharf 1997). Others call into question whether the Court can prevent such crimes, given that it lacks the legal mandate and enforcement capabilities to capture and arrest wanted individuals (Ku and Nzelibe 2006; Drumbl 2007). Despite the arguments made by both sides, the current debate suffers from two major problems that make it difficult to determine whether the Court has improved human rights practices. First, researchers have failed to fully theorize the potential deterrent impact of the Court by underestimating the costs that it can inflict on individuals. Second, there is a lack of empirical research examining whether the Court has fulfilled its mandate and prevented gross human rights abuses. As Simmons and Danner (2010, 226) put it, ‘‘few social scientists have given this innovative institution close scrutiny.’’ In this article, I systematically examine the relationship between the ICC and government respect for human rights. I argue that governments from states that have ratified the Rome Statute commit lower levels of human rights abuses than governments from nonratifier states.1 I posit that the ICC can deter ratifiers from committing violations because it imposes costs on them throughout its involvement in a situation that include imprisonment, but also a variety of domestic and international audience costs. As a result, the threat of ICC’s involvement lowers the expected payoffs for engaging in repression, making other policies more attractive to ratifiers. In this way, while I acknowledge the importance of formal sanctions (i.e., incarceration), recognizing that the ICC inflicts various costs on governments once they start an investigation represents an important advance on existing arguments, given that the primary criticism of the ICC is that it is not a credible deterrent due to its limited ability to arrest wanted suspects. I use the Cingranelli–Richards (CIRI) index of physical integrity rights to test the deterrent impact of the ICC (Cingranelli and Richards 2009). CIRI index consists of four key human rights measures: torture, summary executions, physical disappearances, and political imprisonment. The data is appropriate for the present study because it corresponds to the Court’s jurisdiction to investigate and prosecute individuals suspected of committing crimes against humanity and war crimes. All four types of violations featured in CIRI index are explicitly listed in the Rome Statute as both war crimes and crimes against humanity. Further, while the ICC has investigated rebel groups, it also frequently targets governments, which are the focus of this study. I discuss several cases below, including Colombia, Sudan, Guinea, and Kenya. Other notable cases targeting governments include Mali, Israel, Libya, and the Ivory Coast.2 I find support for my theoretical expectations; leaders from states that have ratified the Rome Statute commit lower levels of human rights violations than leaders from nonratifier states. The results are robust to several alternative explanations of human rights abuses and the determinants of ratification (i.e., regime type, democratization, recent conflict history, independent judiciary, etc.). The results are also consistent when accounting for concerns related to selection effects. Using difference-in-differences (DiD) estimation, the findings indicate that the ICC is associated with a reduction in human rights violations, even after accounting for any unobserved preexisting differences between (eventual) ratifiers and nonratifiers.3 I also directly test the causal mechanisms in my argument and find that ICC’s involvement in a situation is related to a greater probability of both economic sanctions and major domestic government crises. The results suggest that the ICC is associated with both screening and constraining effects on governments. Although governments with better human rights records are more likely to ratify the Rome Statute, their human rights practices still improve after ratification. The practices of nonratifiers, however, change very little across time. This suggests that the ICC appears to be associated with an independent effect on ratifiers that cannot entirely be explained by prior human rights practices, trends across time, or domestic conditions. This article makes several important contributions. To my knowledge, this is the first cross-national analysis to find that the ICC is associated with better human rights practices.4 Finding that the ICC can reduce human rights abuses is important for both policy makers and academics. The ICC is a novel institution with unparalleled power to enforce the law and prevent gross human rights violations. In a significant move, ratifier states sacrificed some of their sovereignty by giving the Court the authority to prosecute individuals from their country. As Bosco (2014, 2) puts it, the ICC ‘‘represents a remarkable transfer of authority from sovereign states to an international institution.’’ The findings in this article provide support for the Court’s backers who argue that the establishment of a permanent ICC with such jurisdictional powers can advance human rights. Along these lines, this article also addresses important debates in the literature. In contrast to realist arguments that maintain that international law and institutions are either irrelevant or epiphenomenal, this article suggests that international organizations such as the Court can alter the behavior of governments. In so doing, it draws on arguments from the larger literature on human rights to suggest that the ICC can alter government behavior even with relatively weak enforcement mechanisms. By imposing various costs throughout the process, I suggest that the ICC can deter individuals even with its limited ability to arrest wanted suspects. As noted, this is an important theoretical insight about the ICC that addresses one of the major concerns of those skeptical of the Court’s impact on human rights abuses. The rest of this article is organized as follows. First, I review the existing literature on the Court and identify the shortcomings in it. Next, I put forward my argument on the effectiveness of the ICC. I then introduce my research design and measurement issues and discuss selection effects and present the statistical findings. I then examine whether ICC’s involvement is associated with greater domestic and international costs. I conclude with the implications of this research and directions for future research. Literature Review

### Contention 3: Arctic (UNCLOS)

#### Ratification allows US diplomatic leadership for peaceful Arctic development

Jing and Huff 20 [Dai Jing, combat engineer officer and major in the Singapore Armed Forces, and Raymond Huff, Master Sgt. in the US Army and deputy commandant of the Sgt. First Class Christopher R. Brevard Noncommissioned Officers Academy, Jan/Feb 2020, "Great Power Collaboration? A Possible Model for Arctic Governance", Army University Press, https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/January-February-2020/Huff-Jing-Arctic/]/Kankee

With such potential for economic growth, it is easy to forget that the Arctic melt poses severe environmental impacts that will far outweigh the economic gains discussed above. First, temperature increases in the Arctic will in turn increase global temperatures and could result in rising sea levels.38 Irresponsible development and ice breaking in the region may very well add to these temperature increases. Second, native food security is reduced due to the loss of whaling and sealing from the warmer waters, leading to potential relocations of whole communities in the Arctic.39 To minimize these negative impacts, the primary principle of Arctic governance must be environmental sustainability and climate change prevention. Given current predictions, however, the Arctic melt is probably more a matter of when than if.40 As such, development governance and territorial conflicts need to be addressed early. On economy and resources, the most globally equitable position is to treat the Arctic as a global common that is free and open for international trade and resource exploration while maintaining way-of-life safeguards for the four-million-person indigenous Arctic population.41 This position is aligned with that of the United States, the EU, and most non-Arctic states, suggesting a strong potential for enforcement collaboration.42 Thus, freedom of trade anchored by an international rules-based order must be a key principle in Arctic governance. Given the global impacts of the Arctic, governance of the Arctic’s developments and enforcement of the safeguards should be done by a truly international body. Membership of the Arctic Council should be expanded to all countries with Arctic interests. In addition, all aspects of Arctic development, including military ones, should be up for debate in the council. A possible model to follow is that of the Antarctic Treaty System that governs resource extraction and scientific exploration in Antarctica. Under the legally binding treaty, all signatories suspended territorial claims and military activities. Instead, they collaborated to jointly facilitate the stipulations of the treaty. The Antarctic Treaty Consultative Meetings are open to all countries as long as they conduct “substantial research activity” as proof of commitment to the region.43 Of course, there are significant differences between the Arctic and Antarctica. First, there is little great power competition between the littoral Antarctic states. Second, because it is an actual landmass, the melt in Antarctica will not change trade routes but will instead have a significant impact on global sea levels. As such, the economic and strategic gains in the Antarctic are seemingly less significant, making it easier for countries to focus on environmental factors and be more altruistic in their approaches to the region.44 Nevertheless, with strong international leadership and advocacy for collaboration rather than competition, a similar system could be achieved in the Arctic. In line with the Department of Defense’s desired end state for the Arctic as “a secure and stable region where U.S. national interests are safeguarded, the U.S. homeland is defended, and nations work cooperatively to address challenges,” the United States’ best strategy in the Arctic is to be a leading voice in advocating for international collaboration in establishing the global governance model described in the preceding section.47 To do so, the United States will need to utilize its instruments of national power, with particular emphasis on the twin pillars of diplomacy and military deterrence. With just one heavy-class icebreaker and minimal troops in Alaska, the United States’ deterrent is not credible on its own.48 Diplomatically, the United States needs to work out its conflicts with Canada first and then capitalize on its special relationship with the country to convince its leadership to relinquish its internal waters claim on the Northwest Passage and respect the provisions of UNCLOS.49 Thereafter, the United States should champion international collaboration in lobbying for a more inclusive governance body for Arctic development. This push for global Arctic governance should also be underpinned by multilateral military cooperation with interested nations. In a key demonstration of good faith to rally the nations, the United States should ratify UNCLOS. Given all other Arctic states are abiding by UNCLOS and the United States abides by it in action already, the ratification should be little more than a formality.50 Establishing multilateral cooperation will also alleviate perceptions of hegemonic Arctic ambitions by the United States. The twin pillars of deterrence and diplomacy only work if the deterrence is credible. This is especially so if China and Russia collaborate not just economically but also militarily. It is neither cost effective nor timely for the United States to attempt to catch up to Russia’s, and potentially China’s, over forty icebreakers. However, if it can pair its own icebreaker build up with the twenty-nine icebreakers and other naval assets of the NATO countries and friendly non-Arctic states like Japan and South Korea, it can send a dual message of deterrence and international unity against any country trying to assert hegemony over the Arctic.51 Beyond deterrence, there are plenty of other benefits of military collaboration in the Arctic. First, partner nations can gain much from jointly developing the poor communications infrastructure and navigational data in the region so all vessels can pass through safely.52 Due to the harsh conditions, cost sharing to develop Arctic-hardy unmanned systems will be of special value. Second, the possibility of oil spills as more oil tankers traverse the Arctic will undoubtedly increase. In the difficult conditions of the Arctic, clean-up operations for spills there will likely be even more complex than those of the Exxon Valdez spill in 1989. Thus, joint emergency response plans for this scenario need to be well developed and constantly rehearsed. Finally, search-and-rescue operations in the region will also be fraught with difficulty and would provide a good platform for all nations to collaborate militarily.53 For the U.S. military, a number of changes need to be made. Currently, command of operations in the Arctic is split amongst the U.S. North Command, the U.S. European Command, and the U.S. Indo-Pacific Command. This could prove confusing should a large-scale operation be required. Hence, contingency plans for an ad hoc single command structure for Arctic operations must be in place. In terms of deployments, it is paramount that the United States bolsters Coast Guard and Navy presence in the Arctic, namely in Alaska and around the Bering Strait. Maintaining a continued presence of U.S. Coast Guard District 17 assets would support any diplomatic solution with Canada without escalation to conflict (see figure 2). With these changes and the international collaboration mentioned above, the United States will be in a good position to ensure developments in the Arctic are beneficial to the global community. Conclusion The potential economic gains from the melt are tantalizing. If fully realized, global trade currents could shift, threatening countries half a world away while invigorating regions previously frozen out of the international economic community. Perhaps even more than the South China Sea, impacts of developments in the Arctic are global in nature. Thus, the key priority must be in keeping the peace and stability of the region by promoting international collaboration and reducing counterproductive competition. While the current geopolitical situation in the region seems to be generally collaborative, most Arctic states and other interested non-Arctic states are making diplomatic, economic, and military moves in preparation for future competition as the melt progresses. As an Arctic state and the currently recognized global leader, the United States is in a unique position to shift the current Arctic paradigm. With effective diplomacy and military collaboration, it can be the leading voice for establishing a more inclusive global governance model for the Arctic that will overcome the current weak mandate of the Arctic Council on military issues. The governance model should be based on the three key principles of free and open trade, a rules-based order, and environmental conservation. With current climate observations, the Arctic melt shows no signs of stopping, even if its rate of progress may not always be linear. Hence, the United States needs to make the above preparations for the melt early. Establishing multilateral cooperation will alleviate perceptions that the United States is trying to assert hegemony over the Arctic. With interests of more groups considered, Arctic development is likely to be more sustainable and equitable, leading to the creation of a true global common with benefits for all.

#### Unilateral declarations of Arctic rights outside the UNCLOS process harms US credibility

Solski 24 [Jan Jakub Solski, associate professor at the Norwegian Centre for the Law of the Sea, UiT the Arctic University, 1-16-2024, "The US Arctic Gambit: Testing the Limits of UNCLOS", Arctic Institute Center for Circumpolar Security Studies, https://www.thearcticinstitute.org/us-arctic-gambit-testing-limits-unclos/]/Kankee

In recent weeks, the international community has witnessed two seemingly unrelated events that, upon closer examination, reveal a complex interplay of geopolitics and ocean governance. On one side, there have been discussions within Russia about potentially withdrawing from the United Nations Convention on the Law of the Sea (UNCLOS), and on the other, the United States (US) has boldly announced the limits of the extended continental shelf in various regions, including in the Arctic. The US has not, however, presented a submission to the Commission on the Limits of the Continental Shelf (CLCS) as it is typically done in similar situations. These events shed light on the geopolitical chess game between nations, particularly Russia and the US, as they navigate the intricate waters of international law of the sea. Russia’s view of the world through the prism of rivalry with the US has long influenced its stance on global agreements, and UNCLOS is no exception. There have been discussions in Russia over the last thirty years about the significance of the law of the sea convention in the Arctic. Some people in Russia believe that UNCLOS’ ratification and implementation in the Arctic have limited the country’s room for maneuvering unnecessarily. Conversely, proponents highlight the Soviet Union’s strategic success within UNCLOS, securing unprecedented rights in ice-covered areas and the procedure to obtain recognition for sovereign rights over a sizeable continental shelf. The outer continental shelf regime, often considered the primary ‘carrot’ of UNCLOS, has worked in Russia’s favor, exemplified by its status as the first country to apply to the CLCS. However, the recent decision by the US to bypass the CLCS in announcing extended continental shelf limits sends a clear message — participation in UNCLOS may be perceived as burdensome and unnecessary. The law of the sea recognizes two distinct criteria for entitlement to a continental shelf: either a distance of 200 nautical miles or the outer edge of the continental margin. In cases where the entitlement is anchored in the latter criterion, the coastal State is required to provide scientific evidence to support the claim. The complexity of the legal regime for establishing the limits for extended continental shelf underscores the necessity of the CLCS as a credible institution to evaluate the legitimacy of such claims. The rights to a continental shelf exist inherently as a matter of international customary law, making it challenging to demand that the US obtain CLCS recommendations for their assertion. However, by circumnavigating the CLCS, the US undermines the established international process, creating uncertainty about the credibility and acceptability of the US’s extended continental shelf limits. The US announcement is consistent with international law to the extent that it informs the world about the extent of its continental shelf. However, without a CLCS submission, other states are left to evaluate the credibility of the US announcement. Unlike situations where maritime zones’ outer limits depend on distance, assessing the credibility of limits based on scientific criteria poses challenges for other states lacking the necessary resources. The response from other nations should be straightforward: submit your data to the CLCS, adhere to the established process, and await evaluation like everyone else. Russia and China, both parties to UNCLOS, often accuse the US of cherry-picking arguments and stretching interpretations in a way that disrupts the internationally accepted order. While it remains uncertain whether Russia will revoke its participation in UNCLOS, the US’s practice may bolster arguments of nations claiming a higher moral ground in defending international law against perceived exploitation. A response from the international community urging the US to adhere to established norms would reaffirm the importance of institutions like the CLCS in maintaining order in the complex realm of ocean governance.

#### The Arctic needs diplomacy to cap tensions and avoid miscalculation with Russia

Rumer et al. 21 [Eugene Rumer, senior fellow and the director of Carnegie’s Russia and Eurasia Program with a BA from Boston University with a PhD from MIT, Richard Sokolsky, nonresident senior fellow in Carnegie’s Russia and Eurasia Program and visiting senior fellow at the RAND Corporation and at the Institute for National Strategic Studies at the National Defense University with a M.A. from the Johns Hopkins School of Advanced International Studies, and Paul Stronski, senior fellow in Carnegie’s Russia and Eurasia Program and educator of history and post-Soviet affairs at Stanford with a PhD from Stanford, 3-29-2021, "Russia in the Arctic—A Critical Examination", Carnegie Endowment for International Peace, https://carnegieendowment.org/research/2021/03/russia-in-the-arctica-critical-examination?lang=en¢er=global]/Kankee

Russia has already had to shelve its plan for creating a second Arctic Brigade for improved coastal defense.64 Moreover, the Northern Fleet faces major shortfalls in icebreakers and ice-capable ships, troop transport, aerial refueling, and ASW patrol aircraft.65 The fleet’s ability to conduct a broader range of missions and operations beyond bastion defense of its SSBNs will be severely hampered unless major investments are made to redress these shortfalls. Russia’s ability to prevail in an Arctic conflict with NATO is an open question. The Baltic states are cut off from the rest of the alliance and, in a crisis, reinforcing them or deploying troops on their territory would be extremely challenging, involving a major operation that would be highly vulnerable to Russian interdiction. Moreover, their small size and proximity to major Russian military installations and garrisons would present Russia with undisputed advantages as would its superiority over NATO in icebreakers, ice-capable ships, local infrastructure, and cold-weather technologies and training.66 On the other hand, the geography of the Baltic region presents Russia with major vulnerabilities.67 The proximity of major Russian military installations to the Baltic states would leave them vulnerable to NATO’s longer-range precision weapons launched from air- and sea-based platforms. The Russian Navy’s ability to escape the confines of the Gulf of Finland in the event of hostilities would be in doubt.68 The heavily militarized Kaliningrad enclave, cut off from the rest of Russian territory, would also be vulnerable to NATO strikes. Russia’s aggressive posturing in the Arctic and the Baltic regions has provoked NATO moves that in a crisis situation could backfire against it and severely threaten its security and interests. In February, the United States deployed an expeditionary B1-Lancer squadron with 200 personnel on a temporary basis to Norway.69 Last September, the U.S., British, and Norwegian navies conducted joint exercises just over 100 miles from the Russian coastline.70 And last March, Norwegian, British, U.S., and several other NATO units, as well as units from Sweden and Finland, conducted exercises simulating a “high-intensity combat scenario” in northern Norway.71 Implications for U.S./NATO Policy Mutual accusations and warnings by NATO and Russia about the threat they pose to each other risk becoming a self-fulfilling prophecy. The situation is similar to the classic “security dilemma,” in which states take steps to increase their security, prompting other states to respond with their own security measures, thereby decreasing security for the first state.72 This is risky. The commitment of NATO members to each other and Russia’s vision of its security requirements, which emphasizes strategic depth and buffers to shield it from perceived threats to the homeland, meet toe-to-toe along the alliance’s northern flank. An outright military conflict in the Arctic would not be confined to the region and would prove catastrophic for both sides. All the Arctic stakeholders have an obvious interest in avoiding such an outcome, as the result of either a deliberate or an unintended escalation. The latter is the more likely scenario and this risk is likely to increase as the opposing forces continue to operate in close proximity to each other. However, neither side has shown willingness to back down. For NATO it is a matter of maintaining the credibility of its commitment to mutual defense; for Russia, its main adversary has advanced to the gates of the homeland and is intent on denying the security, geopolitical, and economic claims to which it feels entitled. The rising tensions are not the result of mutual misunderstandings—both sides’ actions are deliberate and reflect clashing interests. Managing the Competition It can be difficult to see past Russia’s rhetoric, deliberately provocative acts, and grandiose statements about its Arctic plans and threats to them, and to acknowledge that its bark so far has been worse than its bite. Russia’s ambitions far exceed the resources it has to realize them. Thus, while it is essential not to yield to Russia’s posturing, it is equally important not to overreact to it. Notwithstanding the seeming novelty of the situation—changing climate, NATO’s new frontier in Eastern Europe, China’s growing footprint in the Arctic, and so on—Russia’s drive to the Far North and the rationale behind it are part of a long-standing historical pattern. Its confrontation with the West is not a new development either, and the push for Arctic resources is crucial for its ability to sustain this posture. From the perspective of the country’s security establishment, Russia is playing defense rather than offense. Moreover, Russia is confronting the West in vastly diminished circumstances. Its economy is stagnant, its population is declining, and it is diplomatically isolated in Europe and among the Arctic states—almost entirely thanks to its own actions. It has rebuilt its military capabilities after a long period of neglect and decline, but even this utmost national priority is facing budget constraints and technological challenges. In the years to come Russia’s Arctic pursuits and posture will likely be driven by concerns about being able to sustain its already weakened position vis-à-vis the West. Rather than treat the Arctic as the next arena of great-power competition with Russia, the United States and NATO’s other Arctic members should adopt a two-track strategy of diplomacy and deterrence. Diplomacy Although Russia may not prove receptive, the United States and NATO should explore multilateral arrangements to reduce tensions, avoid or manage crises, and mitigate the risks of conflict through an accident or miscalculation. Currently, there is no venue for dialogue on security issues in the Arctic. One could be proposed to fill this gap—comprised initially of Russia, the United States, Canada, Denmark, and Norway—with a mandate to focus on crisis management, risk reduction, and conflict prevention, even if Russia’s continued unwillingness to engage seriously on these issues raise questions about its near-term viability. Deterrence The United States and NATO should implement defensive improvements to discourage Russia from harassing their military and commercial aircraft and ships in and around the Arctic, and to ensure that the alliance maintains the capability to execute its wartime reinforcement plans for its northern and eastern flanks. 73 The alliance should continue with its current posture of restraint and resolve to signal to Russia that it does not intend to engage in offensive operations, but fully prepared to defend its interests. Striking this balance will be difficult and will require clarity in communication to Russia the allies’ interests, objectives, and redlines. Conclusion In responding to Russia’s ambitions in the Arctic, it is important for the United States and NATO to base their plans on a realistic assessment of its posture there, its drivers, and its capabilities. Tempting as it may be to view the Arctic through the prism of great-power competition—which undoubtedly would fit with Russia’s quest for recognition as a great power—there is little to suggest that its military posture in the Arctic is a fundamentally new undertaking. Rather, it signals the return to a version of its Cold War–era posture centered around long-standing missions of protecting the sanctuaries of its ballistic missile submarine fleet and operations in the North Atlantic in the event of a war in Europe. The Russian military is resuming these missions with fewer resources and facing a more formidable array of adversary capabilities than during the Cold War. Some hedging against a greater-than-anticipated Russian threat should be one element of the United States’ and NATO’s overall approach to the Arctic Region. But pursuing the goal of winning a great-power competition with Russia in this region is likely to be a distraction from other, more important U.S. pursuits. The alliance should act with prudence, realism, and restraint in protecting its core interests in the Arctic and carefully manage competition with Russia to avoid destabilizing consequences. Even though their tense standoff is likely to continue, some cooperation between Russia and other Arctic nations, in practical areas that are largely depoliticized, is probably possible. These include climate change, search and rescue operations, and scientific research. Other opportunities for cooperation should be explored on issues of common concern, such as the safety of maritime shipping, environmental remediation, protection of fisheries, and incident management. In addition, it is essential for NATO allies to find potential diplomatic avenues for managing the standoff—that is, rules of the road to mitigate the risks of crises or incidents with the potential for escalation.74 No matter how unpromising they may seem, they should be explored. The allies have been here before.

#### NATO/Russia Arctic standoff risks accidental war – only diplomacy solves

Foreign Policy 20 [Foreign Policy Analytics, 12-14-2020, "Military Buildup and Great Power Competition", Foreign Policy, https://foreignpolicy.com/2020/12/15/arctic-competition-defense-militarization-security-russia-nato-war-games-china-power-map/]/Kankee

Conflict Potential and Prevention in the Emerging Arctic Great Power Competition While there is relatively minimal risk of direct military conflict over resources or territory in the Arctic, great power competition the region is set to intensify for the foreseeable future. Prominent Arctic experts agree that there are two primary, short-term risks that could trigger military escalation in the region: a misunderstanding between Russian and NATO forces or external conflict spilling over into the Arctic. Russia and NATO countries increased military capacities throughout the region magnify both the likelihood and severity of a potential misunderstanding or spillover event occurring. Since the end of the Cold War, the Arctic has been a region largely free from outside geopolitical disputes. Since 2014, however, this dynamic has changed rapidly. The Arctic is now a key strategic region for both Russia and China, and any potential conflicts involving these nations are likely to include the Arctic. Preventing such a conflict is an expressed priority for Arctic nations. However, there is no forum or formal channel for nations to discuss Arctic defense priorities or resolve disputes. The lack of communication among major actors on defense and security issues further heightens the risk of a misunderstanding in the region, while making any potential conflict significantly harder to de-escalate. The Need for a Security Dialogue and Forum for Conflict Prevention and International Cooperation in the Arctic As noted above, escalating military buildup increases the likelihood and impact of the two largest short-term risks in the Arctic: a miscalculation or an outside conflict spilling over. As the Arctic becomes more militarized, increasing numbers of Russian, NATO, and Chinese military vessels are occupying the same international waters, and mounting tensions between great powers outside of the Arctic present risks of conflicts within the region. The geopolitics of the Arctic itself will become more complicated as additional countries involve themselves in Arctic affairs. India and Japan have the potential to play roles in the Arctic, alongside South Korea and Japan as they seek to partner with Russia on oil and gas exports and explore potentially larger overall economic involvement with Russia in the region. The EU’s increased interest in the Arctic, and eight EU states being admitted to the Arctic Council as Observers since 1998, open the door for a larger EU presence in the Arctic. If the U.S. continues to underinvest in the Arctic, other NATO countries may take it upon themselves to begin bolstering Arctic security forces. As more nations assert their interests in the Arctic, it is critical to have mechanisms in place to diffuse misunderstandings or points of conflict. The Arctic Council is an effective mechanism for coordinating Arctic issues related to the environment, search and rescue, scientific research, environmental concerns, and more. However, it is not designed to address security and defense disputes, and members are forbidden from discussing defense and security issues due to their commitment to keeping the forum depoliticized. Today, there is no official structured forum for discussing or addressing Arctic military and security issues. Recognizing this as a major gap in international governance, the Northern Chiefs of Defense Conference and the Arctic Security Forces Roundtable initiatives were established to expand security cooperation across the Arctic around 2012, but neither organization includes Russia, preventing multilateral Arctic security discussions inclusive of all Arctic nations from occurring. Since then, no comprehensive forum for communicating and coordinating Arctic defense and security issues has been established. In the absence of such a forum, continued collaboration through the Arctic Council remains critical to fostering continued international engagement. Arctic nations can strengthen cooperation on a range of critical environmental, research, and commercial issues, despite tensions in other realms. Climate issues are central to the Arctic and present a key realm of collaboration for all Arctic nations. The incoming Biden administration in the U.S. offers an opportunity for constructive engagement. Collaborative efforts on issues affecting all Arctic nations will help offset rising tensions in other areas. Great power competition has arrived in the Arctic, but the Arctic is not yet on the precipice of conflict. Amidst the military posturing and rhetoric, there are still ample opportunities for adversarial powers to strengthen alliances and find common ground. Looking Ahead Rapidly melting sea ice is opening up the Arctic for increased economic activity and transforming it into an arena of great power competition. In Part I of this series, Arctic Resource Competition, we laid out why a scramble for Arctic resources is unlikely to lead to direct conflict but is instead shifting geopolitical partnerships in a more nuanced way—pushing Russia and China closer together and amplifying both countries’ status in the region. Russia’s vast Arctic resource base, and the opening of the NSR, are leading that country to boost its Arctic defense capabilities as Arctic development becomes progressively more critical for its economic future. This, coupled with Russia and China’s strengthening ties in the region, is raising U.S. and NATO concerns over an emerging Russia-China Arctic axis. In response to increased Russian militarization and extensive war games conducted in Russia’s Arctic and the North Atlantic, Norway has hosted its own military exercises that have included all of its NATO allies. These activities have been accompanied by increased military spending on its Arctic capabilities by both the U.S. and Norway, and increasingly close military cooperation between the two countries—resulting in the the most substantial military buildup and activity in the region since the Cold War. A more militarized Arctic raises the stakes and likelihood of a potential miscalculation occurring in the region—and, with direct territorial disputes unlikely to lead to conflict at present, a miscalculation remains the most immediate risk for regional escalation. While the Arctic is still not likely to be an arena for direct military confrontation in the immediate future, the great power competition emerging in the region has long-term implications reaching far beyond Arctic borders. The Arctic presents Russia with its best opportunity for projecting international power, serving as a key strategic region in which it can maintain a distinct military advantage over NATO rivals. The U.S. is recognizing the long-term strategic importance of the region, and growing attention by policymakers and funding for Arctic defense could signal the beginning of a prolonged Arctic power struggle with Russia. While China is still an outsider in Arctic affairs, its ability to provide capital for Arctic developments makes it a mainstay in the Arctic for the foreseeable future. Despite it being the largest financier of Russian Arctic development, Russia’s relationship with China is nuanced, and it remains to be seen whether both nations can maintain a stable partnership in the region. As climate change continues to affect the region at a disproportionate rate, the impacts of Arctic affairs will increasingly be felt outside of the Arctic. More nations across Asia and Europe are now looking toward the Arctic for resources and increased trade and navigation and as a key region in the fight against climate change. Collaboration on climate change represents a clear opportunity for deeper engagement among Arctic nations. Since the Cold War, the Arctic has not been at the forefront of geopolitical debates, but the worsening climate crisis and the return of great power competition are bringing it toward center stage. And for stakeholders with key interests in the Arctic, the region is now a commercial and geostrategic priority.

#### UNCLOS ratification is key to Arctic conflict mitigation

Kammel 24 [Choteau X. Kammel, J.D. Candidate at Texas A&M School of Law, 4-25-2024, “Climate Change and Implications for National Security and International Law in the Arctic,” Texas A&M Journal of Property Law, https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1245&context=journal-of-property-law]/Kankee

One proposal that would integrate American and allied interests into a formal Arctic strategic approach would be for NATO to establish an Arctic Command (“ARCCOM”).113 A unified command of allied Arctic states would prove significant to the United States because “the nature of competition in the High North is so unique it will require an individualized focus.”114 Moreover, “NATO [could] establish a dedicated command to be the motive force of the alliance’s efforts to advance discussion and deterrence in all things Arctic, be they diplomatic, informational, or military, allowing it to pursue all of these goals at once.”115 Although this concept would improve American military footing for Arctic operations, there is a risk of escalating tensions with Russia if the Arctic is viewed through a lens that pits Russia on one side and NATO on the other. Additionally, an important political and legal question that the Arctic NATO states should be prepared to answer is whether Russian force on or to assert a claim over a disputed seabed or ocean constitutes an armed attack in the context of Article V’s collective defense obligation. Furthermore, due to the high potential for conflict in an Arctic increasingly polarized between NATO states and Russia, the region should retain a diplomatic forum that is not predicated on military alliances, hence the importance of the Arctic Council. An additional strategic challenge that the United States should consider as the Arctic opens is its ongoing dispute with Canada over the Northwest Passage. Canada is an integral hemispheric and global ally; therefore, the United States should be prudent as to how it approaches a sea lane that Canada considers to be sovereign internal waters. A plausible course of action would be for Canada to retain but suspend its claim and provide consent to the United States Navy to patrol the passage. As a final consideration for the United States, it should ratify UNCLOS. “All Arctic nations . . . except for the United States, [have] ratified the Convention . . . As a nation with an extensive coastline and a continental shelf with enormous oil and gas reserves, the United States has much more to gain than lose from joining the Convention.”116 Moreover, if the United States ratifies UNCLOS, it would be able to contest Russian expansion in the region and gain access to the convention’s dispute resolution procedures.117 While the United States may follow UNCLOS in principle, its unratified adherence fails to provide access to the convention’s full benefits. With significant seabed disputes between Russia and the United States’ Arctic allies and Russia’s assertion that military force is a viable tool for securing those claims, UNCLOS is the only binding legal framework for the region that offers a tangible avenue for resolving conflicting claims. Accordingly, the United States should ratify it and assert its own participation in the process. Although Russian recognition of the convention is less certain owing to its invasion of Ukraine, such speculation is not a license for inaction on the part of the United States in seeking to leverage international mechanisms to advocate its national interests. As for strategic considerations for the Arctic’s international institutions, the potential for conflict over maritime trade access and resources in the Arctic is too significant not to have a functioning intergovernmental forum that allows for the discussion of security concerns between states. Therefore, the Arctic Council should amend its own foundational rules to allow for the consideration of military and security affairs and bite the metaphorical bullet by seeking to bring Russia back into the fold of regional cooperation. Constructing international governing mechanisms from the ground up is difficult, and accordingly, the cooperative infrastructure that the Arctic Council has built since the 1990s should be adapted to suit the evolving needs and challenges of the region. For example, although the Arctic Council is not nearly as integrated and expansive as the United Nations, the latter’s obvious failings do not demand its abolition but rather necessitate its further evolution.118 Although Russian cooperation with the United States and allied nations in the Arctic on security matters is unlikely, keeping channels of communication open for de-escalation purposes has its own utility, and “there [still] may be some room for cooperation with Russia on environmental protection, scientific exploration, and search and rescue operations.”119 Furthermore, the Arctic Council’s inclusion of indigenous peoples in its decision-making and deliberation makes it unique as an international organization, and there is additional value in continuing collaborative efforts in the Arctic with the input of native peoples whose livelihoods will be directly impacted by climate change in the region. Although it may be unpalatable to cooperate with Russia as it continues its illegal invasion of Ukraine, for the sake of seeking a more secure Arctic for all parties in the face of climate change, it may be best if the Arctic Council continues cooperation with Russia and expands its work to include the discussion of security and military concerns. Therefore, while the United States faces its own host of challenges in the Arctic, it also has tangible and actionable options to best establish its strategic regional interests. These include defense planning for the costs likely required to operate in the Arctic, ratifying UNCLOS, settling the Northwest Passage dispute with Canada, and developing a cohesive Arctic front across allied nations. For the Arctic’s international institutions, however, while there are evolutionary steps to better adapt to climate-induced security challenges, their feasibility is weakened by the low probability of Russian cooperation. Regardless, the existing institutions should be best leveraged and modified to de-escalate future conflicts and incorporate the views of the Arctic’s diverse stakeholders into any such cooperative efforts. VIII.CONCLUSION

#### Russia-NATO Arctic communication has completely collapsed post-Ukraine – absent multilateral dialogue, militarization and security dilemmas risk strategic miscalculation, escalation, and Russia war

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Climate change adds complexity.5 On top of diminished ice coverage, submarine operations — from torpedo launches to hydro-acoustics — are challenged by changes in seawater quality and salinity.6 Boreal wildfires also require military assistance to aid overrun civilian responses. Most importantly, climate change means more physical access to the Arctic across all domains. As the civilian (e.g., commercial shipping, resource extraction, fishing, tourism) and military (e.g., standing forces and constabulary operations) presence increases in Arctic waters and skies, more incidents and accidents will undeniably happen — especially risks linked to environmental degradation due to environmental catastrophes and human-made disasters (especially radioactive waste management in Russia).7 Unfortunately, the most affected are likely to be local and Indigenous communities.8 Russia began reinvesting in Arctic affairs in the mid-2000s.9 The Kremlin remains adamant in asserting complete control over the Arctic Zone of the Russian Federation (AZRF), extending defense in depth through interdiction capabilities away from the Russian Arctic, and protecting perceived vital interests along the Northern Sea Route (NSR). Russia has been rapidly militarizing NSR approaches, especially across critical choke points,10 and modernizing local infrastructure.11 Under the impact of climate change, more waters and coastlines in and close to the AZRF and the NSR are becoming accessible. In Moscow’s calculations, receding sea ice coverage means that the once “natural” border no longer offers sufficient protection. The Kremlin consequently fears that the US and NATO will soon increase surface, subsurface, and air deployments closer to the AZRF. This situation is fraught with miscalculation and tactical errors that could lead to dangerous escalation with global consequences. This fear has been amplified by Sweden’s and Finland’s NATO accession, fueling a sense of encirclement12 and vulnerability.13 Ukrainian drone strikes on the Olenya air base,14 home to strategic aviation assets, in July 2024, raises the question of how potent Russia’s multilayered defense capabilities truly are. China’s approach to Arctic security is very different. The self-aggrandizing “near-Arctic” state proclamation in 201815 prompted a diplomatic backlash and forced China into “tactical retreat.”16 Beijing’s approach to the Arctic is linked to resource access diversification as part of the Belt and Road Initiative for fossil energy, rare earths, and fishing stocks. China is hoping to impose more Beijing-friendly governance rules for regional access and resource exploitation.17 Chinese Arctic activities must be understood as fundamentally dual-purpose. Its military presence in the Arctic has thus far remained limited but suspicions arise that scientific research presence feeds intelligence and domain awareness18 — not least to bridge China’s learning curve in cold weather operations. China is also managing a fleet of polar-specific satellites as part of the BeiDou system and investing in modern satellite technology.19 It plans to deploy a large-scale network of dual-use listening devices in the Arctic Ocean20 as part of the Underwater Great Wall21 — all of which could be used for military purposes. Suspicions also abound that Beijing is seeking to increase its military footprint in the Arctic,22 notably with the People’s Liberation Army Navy, to sustain its strategic ambitions, and its commercial presence with the Transpolar Sea Route and future resource exploitation.23 Russia and China have been displaying symbolic attempts at closer Arctic cooperation — such as the signature in April 2023 of a memorandum of understanding strengthening cooperation between the Russian Federal Security Service (FSB) Border Service (Coast Guard and Border Guard) and the Chinese Coast Guard24 — although the agreement is not Arctic specific. They are also conducting a growing number of joint aerial exercises and patrols close to the Pacific Arctic, such as near the Japanese,25 South Korean,26 and Alaskan27 air defense identification zones (ADIZs), as well as joint maritime drills,28 including close to the Aleutian Islands and off the US exclusive economic zone (EEZ) in the Bering Sea.29 However, such bilateral cooperation has remained mostly symbolic and politically valuable — not least because these efforts retain Western attention and lead to exaggerations about their significance. Overall, Sino-Russian Arctic interactions are characterized chiefly by friction and mistrust rather than partnership.30 As in energy or economic development, the deepening of bilateral defense and military cooperation in the Arctic is shadowed by each country’s long-term objectives in governance and security. Greater Chinese activity may lead to a “strategic culture clash.”31 Against this picture, US and allied presence is still lacking. Though the Arctic is no longer a blind spot for the United States, persistent gaps in critical capabilities prevent complete domain awareness. These include cold weather hardware; ice-strengthened assets; early warning threat detection systems and air defense; radar coverage; and aerial domain awareness, subsea sensing, logistics, and resupplies. Command-and-control responsibilities still overlap among US commands, NATO structures, and North American Aerospace Defense Command (NORAD). More fundamentally, the United States, Canada, Denmark, Iceland, Norway, Sweden, and Finland, known as the Arctic 7, do not fully agree in their approach to the region — especially in terms of diverging national views on circumpolar security, what constitutes defense priorities, and geographical priorities across the Arctic theater. As the Arctic continues to open, the security challenges will deepen. The Arctic 7 must prevent a genuine return of a Cold War–style “strategic Arctic.”32 This paper closely follows the release of recent US strategic documents related to the Arctic — namely the 2022 “National Strategy for the Arctic Region” (NSAR),33 the 2023 implementation plan for the NSAR,34 and the US Department of Defense’s (DoD’s) “2024 Arctic Strategy.”35 It places these documents in the context of changing geostrategic dynamics in the Arctic and offers policymakers ways forward in approaching the role and place of NATO in the region, discussions on Arctic military security affairs, Arctic-specific deterrence, and the development of modern technology for future circumpolar security. Chapter 1: Military security affairs in a changing Arctic Future US, NATO, and allied policy toward the Arctic must ensure that the region remains stable and predictable. Many unknowns remain, including the role and place of NATO in Arctic military security affairs and governance frameworks. Policy must determine NATO’s Arctic future, streamline US priorities, and envision a dedicated military security architecture for the region. 1) The role and place of NATO in Arctic security The accession of Sweden and Finland to NATO is geographically and strategically putting more emphasis on the Northern dimension of the Atlantic alliance. The de factocreation of the “NATO Arctic 7”36 also strengthens the link between the Baltic Sea theater and the European High North, especially considering strategic competition with Russia. If, on paper, NATO represents a good framework for circumpolar military cooperation among the Arctic 7, two main unknowns remain: What is the exact role and place of NATO in an Arctic environment — namely “how much NATO” is needed? What should be the contour of NATO’s missions and endeavors in the Arctic — namely “what kind of NATO” should be in the region? How much NATO? Outlining the role and place of the alliance in Arctic military security Some commentators have rightly pointed out that NATO has always been an Arctic alliance.37 Indeed, the Cold War saw a high level of competition and contestation between the Union of Soviet Socialist Republics (USSR) and NATO and its allies in an Arctic environment — from circumpolar subsea warfare to nuclear testing in Russia’s Arctic and the threat of strategic bomber overflights through North Pole approaches. With the recent inclusion of Sweden and Finland in the alliance, there is now equally more Arctic in NATO and more NATO in the Arctic. For the past few years, NATO’s Arctic efforts and footprint have grown, such as with the activation of Joint Force Command (JFC) Norfolk in 2018 under Allied Command Operations, the recent joint operational coordination mechanisms between NATO’s Maritime Command and the Danish Joint Arctic Command,38 and other efforts coordinated through NATO Allied Command Transformation.39 A genuine “Arctic awakening” within NATO structures still awaits. The alliance has an opportunity to properly define its regional role as well as calibrate Arctic policy among allies. The main objective is to determine NATO’s exact perimeter of operation in the region while establishing deterrence against competitors,40 but without overtly escalating or militarizing Arctic discussions. NATO and its allies must fundamentally answer the question of how much NATO is needed and necessary in the Arctic. Geographically, this means not only North Atlantic approaches and sea lines of communication (SLOC), but “north of the North Atlantic” in the European High North, through North Pole approaches, and further out in the Pacific Arctic for US and Canadian homeland defense — in other words, achieving genuine transarctic defense. NATO should avoid approaching the Arctic by thinking through the usual prism of regional flanks or by compartmentalizing the region into a specific area of operation or domain. Because of geography, the Arctic spans multiple theaters, creating an integrated strategic continuum from the European High North to the Pacific Arctic, with North Pole approaches in between, that goes beyond NATO’s usual remit. Comprehensive regional security for the alliance encompasses a wide range of issues and discussions, especially for North American and North Pacific defense. Commentators have been calling for a NATO strategy in the Arctic.41 Such a move might be premature — not least to avoid an overlap among existing command structures. More than a “strategy” or an “Arctic command,” NATO must first find its credible voice42 in circumpolar security as well as internally build its Arctic dimension and framework of operations. Unfortunately, the final declaration of the 2024 NATO Summit in Washington did not mention the Arctic as an area of interest. Before having a properly defined strategy for the Arctic, NATO first needs an operational roadmap in terms of presence and capabilities. It should start by strengthening internal awareness of Arctic affairs as well as taking stock of existing endeavors and streamlining them under one umbrella. A second step would be to discuss with partners and allies the most organic role and place for NATO in Arctic military security affairs. This should avoid overlapping with existing regional endeavors such as the Arctic Security Forces Roundtable, the Arctic Chiefs of Defence Staff meetings, Nordic Defence Cooperation (NORDEFCO), the UK-led ten-country Joint Expeditionary Force, or the newly created Arctic Security Policy Roundtable.43 The goal would be to achieve a genuine transatlantic perspective on circumpolar security44 while bridging diverging views on Arctic security. Such initial work will help determine what gaps NATO could potentially fill. NATO’s role and place in Arctic military security affairs must be caveated by a thorough discussion on the limits of NATO’s regional presence. Indeed, the alliance should not monopolize the debate on regional hard security issues, nor should it be the sole and only arena of discussion. NATO must find an appropriate balance between minimal presence and over-militarizing Arctic affairs. “Too much” NATO would essentially strengthen Moscow’s “besieged fortress” mentality45 — with the greater risk of increasing miscalculation, tactical errors, and unintended escalation.46 Should NATO’s capabilities and footprint expand in the region, members of the alliance must accept the potential for regional escalation. As NATO is going through an adjustment period about its role and place in the Arctic, information sharing among allies and partners will be key to success. So far, Nordic members of NATO have agreed to strengthen the land component of the alliance. In June 2024, Norway, Finland, and Sweden announced the establishment of a trilateral military transport corridor to streamline logistics and resupplies across the High North.47 The same month, alliance Ministers of Defense greenlighted the establishment of the Multi Corps Land Component Command as well as Forward Land Forces in Finland.48 Under JFC Norfolk, the new land command will host the multinational battle group, initially with Finland, Norway, and Sweden. These initiatives, and others to come, will steadily pave the way to an integrated NATO policy for the Arctic. What kind of NATO? Relations with allies and command structures Another set of issues NATO must approach is the exact perimeter of Arctic operations and the internal division of labor among command structures, military forces, and Arctic-specific concepts of operation. Even though the Arctic region remains peripheral in NATO thinking, it is now taking up more space, especially from a maritime command point of view. The exact division of labor remains undetermined but will shape NATO’s role in an Arctic context. The accession of Sweden and Finland impacts how NATO should approach command and control (C2) organization as well as the future force model and structure for the Arctic.36 The debate on C2 organization must consider the balance between Arctic and Baltic security — in command structure terms, between JFC Norfolk and JFC Brunssum. Further policy planning is something Nordic policymakers are particularly eager to determine as it will impact the division of responsibility and area of operation within NATO. The debate has been somewhat closed now as Sweden and Finland will join JFC Norfolk, under US command, to streamline North Atlantic and potentially Arctic operations. Yet the exact perimeter of interaction with JFC Brunssum remains to be determined. These boundaries between both JFCs need to be clear and understood early in the process to ensure that they can act effectively in a potential crisis. An important aspect of the discussion relates to the interconnection between NATO and NORAD. NORAD modernization must go hand in hand with further integration and cooperation with NATO structures49 — not least because the Supreme Allied Commander Europe’s area of responsibility (AoR) blends into NORAD’s and vice versa. A final aspect of the debate is the integration of US command structures within NATO in an Arctic context. As more dialogue and information sharing will be necessary among allies, the US must find appropriate ways to streamline the different commands responsible for various aspects of Arctic operations — Northern Command (NORTHCOM), European Command (EUCOM), Indo-Pacific Command (INDOPACOM) — and coordinate them efficiently within NATO to avoid overlaps. Of particular relevance is the interaction between US NORTHCOM and NATO JFC Norfolk in the context of NATO’s Regional Plan Northwest. These aspects are clearly identified in the US DoD “2024 Arctic Strategy.”50 Overall, the NATO 7 must increase their collaborative and cohesive approach to Arctic security. This will require more information and intelligence sharing, and ultimately better coordination. NATO members must better coordinate military exercises and strategic communication around Arctic operations. For instance, US NORTHCOM’s Arctic Edge,51 Canada’s Operation Nanook,52 and NATO’s Cold/Nordic Response exercises took place within weeks of each other, yet with a striking and regrettable lack of coordination. Another key question relates to finding the balance of response between national and collective defense in an Arctic context. Since the Arctic is a question of homeland security for circumpolar states, there is a need to expand it to layered, allied defense in an integrated way. A final question pertains to broader human presence and forward deployments. In a NATO context, forces will have to focus on deployment agility and sustainability, but not necessarily on permanent regional presence. Recent NATO drills have already identified several vulnerabilities in operating in a cold weather environment.53 Future work must also consider interfacing with the Centre of Excellence for Cold Weather Operations54 in Norway as well as with the Joint Expeditionary Force, led by the United Kingdom (UK), which could become a spearhead force for Arctic operations. Arctic training must deepen at the NATO level, with the caveat that the alliance must find a balance between training for Arctic conditions without always being present in the Arctic.45 The recently renamed annual Nordic Response exercise will become the staple of NATO’s Arctic coordination in the years to come55 as it includes Arctic states and key partners such as the UK and the Netherlands. 2) The US role and presence in the Arctic Since the early 2020s, a flurry of Arctic-related strategic documents and actions in the United States — from the 2022 NSAR,56 the 2023 implementation plan for the NSAR,57 the creation of the DoD Arctic Strategy and Global Resilience Office,58 and the release of the 2024 DoD Arctic strategy50 — has successfully enshrined the Arctic as an area of vital importance for the US in terms of homeland defense, cooperation with allies, and regional stability. Arctic security, beyond Alaska and NORAD, is no longer a blind spot for the United States. In military security affairs, the DoD 2024 strategy will allow for the implementation and resourcing of the security pillar of the NSAR. Understanding is growing that wider Arctic security directly impacts homeland defense, not least in the face of increased Russian and Chinese competition.59 The US must avoid being a bystanderin the wider Arctic and rather focus on having a global perspective regarding presence and access to the region. This would entail better connections and communication — especially around strategic exercises and readiness. The 2024 DoD strategy clearly outlines that NORTHCOM is and will remain the key Arctic capability advocate.60 as part of the Unified Command Plan and Total Force. To that end, bilaterally, the US expanded its agreement (DCA) with Norway and entered into DCAs with Finland and Sweden in 2024.61 These agreements are critical for partnership including access to basing for US military personnel and pre-positioning of military materiel. These three DCAs will allow for more than 40 locations with US military access, including 15 in the north of each of these countries.62 They solidify critical capacity and capability as the region and alliance continue to strengthen their presence, deterrence, and defense. Further coordination with EUCOM (North Atlantic AoR) and INDOPACOM (military assets and troops in Alaska) will also be necessary to prevent further overlap in responsibilities and deployments. Another coordination aspect is between the US 2nd and 6th Fleets with EUCOM and NATO’s JFC Norfolk.36 Moving forward, US stakeholders must identify key priorities for capabilities and procurement of Arctic-enabled systems. Despite budget constraints, the US government can better calibrate efforts internally as well as with NATO allies and beyond. An important first step is to match capabilities with operational design for cold weather operations and future presence. Since 2020, successive strategic documents released by the US armed services have helped identify capabilities gaps that have been streamlined under the 2022 NSAR and the 2024 DoD Arctic strategy.63 To fill the “icebreaker gap,” a major part of procurement is the extension of the Polar Security Cutter program for the US Coast Guard64 and the upcoming Arctic Security Cutter program. In the context of the US Army’s 2021 “Regaining Arctic Dominance” strategy,65 the reactivation of the 11th Airborne Division in 202266 is a positive step to tune US forces into Arctic operations. The goal is to turn the Alaskan division into an Arctic-capable force by design that can be rapidly deployed across the circumpolar theater and beyond — including expeditionary multidomain operations in the Indo-Pacific theater. Decisions to reactivate the Navy 2nd Fleet as part of NATO’s JFC Norfolk,67 increase airlift capabilities at the Keflavík airfield in Iceland,68 and expand F-35 presence at the Eielson air base in Alaska69 are also positive steps forward in fulfilling US regional strategy. Through permanent and rotational deployments, the US approach to Arctic “calibrated presence”70 is considering a form of “agile basing” through modular forward operating presence. One issue remains, however, in terms of division of labor, notably with Canada. For instance, if US troops in Alaska under INDOPACOM are drawn out to the Asia-Pacific theater, this will automatically increase pressure on Canada to have a greater regional security role to defend North American approaches. Finally, as part of the “monitor and respond” approach, the 2024 DoD Arctic strategy and the 2022 NSAR emphasize the need to exercise presence in the Arctic independently and alongside allies. Presence will be further established through continued cycles of training and drills in the US and within a NATO context.50 US Arctic operations will focus specifically on circumpolar security choke points such as the Bering Strait and the Greenland–Iceland–United Kingdom (GIUK) and Greenland-Iceland-Norway (GIN) gaps. 3) A framework for Arctic military security affairs The Arctic needs a dedicated military security architecture.71 Expert discussions before the 2022 full-scale invasion of Ukraine considered key factors that could help the Arctic 7 outline what a military security architecture would look like.72 Since 2014, Russia’s war against Ukraine has dented the ability of Arctic-related governance frameworks to carry out their missions and kindle the spirit of “low tension.” With circumpolar governance at risk of a geopolitical takeover, a predictable and transparent military security framework in the Arctic is needed. The need for a designated military security architecture is compounded by risks of miscalculation and tactical errors between the Arctic 7 and Russia. With more human presence across the region, the potential for accidents and incidents will undoubtedly increase. Left unchecked and in the absence of clear lines of communication and deconfliction with Moscow, such events carry the risk of (un)intended escalation.73 Furthermore, even though Russia has little incentive to voluntarily escalate in the Arctic, restraint and transparency cannot be taken for granted. Past Arctic incidents no longer offer a benchmark of the Kremlin’s behavior in crisis situations.74 Russian leadership has also not been transparent regarding recent serious environmental catastrophes (for instance, the 2019 Nyonoksa radiological incident, the 2020 Norilsk spill, and the 2021 Siberian wildfires). Building a proper security architecture The Arctic 7 must bridge diverging national views on circumpolar security. If all Arctic NATO countries now recognize that Russia represents a security threat to the region, they lack an integrated view on what constitutes defense and security priorities within that threat environment.36 For instance, Russia as a circumpolar security threat conveys a different meaning and response between the European Arctic and the North American/North Pacific Arctic.44 Arctic security in Nordic countries, especially in Finland and Sweden, is a matter of territorial defense and a prerequisite for national security. Geography also matters: The definition of the “Arctic” diverges from a Canadian, American, Danish, or Finnish point of view. While Sweden and Finland focus as much on Baltic Sea and Lapland security, US and Canadian defense focus remains circumscribed within NORAD’s AoR. Yet, the US and Canada also have different approaches to security in the North American Arctic — military focused for the US and “defense centric” for Canada.75 The Arctic 7 must avoid a bifurcation between the North American NORAD-centric Arctic and the European High North. Thankfully, Arctic allies have strong complementarities — for instance, Norway’s naval focus; Finland’s land presence and ground forces; and North America’s air defense, air power, remote sensing, and space operations. A second paramount factor is the need to obtain a common understanding of what represents acceptable, legitimate, and nonthreatening military operations at peacetime in the region. This could be achieved by creating an Arctic Military Code of Conduct (AMCC).76 By defining the rules of the road of peacetime military activity, an AMCC would help diffuse tension and limit the risk of miscalculation. The AMCC should be extended to Russia and to all non-coastal states able to deploy and sustain military assets in the Arctic (which would undeniably include China).77 The AMCC would increase transparency and predictability in regional military security affairs. In terms of format, a code of conduct should remain light and noninvasive enough to avoid over-institutionalizing military security affairs in the Arctic. Caveats to Arctic military security Finally, two caveats must be introduced about Arctic military security discussions. First, the intrusion of geopolitics and a hard security discourse in the Arctic must not take wider discussions hostage or overshadow the conversation on the impact of climate change, environmental protection, or human security in the region. Second, Arctic nations must be careful not to create overlaps with existing frameworks and cooperative endeavors touching upon regional security affairs. As noted above, many formats already deal with circumpolar security issues. An important question moving forward is to determine whether such frameworks should be completely subordinate to NATO or simply support the alliance without overlapping with it. Any discussion on hard security must avoid being over-institutionalized and streamlined within existing endeavors to prevent a “mille-feuille” of initiatives. The recently created Arctic Security Policy Roundtable, at the defense-policy level, will also have to interface with existing endeavors. Beyond low tension in the Arctic, what matters most in the situation is the predictability of the operating environment and transparency over regional military activities. The ultimate objective will not necessarily require building trust with Moscow, but will involve minimizing misunderstandings and therefore limiting the risk of miscalculation. Yet, as the Kremlin is now absent from existing cooperative frameworks, it could eventually be reengaged or re-invited.78 Arctic stakeholders should ask themselves whether they fear reintegrating Russia more than accepting the collapse of the existing architecture in the Arctic. The policy corollary is to understand under which circumstances reintegrating Moscow would be an acceptable proposition for the European Arctic countries closest to Russia as well as for the United States. Chapter 2: Deterrence in an Arctic context

#### Arctic hotspot escalation causes nuclear war

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B. Maintaining Peace in the Arctic 1. Issues: Arctic Militarization and Nuclear Destabilization The hard security issues affecting the Arctic today include its growing militarization, the collapse of cooperation between seven more-or-less NATO aligned Arctic states and Russia, and the potential destabilization of the global nuclear balance by the Arctic thaw. The Arctic is at risk of becoming a military flashpoint. The likelihood of military tensions over control of newly accessible natural resources should not be overstated, as most Arctic resources are clearly in the EEZs or continental shelves of this or that Arctic State.270 Yet the Arctic thaw inevitably opens new invasion routes that Arctic States must take into account when planning their defense—be it through the Arctic Ocean, the Bering Sea, or the RussoScandinavian borders.271 Loud calls on all sides against the militarization of the Arctic have been followed by quiet improvements in Arctic military capabilities, especially by Russia.272 The central concern here is the deep fracture between the seven Arctic NATO states and Russia, the geographically largest Arctic state. Russia was not represented at Arctic security forums following the Ukraine crisis, increasing the room for distrust, misunderstanding, and overreaction in the Arctic context.273 Indeed, key Russian security documents such as the 2014 Military Doctrine, the 2015 Maritime Doctrine, and the 2015 National Security Strategy identify NATO’s expanding influence as being among the top security threats to Russia, and highlight the need to defend Russian Arctic interests.274 Security tensions are already having economic implications, as anti-Russia sanctions in the wake of the Ukraine crisis have blocked a number of Russian Arctic resource development projects by preventing U.S. and EU companies from contributing equipment, technology, and financing.275 These outcomes appear to have been wholly preventable—a product of mutual fear rather than necessity. Four periods can be distinguished in Russian Arctic security policy in the post-Cold War era, with none clearly directed at threatening the interests of other Arctic states. Ekaterina Klimenko, writing for the Stockholm International Peace Research Institute, first notes an almost complete disbanding of Russian Arctic forces in the 1990s, as the country was reeling from the Soviet collapse.276 The 2000s then ushered a period of national power restoration, notably through the State Rearmament Program, which unsettled neighbors despite the spending targets remaining much more modest than in the Soviet era.277 Klimenko notes for instance that while the Program paid particular attention to the overhaul of Russia’s northern fleet, in particular for submarine patrols in the Arctic, the number of operational submarines at Moscow’s disposal actually fell by three-quarters from 1986 to 2010.278 Klimenko then highlights a period of attempted cooperation beginning in 2008, as a key Russian policy document insisted that it was a top strategic priority for Russia to keep the Arctic a “zone of peace and cooperation.”279 This posture presumably reflected the fact that Russia simply cannot afford to substantially fortify its extremely long northern coastline, especially considering that the Russian military budget is only about a seventh of America’s, and that the country’s economy was hit hard by plunging oil prices.280 In any case, this period was marked by Arctic advances such as the Ilulissat Declaration of 2008, the Norway-Russia Agreement on the Barents Sea in 2010, and the setting up of Arctic security roundtables.281 Note also that Russia’s 2013 Arctic Strategy outlines exclusively defensive goals for Russian armed forces in the region, such as safeguarding sovereign rights, providing strategic deterrence, and repelling aggression.282 Finally, the 2014 Ukraine crisis began a period of rapidly deteriorating Russo-Western relations and a strengthening of Russia’s Arctic posture, for instance through large military exercises mirroring those of NATO and the setting up of a Joint Strategic Command for Russia’s northern forces.283 Klimenko notes, however, that many Russian military developments in the region since 2013 are products of plans that were announced long before the Ukraine crisis, such as the State Rearmament Program.284 So while it may be expected that other Arctic States would seek, like Russia, to proportionately protect their Arctic interests, there does not yet appear to have been any particular event making Arctic militarization an ineluctable necessity.285 Be that as it may, the Arctic is also at risk of nuclear escalation. Because it represents a direct way for the two most important nuclear powers to bomb each other, it has been regularly patrolled by long-range nuclear bombers and by nuclear-armed submarines since the Cold War.286 The mutual downsizing of arsenals after the collapse of the Soviet Union did relax the nuclear danger for a time.287 Yet tensions are on the rise again after Washington noticed its withdraw from the Anti-Ballistic Missile Treaty (ABM Treaty) roughly three months after 9/11.288 President Bush claimed this move was necessary to defend against “terrorists who strike without warning, or rogue states who seek weapons of mass destruction,” but the ensuing development of ballistic missile defense (BMD) capabilities also destabilized the global nuclear balance.289 BMDs fuel an arms race logic insofar as countering them requires firing more missiles than they can intercept, so the expected response to U.S. BMD development by nuclear powers not allied to Washington is to maintain, modernize, and perhaps develop their nuclear arsenals.290 BMDs are particularly relevant to the Arctic because the most important American BMD base is Fort Greely in Alaska, where dozens of ground-based mid-course defense (GMD) interceptors are emplaced to defend against incoming ballistic missiles by intercepting them midcourse.291 Russia has in response deployed some S-400 missile defense units, which are similar to American Patriot systems in their multi-role ability to target both aircraft and ballistic missiles, albeit with a greater range.292 The Arctic thaw could further destabilize the global nuclear balance. It could facilitate the deployment of the American sea-based Aegis BMD in the Arctic Ocean (designed to intercept midcourse short-to-intermediate range missiles), as well as the deployment of surface anti-submarine warfare capabilities to hunt nuclear-armed submarines.293 The development of American BMD capabilities in the Arctic could also provoke China into developing a larger nuclear arsenal and deepening military cooperation with Russia, as Beijing is already actively developing counter-measures against the development of U.S. BMD capabilities in the Pacific.294 The Doomsday Clock of the Bulletin of the Atomic Scientists now suggests we are only “two minutes” away from an apocalyptic “midnight,” closer than we were during the 1980s, and “the closest the Clock has ever been to Doomsday . . . .”295 2. Instruments: Security Arrangements and Arms Control

#### Arctic deterrence fails – Russia’s winterized combat capabilities mean they’d win an Arctic war

Kammel 24 [Choteau X. Kammel, J.D. Candidate at Texas A&M School of Law, 4-25-2024, “Climate Change and Implications for National Security and International Law in the Arctic,” Texas A&M Journal of Property Law, https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1245&context=journal-of-property-law]/Kankee

VI. ARCTIC CLIMATE CHANGE AND UNITED STATES MILITARY INTERESTS First, the United States military is currently ill-equipped for expanded Arctic operations because “[t]raditional military tactics, logistics, and equipment will likely be unsuited to the challenges of combat in the High North.”99 Further, “land forces would require special modification and training to operate in the region if they intend to maintain the flexibility and rapid response abilities that make them so potent . . . . Likewise, the issue of polar seas would restrict the usage of traditional naval forces.”100 Additionally, while military aircrafts’s functionality is less likely to be hindered by the Arctic environment, air bases and other operations hubs are susceptible to melting permafrost weakening their foundations.101 Therefore, Arctic military operations are substantially different than past conventional conflicts in which the United States military has engaged. Russia contains 53% of the Arctic’s coast and accordingly possesses significantly more regional military infrastructure than the United States does.102 This disparity limits American regional force projection and, as will be discussed later, necessitates greater military integration with Arctic NATO and soon-to-be NATO states. Consequently, after several decades fighting insurgency in the deserts and mountains of Iraq and Afghanistan, along with the Navy preparing for possible conflict in the Pacific, the United States military is not currently tailored toward operating extensively in the Arctic. The Department of Defense has recognized these weaknesses and accordingly has increased training exercises and wargames efforts in the Arctic in preparation for possible military action in the region.103 Additionally, the Navy and Coast Guard recently recognized the need for an icebreaker fleet beyond the few rescue vessels currently maintained.104 While certainly necessary, greater appropriations for Arctic-specific vessels means less funding available for conventional naval assets such as submarines, aircraft carriers, and support ships that may be needed in an eventual Pacific conflict. Thus, while the United States Navy must make significant investments in its capability to prepare for Arctic conflict, there will be opportunity costs that could reduce effectiveness in other capacities. The realm of military medicine is another area where the Arctic presents challenges to military operations there. While the United States military obtained a 98% survival rate in its Middle Eastern conflicts, such a rate is unlikely in the High North where inclement weather and immense travel distances between developed facilities make delivery of robust military medical care more difficult. “Future Arctic wars will most certainly feature mass casualties, delayed evacuation times, and significant resource strains. These conflicts will challenge medics’ training, knowledge, and spirit.”105 Resource shortages and delayed logistics times will likely affect other areas of military readiness as well, such as weapons platform readiness, base maintenance, and mechanical repair. Accordingly, American military preparation for eventual conflict in the Arctic will require servicewide adaptation and significant financial investments both in tangible technologies and in personnel training. The final and most direct impact that climate change’s effects in the Arctic will have on American military capability will be physical damage to military infrastructure due to weather events and melting permafrost. Alaska is the United States’ Arctic foothold, and warmer temperatures in the Arctic threaten to weaken the American ability to operate effectively from and in the region. This is significant because “Alaska is the closest U.S. state to major Russian population centers (3,800 nautical miles between Juneau, AK and Moscow, Russia), making it a geostrategic location for U.S. security fixtures.”106 Moreover, Alaska is home to nearly two dozen early warning radar sites that form the North American Aerospace Defense Command’s (“NORAD”) North Warning System (“NWS”).107 While these sites were considered technologically advanced in the Cold War, financial neglect, melting permafrost, and sea level rise threaten to render them ineffective against future threats in the Arctic. Consequently, the Department of Defense’s 2019 Arctic Strategy stated that “[t]hawing permafrost, compounded by storm surge and coastal erosion, adversely affects infrastructure, including DOD installations.”108 Thus, while Arctic military operations will drive increased financial expenditure on training and military vehicle adaptation, American military facilities will require additional investment to remain viable in the region. Overall, as climate change opens the Arctic to increased maritime passage and resource exploitation, the potential for conflict between great powers rises. The Arctic looks to be split, like much of the world, between a resurgent authoritarian bloc in Russian and China and an American-led coalition of NATO and allied countries. Consequently, military operations in the Arctic will require significant overhauls of American warfighting technologies, strategies, and platforms in order to effectively assert American and allied interests in the region. Furthermore, the region’s governing international institutions must evolve to preempt armed conflict or escalation in the Arctic. The following Section of this Article will discuss strategic considerations and recommendations for the United States and the Arctic’s international governing mechanisms. VII.STRATEGIC CONSIDERATIONS AND RECOMMENDATIONS The United States faces several strategic challenges as climate change shapes the Arctic into a probable flashpoint for conflict in the coming decades. These challenges range from increased financial burdens to support training and re-equipping a military force for Arctic operations, possible diplomatic strife with Canada over the Northwest Passage, resource disputes across competing continental shelf claims, and the lack of a clear allied consensus on operations in the region. Climate change in the Arctic poses additional challenges to the region’s governing institutions. The Arctic Council currently lacks authority to discuss security and military concerns but perhaps more importantly is not even currently operating at full capacity. Following Russia’s invasion of Ukraine in February 2022, the Council paused its work indefinitely.109 As of March 2023, there has been a limited resumption of work on projects by the other seven Arctic states without Russia.110 Consequently, the Arctic’s only formal and established intergovernmental forum is now only partially functional. It lacks one of the region’s largest states and the one most likely to be at odds with the other Arctic states. Therefore, considering the challenges facing both the United States and the Arctic’s international institutions, what should be done? The United States should be prepared for the financial expenditures necessary to retool and re-equip its military for possible conflict and operations in the Arctic region. Specifically, the Navy will require a significant technological overhaul to ensure its ships are sufficiently weatherized for Arctic operations, and icebreaker development should be fast-tracked. With new commercial maritime lanes opening in the coming decades due to climate change, if the Navy seeks to undertake its espoused duty to ensure global freedom of navigation, it must be prepared to deploy extensively into the Arctic. Moreover, while the American and NATO allies have begun holding more training exercises in the Arctic,111 Russia’s regional military footprint dwarfs that of any allied coalition. Although its invasion of Ukraine has exposed significant vulnerabilities in Russia’s armed forces, the war has also shown that Russian leadership is willing to take dangerous and unexpected actions and shows little concern for casualties or combat costs. Accordingly, the United States and NATO should take Russian militarization and aggression in the Arctic seriously. Currently, the United States and its allies lack a cohesive or uniform Arctic strategic agreement or approach beyond Article V mutual defense commitments to NATO Arctic states.112 With Finland’s and Sweden’s new memberships, the Arctic is poised to be split between Russia on one side and seven NATO allies on the other. Thus, the United States should pursue an expanded allied strategy for Arctic operations that includes significant input from Finland, Sweden, and Norway: three Nordic states with extensive Arctic experience. This could include, amongst other things, partnerships to develop better technology for Arctic operations, forward deployment of American forces in Scandinavia, and an expanded military medical care network to allow allied use across regional NATO member facilities. Considering its location in the North Atlantic and naval capabilities, the United States should also consider inviting the United Kingdom into integrated Arctic security cooperation and planning. One proposal that would integrate American and allied interests into a formal Arctic strategic approach would be for NATO to establish an Arctic Command (“ARCCOM”).113 A unified command of allied Arctic states would prove significant to the United States because “the nature of competition in the High North is so unique it will require an individualized focus.”114 Moreover, “NATO [could] establish a dedicated command to be the motive force of the alliance’s efforts to advance discussion and deterrence in all things Arctic, be they diplomatic, informational, or military, allowing it to pursue all of these goals at once.”115

#### UNCLOS membership is key to US Arctic leadership – it’s the key regional treaty

Nevitt 20 [Mark Nevitt, Associate Professor at Syracuse University College of Law, 9-30-2020, "Climate change, Arctic security and why the U.S. should join the U.N. Convention on the Law of the Sea", CERL, https://www.penncerl.org/the-rule-of-law-post/climate-change-arctic-security-and-why-the-us/]/Kankee

Climate change is transforming the Arctic in new and dramatic ways. According to the UN Intergovernmental Panel on Climate Change (IPCC), the Arctic is warming two to three times the rate of the rest of the planet. And this month’s “United in Science 2020” report found that the Arctic sea ice extent was the lowest on record for July. Due to a pernicious feedback melting loop, melting permafrost, and the continual possibility of cataclysmic “green swan” events, worldwide sea level rise will be further impacted by Arctic events. What happens in the Arctic does not necessarily stay in the Arctic. In addition, climate change is both opening maritime trade routes and offering the possibility of natural resource extraction on the Arctic’s continental shelf. It is also creating a whole new operational domain for the world’s militaries. Unlike Antarctica—which is also being dramatically impacted by climate change—the Arctic lacks a comprehensive, Arctic-specific treaty. The Arctic region is largely governed by the United Nations Convention on the Law of the Sea (UNCLOS), the increasingly important work of the Arctic Council, and a hodgepodge of laws and bilateral agreements. But climate change is increasingly stressing this legal and policy framework. UNCLOS, aptly described as “A Constitution of the Oceans,” remains one of the most comprehensive and complex international law treaties ever negotiated. It will take on increased importance as the Arctic adjusts to its 21st century climate reality. The United States, however, remains the only Arctic Council member that is not party to UNCLOS. This is short-sighted and contrary to U.S. national security, environmental, and economic interests. Despite continued U.S. intransigence on law of the sea ratification, a remarkably diverse coalition of American national security experts, environmentalists, and business interests support the United States becoming a party to UNCLOS. To be sure, the United States accepts UNCLOS’s key navigational provisions as binding as a matter of customary international law. But as a non-party to UNCLOS, the United States increasingly lacks a “seat at the table” on core law of the sea matters and cannot avail itself of its adjudicatory bodies. It also cannot take advantage of key UNCLOS provisions, such as submitting information to establish the outer limits of Alaska’s continental shelf. Climate change’s opening of maritime trade routes and the possibility for natural resource extraction reinforces the need for the U.S. Senate to provide its advice and consent on this critical treaty. I will argue the United States should join UNCLOS, and I will highlight three UNCLOS provisions that take on increasing importance in a changing Arctic. Article 38: The Right of Transit Passage Through the Northwest Passage and Northern Sea Route The right of transit passage will take on increased importance as climate change opens two Arctic maritime routes: the Northwest Passage and Northern Sea Route. These two seasonal waterways—the Northwest Passage that runs through Canada and the Northern Sea Route (sometimes referred to as the Northeast Passage) that hugs the Russian coastline—are both found in the Arctic. The Northwest Passage contains several possible routes running through the Canadian Arctic Islands, linking trade from northeast Asia via North America to the northern Atlantic. The Northern Sea Route provides the shortest maritime link between eastern and western Russia while offering another global maritime shortcut for the world’s shipping. The right of transit passage applies to straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone. All ships and aircraft enjoy this right, and UNCLOS makes clear that this right “shall not be impeded” provided that ships and aircraft proceed without delay through (or over) the strait. But does the right of transit passage fully apply to these two Arctic waterways? It remains unclear. As the Arctic sea ice extent decreases, shipping from all nations—to include nations outside the Arctic such as China—will also increase as nations seek faster and cheaper routes. Yet the international right of transit passage is running headfirst into Russian and Canadian claims over these waters. Canada, for example, asserts that much of the Northwest Passage traverses through an Arctic Archipelago that are historic Canadian internal waters. In addition, Russia asserts a similar internal waters claim over three straits that makeup the Northern Sea Route. Both Russian and Canadian claims challenge the right of transit passage through these waters. While these claims have been protested as excessive by both the United States and European Union, their precise legal status remains unclear. While the United States and Canada signed a 1988 Agreement on Arctic Cooperation that has defused tensions between these two allies, consider how much the Arctic (and world) has changed since 1988. How much longer can the “agree to disagree” approach hold? Article 76: Defining the Continental Shelf The five Arctic coastal states (Denmark (via Greenland), Russia, United States, Norway, and Canada) all have continental shelves in the Arctic Ocean. Converging at the North Pole, each nation’s extended continental shelf comes together the way orange wedges meet at the stem. Approximately half of the Arctic’s ocean floor is composed of the continental shelf, the largest percentage of any of the world’s oceans. Why is the Arctic continental shelf so important? A coastal state’s continental shelf comprises the seabed and subsoil that extend far beyond the territorial sea. The United States has an enormous continental shelf off the coast of Alaska, and the seabed and subsoil provide access to valuable oil, natural gas, and minerals. Unlike other maritime zone delineations, the continental shelf lacks an express outer limitation. Under UNCLOS, for example, each coastal state’s exclusive economic zone extends out to 200 nautical miles. But a coastal state’s continental shelf is not limited to 200 nautical miles, and it is far more difficult to determine its outer limit with precision. Under UNCLOS, each coastal state’s continental shelf extends beyond its territorial sea “throughout the natural prolongation of its land territory to the outer edge of the continental margin.” What, exactly, constitutes a natural prolongation is a complex scientific and technical question that is made even more difficult by the costs to procure this information in the harsh Arctic environment. As climate change renews the possibility for Arctic oil, mineral, and gas extraction determining the precise breadth of each nation’s continental shelf will take on increased importance. Indeed, the U.S. Geological Survey estimates that 30% of the world’s undiscovered gas and 13% of undiscovered oil lies north of the Arctic Circle. UNCLOS can aid in resolving competing continental shelf claims with the procedures outlined in Article 76 that establishes the Commission for the Limits on the Continental Shelf (CLCS). With Canada’s Arctic submission to the CLCS in May 2019, each Arctic coastal state—but not the United States—has submitted information in support of its continental shelf claim. Not surprisingly, each Arctic coastal state seeks a fairly broad interpretation of “natural prolongation” and the outer breadth of their continental shelf. Russia, for example, asserts a continental shelf that extends to the Lomonosov Ridge, an area that extends to the North Pole several hundred miles from its Arctic coastline. As a non-party to UNCLOS, the United States is likely prohibited from making a submission to the CLCS in support of its Arctic continental shelf claim off the Alaskan coast. While the CLCS can only make recommendations on the breadth of each nation’s continental shelf, “the limits of the continental shelf established by a coastal state on the basis of these recommendations shall be final and binding.” Regardless of the finality of CLCS decisions, the United States should ratify UNCLOS and immediately make an Alaskan continental shelf submission to the CLCS. Article 234: Ice Covered Areas As highlighted above, climate change is dramatically altering the Arctic icepack’s size, opening up shipping lines and navigational waterways for the first time in human history. Beyond the disputed claims by Russia and Canada over the Northwest Passage and Northern Sea Route, climate change is forcing us to look with fresh eyes at each Arctic coastal state’s authority over Arctic “ice-covered areas.” Article 234 (“Ice-covered areas”) of the law of the sea treaty states: Coastal states have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation …[s]uch laws and regulations shall have due regard to navigation and protection of the marine environment. This provision is taking on increasing importance in the Arctic, which has large swaths of ice-covered areas that are melting due to climate change. Article 234 bestows special regulatory authority for Arctic coastal states over ice-covered areas up to 200 nautical miles, the limits of the exclusive economic zone. Yet climate change raises several key questions about the outer scope of this authority. What, for, example, does “for most of the year” and “severe climatic conditions” mean? And won’t climate change gradually diminish any regulatory authority over ice-covered areas as the Arctic ice pack melts? Further, how should we apply Article 234 to the Northwest Passage and Northern Sea Route? And how can this provision be reconciled with the right of transit and innocent passage discussed earlier? Despite these questions, both Canada and Russia have taken a forward-leaning view of their authority under Article 234. Russia has asserted an expansive view of this authority, requiring notification of foreign ships prior to transiting the Northeast Passage. While this runs counter to other UNCLOS provisions concerning the right of innocent passage through another nation’s territorial sea, it, too, remains unresolved. The U.S. Should Ratify and Sign the United Nations Convention on the Law of the Sea The United States is an Arctic nation. And the Arctic Council’s 2008 Ilulissat Declaration reaffirmed the Arctic Council’s commitment to the law of the sea framework. While the United States is not a party to UNCLOS, the United States has actually been a good law of the sea partner in upholding navigational freedoms throughout the world. And the U.S. Navy has complemented and enforced many key UNCLOS provisions through freedom of navigation operations. The United States has also worked hard to resolve disputes peacefully, a core law of the sea principle. But the United States lacks a seat at the law of the sea table, and its credibility and commitment to the law of the sea are questioned by other nations—a point made painfully clear in both the Arctic and in ongoing disputes in the South China Sea. As these three provisions highlight, the law of the sea will be central to resolving current and future disputes in the Arctic. President Bill Clinton sent UNCLOS and the 1994 Amendment to the Senate for its advice and consent in 1994. And both Presidents George W. Bush and Barack Obama urged Senate law of the sea treaty ratification. While the Senate held hearings in 2004 and 2012, a vote on UNCLOS ratification died on the vine. Whoever wins the 2020 U.S. presidential election should renew calls for Senate ratification. And the Senate should provide its advice and consent to UNCLOS without delay.

#### Non-participation increases Russian Arctic power and undermines US maritime claims

Matcha and Sivakumar 23 [Ganeswar Matcha, L.L.M, Legal fellow at Institute for Governance and Sustainable Development, and Sudarsanan Sivakumar, Law clerk at Centre Law and Consulting, 2023, “Natural Resources In the Arctic: The Equal Distribution of Uneven Resources,” Sustainable Development Law & Policy, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1732&context=sdlp]/Kankee

VI. The Author’s Anathema As the United States is not a signatory member of the UNCLOS, can the United States extend its rights into the Arctic under Article 76 of the UNCLOS? Unless the United States ratifies UNCLOS, the United States will be less able to promote and protect its self-interest as it will be “left without a voice when the Arctic region is being divided amongst other nations.”33 Also, the UNCLOS has expressly mentioned that only ratified States can file their claims for ECS with CLCS.34 Specifically, the United States will not be able to participate in the extended continental shelf process pursuant to Article 7635 when Russia and other Arctic nations submit their extended territorial claims to the CLCS. This will not only put the United States at a significant disadvantage in the Arctic region but will also undermine the current balance of socioeconomic power among the Arctic nations. For example, without UNCLOS ratification by the United States, Russia will be able “to pursue its arctic claims without opposition from America” stated UNCLOS.36 Russia has started drilling for oil and gas in the Arctic regiment and full scale commercial operations are in progress.37 Another issue that the authors would like to address is the link between the oil and gas sector in the Arctic and global trade. The United States and its allies have imposed sweeping sanctions, export controls, and other measures following the start of Russia’s war against Ukraine. Since February 2022, the United States Department of the Treasury has implemented more than 2,500 sanctions in response to Russia’s war of choice.38 Despite such robust sanctions, Gazprom, a Russian majority state-owned multinational energy corporation, seems to have no dispute about supplying its gas from Russia’s claim in the Arctic to the rest of the world. In 2014, the launch of a gas exchange in St. Petersburg by SPIMEX, the St. Petersburg International Mercantile Exchange. This provided the latest and most serious opportunity for a true market price to be established in Russia.39 The establishment of SPIMEX has made it easier for Russian companies to trade their gas with customers in the West. Following the establishment of SPIMEX, Gazprom, apart from selling its gas product, has also taken on the official status of commodity delivery operator for gas on SPIMEX. This means that it is assuming the role of balancer for gas sold out of the exchange onto the Russian gas market.40 According to a report by SPIMEX in 2018, the major buyer of the gas product is Eurochem, a Swiss-based fertilizer manufacturing company.41 Eurochem has used natural gas to produce urea ammonium nitrate, a liquid fertilizer, which in turn has been distributed to countries across the world, including the United States.42 Eurochem was recognized as a crucial player in the food supply chain by the U.S. Department of the Treasury.43 However, the ownership of the Eurochem was under scrutiny following the sanctions imposed by the West as the ownership has shifted from a Russia businessman, Andrey Melnichenko, to his wife, Aleksandra Melnichenko, a Siberian citizen. Following the ban of Aleksandra Melnichenko by the European Union (EU) for taking part directly in the organization,44 Eurochem has released a press report that the board of directors are only EU based members and Aleksandra Melnichenko is acting as the beneficiary of the company.45 In general, beneficiary of a company refers to: “[t]he person or entity that you legally designate to receive the benefits from your financial products.”46 The authors feel this is an undiscovered area as the sanctions imposed by the United States and its allies or EU did not specify implications on a person for acting as a beneficiary to an organization. Placing aside the sanctions, this proves the potential of the Arctic natural resources and how its tradelines could benefit countries worldwide.

#### Ratification is key to Arctic mining rights – we can’t submit without ratification

Danner 24 [Lukas K. Danner, Fulbright-NSF Arctic Research Scholar at the Centre for Arctic Studies at the Institute of International Affairs at the University of Iceland, 7-26-2024, "Could New Underwater Territorial Claims in the North Pacific and Arctic Finally Prompt the US to Adopt the UN Convention on Law of the Sea?", East-West Center | eastwestcenter.org, https://www.eastwestcenter.org/news/web-article/could-new-underwater-territorial-claims-north-pacific-and-arctic-finally-prompt-us]/Kankee

To Ratify or Not to Ratify? Although the United States played a key role in negotiating the provisions of UNCLOS in the 1970s and supports most of the pact as customary international law (that is, international law based on consistent state practice and opinio juris), it has never actually ratified the UN convention. This did not matter in establishing the US EEZ because that doesn't require UN approval. But since the new ECS claim does require approval by the UN’s CLCS commission, US non-ratification of UNCLOS will present a problem. Some of the 165 countries that have ratified UNCLOS, including Russia, are already raising objections on the basis that the US, as a non-party to UNCLOS, is not eligible to submit its continental shelf claims to the Commission. On the other hand, without ratifying UNCLOS, the United States will not be able to oppose ECS claims it regards as excessive. Sealing the Deal on UNCLOS The original US concerns over UNCLOS were largely over provisions regarding deep-sea mining in areas beyond territorial claims. Today, however, US mining and petroleum interests are urging ratification because without it US companies will be unable to claim any mining concessions the Seabed Authority gives out. The military and diplomatic communities have long supported ratification because they believe it will help give legitimacy to US efforts to support the rule of law and maintain freedom of navigation. One source of objections is the fear of legal challenges at the International Tribunal for the Law of the Sea if the US becomes a party to UNCLOS. But ratification can include reservations, and non-ratification means that the US is entirely left out of negotiations on possible UNCLOS amendments or new provisions. The tantalizing prospect of 386,000 square miles of new underwater territory should add powerfully to the argument that the time is ripe for the US to reconsider its stance on acceding to UNCLOS.

#### Mineral rights are impossible without legal standing enshrined in UNCLOS ratification

Carmichael 18 [Cade Carmichael, researcher, 05-2018, ‘The United States, UNCLOS, and the "Race to the Arctic”,” Final Thesis, https://skemman.is/bitstream/1946/29886/2/LL.M.%20Thesis%20-%20Carmichael.pdf]/Kankee

Given the U.S.’ overt reliance on customary international law in its relationship with CLCS (which, as discussed, is not per se within such law), its actual standing is made complicated and its claims made somewhat more dubious. Making the negative aspect of this even more magnified for the U.S. is that since the U.S. relies on a customary international law approach to UNCLOS, it is being needlessly left out of a conversation which is already innately similar to such customary law in the first place. Put differently, the U.S. stands to gain nothing by taking its present view of CLCS, and its reliance on arguments of “custom” have little actual merit in regard to the commission despite its own lack of customary history. This, in effect, means that the U.S. is being left of out a critical discussion for no justifiable reason, an outcome which is only harmful to U.S. interests.293 The impacts of the U.S.’ pseudo-committal to UNCLOS via customary international law extend beyond the confines of the CLCS and also spill over to the Arctic itself. This stems from the U.S.’ “sidelined” status within the broader Arctic conversation, a conversation which is becoming increasingly reliant on UNCLOS.294 For example, despite having signed the Ilulissat Declaration in 2008 the U.S. has still been left out of several aspects of the ongoing Arctic conversation due to its non-party status to UNCLOS.295 By continuing to remain outside of the Convention the U.S. is effectively hindering its own efforts in the Arctic not just within the CLCS, but on a broader scale that encompasses both continental shelf claims as well as more mundane Arctic operations.296 These concerns mirror issues raised by the DOD, and have direct impacts on U.S. naval operations in the Arctic region.297 Further, and perhaps of special note for the Trump administration,298 is that this status also limits the U.S.’ ability to make assertions of Arctic resource rights with any semblance of a firm legal standing.299 Indeed, without ratification the U.S. risks an entire Arctic regime – mineral or otherwise – being established without much meaningful input from it within the sphere of UNCLOS’ influence.300 The U.S. risks losing input in other areas concerning the Arctic as well. For instance, the U.S.’ non-party status to UNCLOS can, and has, complicated Arctic negotiations and agreements at the IMO due to that organization’s heavy reliance on UNCLOS for its own ruleset.301 This, in turn, has caused the U.S. to be sidelined in areas that it may not have anticipated, as both Arctic and even global policies from the IMO are frequently based on UNCLOS, meaning that in effect the U.S. only has a needlessly narrow band of legal options with which to engage such policies.302 The result is that, much like the negative effects suffered by the U.S. in the realms of military navigation and security, the U.S. also loses the ability to help shape Arctic policy. As a result, the Arctic loses out on a quintessential international actor and the U.S. has lost yet another opportunity to prevent Arctic policy from being modified adversely to its interests.303 This is in many regards the biggest and most recurrent “negative” effect or “loss” for the U.S. as it applies to many of its military and commercial concerns: due to its lack of position within the CLCS, and with its muted voiced regarding UNCLOS-based Arctic policy – the U.S. simply has no real legal say in most of these matters as a non-party. 2.3.3(b) – “Positive” Aspects of the U.S. gaining Party Status The good news for the U.S. is that not a single one of these aforementioned “negatives” or “losses” is concrete or permanent. As has likely become apparent, ratification would bring the U.S. straight into the fray and allow it to have legally-codified input at the metaphorical and literal UNCLOS “table.” This status would bring “positives” and yield “gains” to the U.S. in the familiar areas of military and security, the CLCS, and the Arctic in general. Given the discussion on the importance of military security to U.S. domestic and international discourse,304 it is useful to examine just what the U.S. would stand to gain in these areas first. One the longest-running benefits the U.S. would acquire upon UNCLOS ratification is that it would finally reap the full advantages of the navigation rights it carefully negotiated and won during the framing of UNCLOS.305 Almost on this point alone UNCLOS advocates have long argued that, on the balance, the gains to navigation security greatly outweigh any perceived or actual costs incurred by UNCLOS ratification.306 This line of argument has seen increasing gains against UNCLOS opponents, as the sheer volume of benefits that the U.S. would reap from ratification is quickly becoming a, if not ideal, then “best alternative” to securing U.S. interests.307 Securing these freedom of navigation benefits may well be one of the biggest “positives” the U.S. would gain as a party to the Convention, especially as such freedoms have appeared within the national security objectives of the past several Executive administrations.308 Here, if one accepts the argument that UNCLOS may well be the only way for the U.S. to ensure its long term Arctic interests, then it might also be said that as a party to UNCLOS the U.S. would make extensive strides in its Arctic security as well.309 Interestingly enough, this is a position that the U.S. Navy has maintained for some time – meaning that the Executive and Naval relationship would likely improve as a result. 310 These codified military navigation benefits would not only impact Arctic operations, but naval operations on a nearglobal scale as well.311 This would in turn have the secondary benefit of reinforcing foreign perspectives (from both allies and adversaries) of the U.S.’ naval rights and claims.312 Bolstering these claims alongside giving the U.S. a more unified presence in the UNCLOS regime would simultaneously boost the U.S.’ own arguing points while also increasing its international resistance against tactics such as “lawfare.” The end result is that the U.S. would reduce the risks it presently incurs when asserting freedom of navigation rights and would improve its potential dispute mechanisms with would-be violators of those claims.313 On this front the U.S. would also gain the benefits of the UNCLOS regime when it comes to contesting encroachments on navigation freedoms – a frequent issue area which UNCLOS has often proven to be successful in ameliorating.314 Much of this success likely stems from UNCLOS’s comparatively315 clear guidance on the freedom of navigation, be it related to territorial seas, innocent passage, or EEZs.316 In addition to these dispute-related and efficiency benefits, party status would also confer lower military and navigational operation costs to the U.S. In fact, some operations would see a “significant”317 reduction in costs due to less reliance on presently resource-intensive navigational programs. 318 This overall cost decrease would also allow the U.S. to focus more on broader policies, rather than on specific programmatic details. From this, it would arguably acquire more influence over UNCLOS and Arctic developmental issues, and military and security personnel have referred to this a situation wherein the “U.S. stands only to gain” by ratifying.319 Perhaps the best argument for the positive impacts of UNCLOS ratification under the military and security arm is that it’s both an immediate boon for the military and conditionally impermanent. On the first point, and as discussed, the U.S. military enthusiastically supports the Convention. As just one example, Admiral Vern Clark, then-Chief of Naval Operations said in a 2004 report to Congress that “I fully support the Convention because it preserves our navigational freedoms, provides the operational maneuvering space for combat and other operations for our warships and aircraft, and enhances our own maritime interests.”320 As to the second point, while opponents of UNCLOS have continuously argued that it would impede military flexibility due to the infringements on U.S. sovereignty, the truth is that under The Vienna Convention on the Law of Treaties (“VCLT”) – which the U.S. recognizes as customary international law321 – the U.S. would be able to suspend its UNCLOS obligations when its national security was threatened or where the circumstances of the Convention have fundamentally changed.322 This aspect of the VCLT means that even in the event that UNCLOS somehow did impinge on U.S. military action, the U.S. would be able to suspend its duties under the Convention as necessary. In this regard, the VCLT, when coupled with UNCLOS ratification, would in no way leave the U.S. in a more negative situation than it could have possibly found itself absent UNCLOS ratification.323 Insofar as the U.S.’ relationship to the CLCS is concerned, there is much to be gained by ratification on this front as well. Here, similarly to UNCLOS more broadly, the U.S. has already endeavored to be a part of the international order and is mostly just interfering in its own forward progress by remaining a non-party. For example, the U.S. is already a party to the 1964 Convention on the Continental Shelf (“COTCS”), and has already agreed to a series of limitations, namely the outer limit of 200 nautical miles.324 However, through ratification of UNCLOS as opposed to just COTCS, the U.S. stands to gain insofar as the CLCS is concerned as it will be able to argue that it qualifies for the special considerations UNCLOS provides for states with naturally broader continental shelves.325 Here, the U.S.’ party status to COTCS is just one more example where it has one foot in customary international law and the other in a codified regime. While the system may be “operational” the U.S. ultimately needs to be a party to UNCLOS in order to reap the advantages of the more evolved CLCS system. 326 In addition, as the U.S. has voiced a clear desire to influence the development of the continental shelf system,327 a seat within the CLCS would prove invaluable to the U.S. as it would more effectively allow them to engage with other members and to ensure that their claims and concerns are actually heard.328 This “seat at the CLCS table” yields several gains for the U.S. beyond putting its own claims forward. It also allows the U.S. to better defend its interests against Non-governmental organizations (“NGOs”) and other non-state or rogue actors (be they domestic or international) which are actually trying to usurp the U.S.’ claims in one fashion or another.329 CLCS membership would also provide the U.S. with added defenses against more traditional adversaries and their respective claims and programs – entities which obviously pose both more of a policy and a real-world threat than do most NGOs. Two prime examples of such potential U.S. adversaries are its classic ideological opponents Russia and China, both of which are becoming increasingly active in such disputes and preparations. 330 Further, a legitimized CLCS position would give the U.S. the ability to oppose not only directly contrasting claims and submissions, but those which are simply “ambiguous” as well.331 This would in turn increase the breadth of U.S. oversight beyond anything it is presently capable of with its “sidelined” status as a non-party that relies solely on customary international law. Finally, turning to the “positive” impacts on the development of the Arctic, the U.S. – needless to say – has much to bring to this endeavor, but as discussed, is currently quite limited due to its self-determined treaty status. Unsurprisingly then, there is much to be gained for the “Race to the Arctic” when it comes to U.S. UNCLOS ratification. For starters, the U.S. has already begun to follow several aspects of UNCLOS as it relates to the Arctic, a change in stance which certainly does little for the U.S. as a non-party, but which might also be reflective of their forward-looking Arctic goals. Just one example of this shift occurred in August 2007 when the U.S. framed its response to Russia’s Arctic claims around UNCLOS provisions – despite the fact that the U.S. did not recognize those particular provisions as customary international law.332 This approach is indicative of the U.S.’ somewhat “subvert” ascension to many aspects of the UNCLOS framework – be they formal or informal – as they relate to the Arctic. 333 This is in spite of the current U.S. governmental control by the “Unilateral Arctic” cluster previously discussed, and even shows hints of a tacit U.S. acceptance of UNCLOS Article 76 as at least partial customary international law.334 While it remains to be seen if this stance will continue with any real vigor under the Trump administration, it has experienced some longevity as it originated within the George W. Bush administration and persisted throughout the Obama administration as well.335 The geopolitics of the Arctic would also be likely to benefit from a more stabilized U.S. presence,336 and here too ratification would allow the U.S. to see its interests better protected and its ability to conduct more operations solidified.337 In many ways this ability to “mold” the dawn of the Arctic legal regime in an era of melting sea ice, newly opening trade routes,338 and more accessible commercial passages, 339 is precisely what both the Arctic regime and the U.S. need to ensure proper international cohesion.340 Of course, ever vigilant as it pertains to its own interests, the U.S. wouldn’t need to settle for any sort of altruistic leadership goal, and instead it would also be able to acknowledge international policy boons such as veto powers as well as more direct – possibly even outright determinative – influence over Arctic amendments and polices.341 Of course here it is important to reiterate that these endeavors, labeled herein as “positives” and “gains,” are centered around the premise that the U.S. had, in fact, ratified UNCLOS. While the question of “how does the lack of U.S. ratification affect the ‘Race to the Arctic?’” has now been examined, it leaves open the lingering doubt as to just whether or not the U.S. will actually decide to ratify UNCLOS. This, in turn, leads to the question of “Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy?” 2.4 – What does the future hold for UNCLOS, the CLCS, and the Arctic in the event of United States Ratification?

#### Offshore oil development is key to US energy security and superpower status

Green 17 [Mark Green, former Adjunct Professor at George Mason University, with a Master's degree at American University, 3-20-2017, "100 Days: Access to Arctic Energy Key to U.S. Security", American Petroleum Institute, https://www.api.org/news-policy-and-issues/blog/2017/03/20/100-days-access-to-arctic-energy-key-to]/Kankee

The enormity of Alaska’s energy potential – onshore and offshore – may be difficult for most Americans to fully grasp. Consider: An area the size of a metropolitan airport within the Arctic National Wildlife Refuge (ANWR) is estimated to hold between 4.3 billion and 11.8 billion barrels of oil – though that assessment is nearly two decades old. At the high end, that’s more than 10 times the oil Texas produced in 2016. The U.S. Geological Survey estimates the National Petroleum Reserve-Alaska, which spans 23 million acres and is the largest single block of federally managed land in the U.S., holds 895 million barrels of oil and 53 trillion cubic feet of natural gas – more than 10 times the natural gas Pennsylvania produced in 2016. Together, the Beaufort and Chukchi seas may hold 23.6 billion barrels of oil and 104.4 trillion cubic feet of natural gas. Last fall, 6 billion barrels of oil were discovered in Alaska’s Smith Bay, which neighbors the Beaufort Sea. An estimated 30 percent of our country’s known, recoverable offshore reserves are in Alaskan waters. Even though its output has been declining, Alaska’s North Slope still produced 173 million barrels of oil in 2016. Two points. First, by their sheer size, Alaska’s oil and natural gas reserves are strategically vital to U.S. energy security. Second, all of the above is just an academic exercise without access to develop those reserves. With new leadership and a new view of U.S. energy in Washington, there is great opportunity. It will require changing a number of policies and clearing away obstacles to safe and technologically sound development. U.S. Sen. Lisa Murkowski of Alaska: “To forsake Alaska oil and gas will be to forsake America’s energy security in a world that is using more energy, not less. It will leave us an economic and environmental disadvantage. … It will result in fewer jobs created here at home, fewer dollars staying within our economy, less affordable energy for our families and businesses and less influence for our nation on the world stage.” Alaskans overwhelmingly support Arctic development (76 percent), according to a survey conducted last fall. Among self-identified Native respondents, 72 percent said they support offshore resource development, and 79 percent said they believe their opinions on the issue should matter most. Richard Glenn, executive vice president for Lands and Natural Resources of Arctic Slope Regional Corporation, which represents the business interests of about 12,000 Arctic Slope Iñupiat, in congressional testimony: “The development of Arctic oil and gas resources provides our communities with the means to preserve our traditional way of life and culture while also allowing our residents to enjoy a greater quality of life. Put another way, our communities cannot survive without continued resource development in our region.” Time must not be wasted. Offshore development in the Arctic has a long timeline, and other nations, including Russia, Canada and Norway, already are actively exploring the Arctic. Military leaders urge Arctic development: “Arctic offshore energy development will occur, whether or not the U.S. participates, as other countries pursue the Arctic’s large energy resources to meet long-term energy needs.” As we say, there’s great opportunity to responsibly develop Alaska’s great oil and natural gas resources. This should be guided by a forward-thinking regulatory framework that prioritizes regularly scheduled lease sales as necessary to enhance U.S. energy security and maintain America’s position as a global energy superpower.

#### Russia Arctic energy dominance revives Russia’s great power status – US UNCLOS leadership is a key counterbalance

Simon 21 [Zach Simon, Senior Staff Writer at the International Affairs Review and M.A. candidate at the George Washington University’s Elliott School of International Affairs in the Security Policy Studies program with a B.A. in political science from Vanderbilt University, 2021, "Arctic Energy Development: Preventing Transnational Insecurity ", International Affairs Review, https://www.iar-gwu.org/print-archive/arctic-energy-development-preventing-transnational-insecurity]/Kankee

ARCTIC ENERGY: EXTRACTION POTENTIAL AND INTERESTED STAKEHOLDERS There is thought to be a lot of untapped energy in the Arctic. We have seen energy exploration and extraction increasing in the Arctic and we can expect it to continue. The Arctic states - and other interested states and private companies - are competing to have a stake in Arctic energy. Geologists believe that the Arctic “may be the last significant oil and gas frontier left” in the world.12 According to a report from the Brookings Institution, interest in Arctic oil and gas increased around the turn of the twenty-first century for four primary reasons. First, as previously outlined, ice melt in the Arctic caused by climate change has made exploration and extraction possible. Second, the report points to the scale of energy potential in the Arctic. As outlined in the 2008 United States Geological Survey (USGS), Arctic energy potential is an estimated 90 billion barrels of oil, or 13% of undiscovered global stores, as well as 47.3 trillion cubic meters of natural gas, which is 30% of undiscovered natural gas globally.13 Third, the report states that high energy prices around the world is causing countries to look for alternative sources of energy. Fourth, it posits the Arctic as a politically stable region with nation states that adhere to international law and uphold oil and gas contracts.14 Multiple state and private sector actors are pursuing dominance in the Arctic.The Arctic littoral states,along with near-Arctic China, have motivations for energy extraction. For Russia, the only non-NATO state with Arctic oil, achieving energy dominance in the High North is of vital geopolitical strategic importance. Since Russian President Vladimir Putin came to power in 2000, he has tried to make Russia a great power, and to be recognized as one. Russia has sought to leverage its position as the main supplier of energy to the European Union (EU) in a series of negotiations. Russian energy dominance provides a high degree of relevance and power to the would-be fledgling state on the world stage. Exploitation of Arctic energy sources and Arctic hegemony would allow Putin to sustain Russia's global position and point of leverage with the EU for years to come.15 Turning to the Arctic for energy is the logical and necessary next step for Russian energy development. China is interested in utilizing the Northern Sea Route for easier trade access with Atlantic countries and moving resources in and out of the Arctic region. Using the Northern Sea Route as a primary trade route not only decreases the time and cost of shipping, but circumvents potentially hostile bottlenecks such as the Strait of Malacca, the Sea of Hormuz, and the Suez and Panama canals. China considers itself a “near-Arctic state” and has become an observer on the Arctic Council.16 As Russia turns to China for capital to develop its Arctic energy capabilities, China not only gains favorable conditions when the Northern Sea Route become perennially accessible, but gains a political voice in Arctic affairs. China believes that development of Arctic oil capabilities is tantamount to the development of the Northern Sea Route. It currently has a 20% stake in Russian Yamal liquid natural gas (LNG) and receives three million tons of LNG per year.17 Like Russia, the United States has large reserves of oil and gas in its Arctic sovereign zone. According to the USGS, the total mean undiscovered conventional oil and gas resources of the Arctic is estimated to be approximately 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids.18 Canada has a significant stake in the Arctic because it covers 40 percent of its territory, it has a 162,000-kilometer Arctic coastline, and it has stewardship of the Northwest Passage. The Canadian government has begun to make offshore oil and gas regulation a priority.19 Finally, Norway maintains its status as an energy superpower because it has offshore sources in the North Sea, Norwegian Sea, and parts of the Barents Sea - Norway’s Arctic body of water. In 2009, USGS estimated the Barents Sea Shelf contains 11 billion barrels of oil, 380 trillion cubic feet of natural gas, and two billion barrels of liquid natural gas (LNG).20 Though not part of the EU, Norway receives heavy funding from the EU to develop its offshore capabilities to diversify the EU’s energy market and move away from Russian dependency. Although each state has different economic, domestic, or geopolitical reasons for developing extraction capabilities in the Arctic, there is one factor that each has in common. It is the idea that each Arctic littoral country has a legitimate sovereign right to extract energy from its territory. Every state can “utilize and benefit from their own natural resources as they see fit,” and this has “become embedded in international customary law in the post-colonial period.”21 The challenge here is that while these countries may perceive that they would individually benefit from exercising sovereignty without having to abide by international regulations on energy extraction, transnational threats will only be mitigated if these countries can create policies through international bodies that curtail energy extraction to protect the fragile environment in the Arctic. Furthermore, comprehensive and universal regulations are needed as a backstop, should energy politics escalate and threaten the Arctic environment. The great power struggle for economic dominance in the world drives revisionist powers, China and Russia, to invest in each other’s efforts to make the Arctic economically viable.22 Conversely, private investment drives Arctic energy exploration in the West. As discussed earlier, climate change has a spiraling effect in the Arctic. In the same way that climate change multiplies the rate at which the Arctic environment changes, mishaps in energy extraction aggravate climate change. Increased presence and human activity in this delicate region will threaten both environmental and human security. RISKS OF INCREASED EXPLORATION AND EXTRACTION Increased energy exploration and extraction poses risks to environmental and human security. The dangers of energy development in the Arctic are particularly consequential compared to anywhere else in the world due to several reasons: the physical makeup of the Arctic makes it extremely difficult for a rapid response to an oil spill; the lack of infrastructure in the Arctic - few permanent structures, runways, and roads - makes the Arctic hard to access; and thawing permafrost poses challenges to the stable ground. The main danger posed by increased energy exploration and extraction in the Arctic is the chance of an oil spill. Most people today remember the environmental catastrophe caused by the 2010 Deepwater Horizon oil spill, which released an estimated 4 million barrels (over 168 million gallons) of oil into the Gulf of Mexico in 2010.23 The accident had a spill-over effect into Arctic policy discussions: it prompted the National Commission for reviewing the Deepwater spill to reassess the implications of deep-water drilling in other sensitive environments, looking specifically to the Alaskan Arctic coast.24 U.S. government authorities estimate that an oil spill off of Alaska’s Arctic coast is about 30 - 50 percent likely: the question is not if an oil spill will occur in the Arctic, but when it will occur.25 The estimated maximum blowout volume of a spill in the Arctic is 1.3 million barrels of oil (58 million gallons).26 The largest spill to date in U.S. Arctic waters is the 1989 Exxon Valdez spill in Alaska which released 11 million gallons of crude oil.27 Both the Exxon Valdez spill and the Deepwater Horizon spill can help predict what an oil spill in the Arctic might look like. However, the potential scale of a spill is estimated to be far larger than the Exxon Valdez spill. The key difference with Deepwater Horizon is the environment: the Deepwater Horizon Commission’s report explicitly stated that the clean- up techniques used to remedy the Deepwater Horizon spill would not work in Arctic conditions.28 Compared to other regions, the ‘response gap,’ a “period of time in which oil spill response activities would be unsafe or infeasible,” is thought to be significantly higher in the Arctic.29 This is primarily due to the remoteness of the Arctic, the lack of infrastructure (the closest Coast Guard airstrip is 1,000 miles from the northernmost point of Alaska, and the closest major port is 1,300 miles), lack of weather prediction capabilities, and lack of available vessels for proper spillage procedures.30 Data on minor oil spills in Alaska’s Aleutian Islands over the past 20 years present evidence that, “no oil has been recovered during events where attempts have been made by the responsible parties or government agencies, and that in many cases, weather and other conditions have prevented any response at all."31 Other factors also increase the chances of a major oil spill and will complicate clean-up, in addition to the difficulties of implementing a rapid response. Thawing permafrost in the Arctic poses challenges to the stability of the ground, and therefore destabilizes the extraction infrastructure on it.32 Because the Arctic Ocean does not experience the same circulation as other bodies of water, oil sitting atop the water’s surface tends to travel less. The Arctic Ocean is also far shallower than other oceans, which slows down dissipation.33 In addition, the physical makeup of the Arctic Ocean provides spaces for oil to become trapped, either under the ice sheet itself or within the jagged landscape. Another factor that would make clean-up difficult is the lack of daylight hours for work to take place during the winter parts of the year. Practically speaking, in case of a major oil spill, it is unlikely that any oil will be removed from the Arctic Ocean. Geopolitical concerns also increase the risks of Arctic energy extraction and exploration. When Russia invaded Crimea in 2014, Western powers, including the United States, Canada, and the EU, enacted heavy sanctions against Putin’s government. The new sanctions regime that arose out of this conflict forced Western private energy companies to cut joint-investments with Russian state-controlled energy gas companies, most notably Gazprom and Rosneft. This reduced Russian companies’ access to Western drilling technologies that enable safer energy extraction.34 Russia has a long history in the Arctic and considers itself the vanguard of Arctic exploration.35 Realizing this Arctic dream by circumventing Western-imposed sanctions would not only be a major economic boost for Russia but would also be a domestic victory for Putin’s political grasp on the country. In response to the sanctions, Russian officials stated they would “Russify” drilling services technology to use in the Arctic.36 Another concern is that while Russia turns to China for investment, it may seek to partner up to develop energy extraction and exploration technology. 37 But with little Arctic experience, it could be argued that China may not be able to fully produce the same safe equipment that the West has. Geopolitical conflicts could lead to unsafe energy development methods in the Arctic. An event happening elsewhere, as in the case of the annexation of Crimea, can have a spill-over effect into the way geopolitical actors approach the Arctic.38 THE TRANSNATIONAL THREATS OF ARCTIC ENERGY EXTRACTION AND EXPLORATION There are two types of transnational threats that Arctic energy development poses: to the environment and to humans in the region. These transnational threats are woven through the immediate effects of climate change. Climate change enables energy development, which only further exacerbates the threat that climate change poses on the region. In some cases, energy activities do directly threaten environmental and human security on their own, but in most cases, increased activity and climate change interact constantly, aggravating each other. For example, the thawing of onshore permafrost not only releases carbon itself, but undermines extraction infrastructure. This could lead to cracked pipelines or other complications. THREATS TO ENVIRONMENTAL SECURITY Energy extraction and exploration have the potential to worsen the effects of climate change on the Arctic environment. There are unavoidable impacts on the environment at each phase of energy development, including seismic explorations, exploratory drilling, pipelines, offshore and onshore terminals, and tankers. First, the acoustic disturbance to marine mammals such as seals, whales, and walruses as a product of seismic exploration would negatively affect the mammals’ migration patterns, feeding, mating, and communication. But this is just the beginning. In the likely case of an oil spill, this spill would "undoubtedly cause extensive acute mortality in plankton, fish, birds, and marine mammals ... [and] there would also be significant ... physiological damage, altered feeding behavior and reproduction, and genetic injury that would reduce the overall viability of populations."39 Because oil persists in the Arctic for longer periods of time, there is no telling how long an oil spill would cause damage in this fragile environment. It is also known that Arctic flora and fauna do not quickly adapt to a changing environment, making recovery of species nearly impossible.40 With the increase in global population, food demand will increase. An oil spill in Arctic waters would not only disrupt fish stock sustainability, but would have second and third order effects on global demand for food, especially for China, which has the world’s largest population of people, and is the world’s top fish consumer.41 On a more local level, an oil spill in the Arctic would seriously harm the Arctic natives’ food sources and lifestyle. THREATS TO HUMAN SECURITY Out of the eight Arctic countries, seven have surviving indigenous people.Their cultures are highly diverse, but all depend on the natural Arctic environment for their sustainment. The Arctic wildlife and environments form the foundation of the Arctic natives’ survival and cultures.42 An oil spill in the Arctic would certainly change the way that these people operate every day. The presence of energy infrastructure also contributes to the loss of pasture lands for reindeer herds, pollution of lakes, pollution of groundwater, and to a disruption of animal migratory patterns. One serious concern caused by both climate change and an increase in energy development infrastructure is a threat to water security in the Arctic. Persistent organic pollutants created by the energy industry also threaten Arctic communities, because they now exist in the tissues of marine mammals which these communities hunt. Oil leaks also pose a perennial threat. Thawing permafrost destabilizes the ground, which not only threatens Arctic communities’ infrastructure, but also threatens the stability of energy industry infrastructure which sits close to Arctic communities. Other hazards include deadly diseases that can resurface after hundreds of years under permafrost. For example, in 2016, a deadly outbreak of anthrax spontaneously broke out among a community of local Yamal Siberians.43 Furthermore, the attitude of the pilots contracted by CMS greatly contributed to the mission creep. Pressure on pilots to deliver results was constant because of the CMS practice of obfuscating contract lengths.44 The cause was thought to be a rotting reindeer carcass underground that transmitted the disease to grazing herds. There are many other organisms buried under permafrost close to the surface. The hazards that could be unearthed due to continually thawing permafrost are unknown, but have the potential to threaten human security across the globe.45 GAPS IN INTERNATIONAL LAW AND REGULATIONS With environmental and human security at risk from these Arctic energy interests, it is essential that there are comprehensive laws in place to mitigate these risks. However, international law is currently insufficient to regulate Arctic energy and mitigate damage. As mentioned before, “there is no law that pertains solely to hydrocarbon extraction or solely to the Arctic. There are no dedicated international legal standards on hydrocarbon development, either on or offshore."46 Instead, energy development is governed by a mosaic of hard and soft law principles and the rights and obligations of states. The Arctic is a region where sovereignty rights and cooperation to mitigate the risks of energy development must be delicately balanced. INTERNATIONAL TREATIES ON ARCTIC ENERGY DEVELOPMENT There are three main hard law treaties that address Arctic energy development, but they have no impact on prevention of oil spills. These are, in chronological order, the UN Convention on the Law of the Sea (UNCLOS), the International Convention on Oil Pollution Preparedness, Response and Co- operation (ORPC), and the Agreement on Cooperation on Marine Pollution, Preparedness and Response in the Arctic (MOSPA). UNCLOS (1982) is “the most comprehensive treaty regulating maritime areas."47 It is the guarantor of sovereignty for the Arctic states and provides the basis for freedom of energy development. It provides a general framework for environmental protection and provisions that demand each state uphold the duties to protect and preserve the marine environment. But these are just guidelines - UNCLOS falls short of enforcement and instead relies on Arctic states cooperation to figure out regulations on their own.48 ORPC (1990) and MOSPA (2013) are similar treaties. Both were created by the Arctic Council, and they regulate offshore oil installations in the Arctic. These treaties mandate that Arctic states prepare for and cooperate on readiness for oil spills. But yet again, these treaties do not have enforcement mechanisms. In sum, although these treaties are crucial for protecting Arctic waters, they do not address prevention, only cooperation post-spill. This is further complicated by the response-gap in the Arctic as previously mentioned. SOFT LAW AND NORMS The most comprehensive set of non-binding soft law principles is the Arctic Council’s Offshore Oil and Gas Guidelines (2009).49 These guidelines are the soft law complement to the hard law body. They address spill prevention, preparedness, and response. Although these guidelines are well respected and commonly used by the Arctic states’ as Arctic strategies, they have no enforcement mechanisms and do not provide regular evaluation procedures to assess the preparedness of Arctic states. Another soft law institution is the Arctic Council’s working group, Protection of the Marine Environment (PAME), which also has non-binding guidelines called the Arctic Marine Strategic Plan 2015-2025 (AMSP), approved in 2015. These guidelines are designed to encourage Arctic states to find the highest standards available for environmental protection: they promote sustainability for the environment, and in the interests of indigenous communities. They also attempt to monitor operating practices of energy development.50 Underlying all these hard and soft laws is the principle of ‘no harm.’ It is the idea that an activity in one country should not have a negative effect on another country.51 The lack of protective measures for energy development in the Arctic would surely violate the body of laws in place today. An oil spill or any mishap related to energy development in the Arctic could have effects on the environment and human security in more than one country. The Arctic environment is not well understood. While there has never been a significant energy development mishap in the Arctic, scenarios indicate that the effects would be transnationally devastating. Though the Arctic region appears to be a far-away frontier, climate change, compounded by an energy mishap, could speed up the rate that the entire world is warming. Without one comprehensive, international law in place, there is no guarantee that a mishap would be prevented. That is why serious policy reform is needed to ensure that proper enforcement mechanisms are in place to strike a balance between sovereignty and regulation. RECOMMENDATIONS The most obvious solution to this problem is for countries to adopt stricter laws on climate change that would require the diversification of their energy resources away from hydrocarbons. Of course, this is highly unlikely and will take decades to achieve, if at all. The threat to the Arctic posed by exploration and extraction is too time-sensitive to wait for changes of that magnitude. Instead, the focus should be on strengthening frameworks to mitigate the risks of hydrocarbon extraction to environmental and human security. At the same time the United States needs to take greater individual responsibility for this safeguarding, as it has the most leverage and financial resources. There are two possible ways to approach the challenge of mitigating risk of energy disasters through regulatory means. The first is to create a new framework with a ‘one-size-fits-all’ approach to streamline regulation at the international level. The second is to build upon the existing framework in place. Given the critical time restraints in the Arctic, a completely new organization of legal instrument “could take time and resources to establish, thus undermining the goal of ensuring that such a vital area as offshore oil and gas exploration is addressed in a timely and comprehensive way."52 Arctic specialists laud the work that the Arctic Council has done since its inception in 1996, despite their outputs being non-binding. They also state that the rush for Arctic resources predicted in the past twenty years has not materialized, citing international cooperation as the reason why. Scott Borgerson, an Arctic specialist, asserts that “none of this cooperation required a single new overarching legal framework. Instead, states have created a patchwork of bilateral and multilateral agreements, emanating from the Arctic Council and anchored firmly in UNCLOS.53 From this consensus, it is wise to take the second option: to build a policy that specifically addresses mitigating energy disasters on top of existing Arctic laws and guidelines. As seen previously, the patchwork of laws and guidelines that pertain to energy development in Arctic governance is largely focused on post-spill collective response. The patchwork provides standard procedure evaluation, but these evaluations are rarely performed. The major gap is in prevention and readiness in case of an oil spill. To remedy this gap, I propose that a new task force be included under the Emergency Prevention Preparedness and Response (EPPR) working group of the Arctic Council . This would largely focus on increasing awareness on readiness in case of an oil spill, and would coordinate joint exercises between the coast guards of the Arctic littoral states, increasing interoperability within these coast guards to ensure that communication equipment works properly. It would also incorporate private energy companies into its exercises to ensure coordination with these key actors. The task force will develop standard procedures that will apply uniformly to all actors. As part of these efforts, it would be essential to incorporate the views of the Arctic indigenous communities. This task force will involve those communities in their exercises to understand where the most fragile areas are and how to best prevent an oil spill or similar disaster from impinging on their human security. Perhaps the most imperative measure that can be taken is for the United States to take a greater leadership role in protecting the Arctic environment and inhabitants from unregulated hydrocarbon exploration and extraction. Out of all the Arctic littoral states, it has the most leverage and coin to do something about putting preventative measures in place in case of an oil spill. It could start by signing on to UNCLOS to show this initiative. In sum, enhanced cooperation through the creation of an oil-spill readiness task force could lead to striking the balance between respecting Arctic states’ sovereignty and improving regulation of this transnational issue. CONCLUSION

#### UNCLOS resolves Arctic issues with US participation

Boring 14 [Keith T. Boring, major in the US Army, 2014, “OPERATIONAL ARCTIC: THE POTENTIAL FOR CRISIS OR CONFLICT IN THE ARCTIC REGION AND APPLICATION OF OPERATIONAL ART,” Advanced Military Studies, https://apps.dtic.mil/sti/tr/pdf/ADA611784.pdf]/Kankee

China may assert itself more into the Arctic region as its economic and military power grows, with its growing demand for hydrocarbon resources. China would seek to increase its clout on the Arctic Council. It would apply for permanent member status from observer on the council. The greater role in the Arctic Council allows China better access to the Arctic region for hydrocarbon and other resource exploration and extraction operations. International forums for managing the region such as the Arctic Council and UN, through UNCLOS, remain relevant to nations seeking international legitimacy for their territorial claims. Overall, the group of littoral Arctic nations, and other non-Arctic nations, with international regimes, could manage any potential aggressiveness by any power. The multi-lateral framework of power through international regimes can manage a nationalist Russia, or resource-hungry China attempting to secure more than its share of the region’s wealth. Any persistent disputes over resources or territory, anticipated by this scenario, are within the capacity of international regimes to manage before reaching to a level of crisis. The indicators leading to this outcome are more competitive behavior among the three powerful Arctic nations – Russia, Canada, and United States. Russian bomber flights near neighboring nations’ airspace may increase. Diplomatic rows may develop, debated in the UN or Arctic Council, over hydrocarbon exploration and extraction in disputed territory. A notable indicator of this scenario is accelerated commercial and military activity and coercion by the rising non-Arctic nation, China. Scenario II: Maritime Cooperation Economic impacts from climate change in this scenario are more dramatic, anticipating increased activity. Receding ice further opens the NWP and NSR for commercial and military maritime traffic, increasing their economic viability. Operating challenges for increased commercial shipping remain, necessitating improved infrastructure and safety mechanisms. 174 The other variable of national approaches is cooperative in this scenario. International regimes of the Arctic Council and the UN are relevant for mitigating disputes as countries encroach into the Arctic region. The incentives for cooperation between nations from the international management of new commercial waterways create an eventual cooperative near future in this scenario. Tensions over access of the passages would increase as Canada and Russia continue to assert their sovereignty over the waterways. Other Arctic and non-Arctic nations, such as the United States and China, would assert that the passages are international routes open to all nations. Opening the Arctic routes can also lead to greater cooperation and regulation by international law in the ungoverned region. Nations’ governments and militaries would cooperate across boundaries to improve the maritime infrastructure and emergency response capability of the busier sea routes recommended by the AMSA report. The economic incentive of opening the waterways could ease the nationalist stance of Canada and Russia. Militaries would also enhance their operational reach capabilities in the Arctic region, improving bases and their Arctic training capabilities. The role of increased militarization would be more cooperative to collectively ensure security of commercial traffic and prevent terrorism than a cold war-like stand off. This scenario highlights the relevance of multi-lateral efforts of the Arctic Council and the UN. Such inter-governmental forums can mitigate tension among Arctic and non-Arctic nations and allow the shared economic benefits of the opened passages. Maritime issues tend to lead toward international cooperation even among rivals. The United States, in this scenario, would increase involvement as a power broker in compromises between Canadian and Russian sovereignty and international use of the Arctic passages. Tension between maritime nations seeking use of the NWP and NSR would be short-lived with the greater incentive of cooperation. Canada and Russia as caretakers of the routes, and the United States and China as advocates of international routes, would realize the risks of acting unilaterally in securing the passages for their self interests. The opportunity costs of denying the routes to international commerce would be too great to risk maintaining tension. The leading indicators of this scenario are increased cooperation among Arctic littoral nations in regulating the opened waterways. The owners of the NWP and NSR, Canada and Russia, cooperate in implementing the safety and infrastructure recommendations by the AMSA in opening the sea passages. Scenario III: Arctic Crisis

#### Bad US UNCLOS posturing encourages Russian UNCLOS withdrawal

Todorov 24 [Andrey Todorov, Researcher at the Netherlands Institute for the Law of the Sea & Utrecht Centre for Water, Oceans and Sustainability Law at Utrecht University with a PhD, 04-09-2024, "Russia's Reaction to the US Continental Shelf Announcement: Political Posturing or Setting the Stage for a Big Move?", Arctic Institute - Center for Circumpolar Security Studies, https://www.thearcticinstitute.org/russias-reaction-us-continental-shelf-announcement-political-posturing-setting-stage-big-move/]/Kankee

On March 18th 2024, Russia, through its representative at the International Seabed Authority, declared that it does not recognize the outer limits of the continental shelf unilaterally established by the United States. Earlier, in December 2023, the U.S. announced the limits of the continental shelf beyond 200 nautical miles from the coast (extended continental shelf, ECS) in various regions, including in the Arctic. The US ECS announcement does not overlap with the Russian ECS submission in relation to the Arctic Ocean, so there is no direct clash of national interests. But given the geopolitical tensions, Moscow could not miss a chance to pinprick its key rival, when such opportunity availed itself. To some extent, the logic behind Russia’s statement, blaming the United States for selecting international law provisions “that they find convenient to implement and reject those that impose certain obligations on them”, has some basis. Not being a party to UNCLOS, but abiding by the bulk of its provisions as reflecting customary international law, the U.S. assured that ECS outer limits were determined using the requirements set out in Art. 76 of UNCLOS. Except one – to submit the scientific data on ECS to the Commission on the Limits of the Continental Shelf (CLCS), which is a body established by UNCLOS to evaluate the sufficiency of the data, verify the correct application of the required criteria and make recommendations based on this evaluation (Art.76 (8)). Under Art. 76 (8), the final and binding ECS limits are established by coastal states themselves, but on the basis of CLCS recommendations. Without going into the details of the legal dispute on whether and to what extent Art. 76 of UNCLOS reflects customary international law, it could be assumed that the US, as a non-party to UNCLOS, was not obliged to submit to CLCS. However, the CLCS procedure set out in Art. 76(8) arguably represents an important element of the whole UNCLOS “package” dealing with the establishment of ECS and recognition by other states, and cannot be easily separated from the other provisions of Art. 76. The Commission is a body formed to validate a coastal state’s efforts with regard to ECS in the eyes of the whole international community, so dodging the CLCS procedures severely undermines the credibility of the US announcement. Establishing ECS without getting CLCS’ recommendations also puts the United States on unequal terms with UNCLOS states-parties – going through the whole CLCS process often entails additional efforts, as well as long waiting time (decades) to complete the ECS bid. For example, since its initial submission in relation to the Arctic Ocean in 2001, Russia had to revise it numerous times based on CLCS recommendations, spending significant resources to gather additional scientific data, and by 2024 has still not completed the bid (although making significant progress in 2023). The US has stated that it “has prepared a package of data for submission to” CLCS, which will be filed upon the US accession to UNCLOS, and that the state is “also open to filing its submission package with the Commission as a non-Party to the Convention.” Whatever it may mean, until the US has done so, other states are left wondering how to react to the unilateral announcement, and Russia has chosen not to accept it. Russia’s demarche is remarkable yet for another reason. In the statement, Russia urges the United States to ratify UNCLOS to assume the full range of rights and duties. This call may sound more than strange amid loud voices from inside Russia to withdraw from UNCLOS. Despite the fact that even in case of withdrawal from the Convention, Russia would still be bound by most of its provisions as customary law, proponents from the State Duma and Defense Ministry still believe that such a move would somehow help Russia strengthen its grip on the Arctic and get rid of unnecessary limitations. It could be that the Foreign Ministry, which published the statement on the US’ ECS with the call to ratify UNCLOS, simply did not coordinate with other state authorities who had made anti-UNCLOS attacks previously. But it should not be ruled out that the rather contradictory wording was used by Russia deliberately – since it is unlikely that the US will ratify UNCLOS in foreseeable future, the selective US approach towards Art. 76 can be exploited by Russia as a potential justification for its own denunciation of the Convention in future.

#### Russia UNCLOS withdrawal destroys the treaty

Tuckett and Rowlands 24 [Caroline Tuckett, Royal Navy Logistics Officer, Barrister, Associate Fellow at the Royal Navy Strategic Studies Centre and Visiting Research Fellow at the University of Plymouth, and Dr Kevin Rowlands, Head of the Royal Navy Strategic Studies Centre and Visiting Research Fellow at the University of Plymouth, 2-9-2024, "Drifting Away? Russia’s Dissatisfaction With the Law of the Sea", Royal United Services Institute, https://www.rusi.org/explore-our-research/publications/commentary/drifting-away-russias-dissatisfaction-law-sea]/Kankee

Denunciation from UNCLOS. UNCLOS Article 317 provides for a state denouncing the treaty and reasons do not have to be given. That said, Article 317 (3) states that the denunciation ‘shall not in any way affect the duty of the State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention’. An obvious example would be the prohibition on the use of force under Article 2 (4) UN Charter. This is reflected in UNCLOS by Article 301, which effectively repeats Article 2 (4) under the title ‘Peaceful uses of the Seas’. No state has yet withdrawn from UNCLOS and, if Russia does, it will be a blow to the rules-based international order. UNCLOS is one of the most widely ratified treaties in existence, with substantial case law on its application, and as such it is viewed as reflective of customary international law. The US, as one of the most prominent non-signatories of UNCLOS, has accepted this view, and with some minor exceptions has declared that it accepts its provisions as binding. Therefore, even if Russia were to withdraw, it would arguably still be bound by its terms. The effects of a Russian withdrawal from UNCLOS may therefore not be felt immediately. As a major maritime power, freedom of navigation is as important to Russia as it is to the UK and US. However, as time progresses, difficulties will lie in dispute resolution. If Russia is no longer a signatory to UNCLOS, it will no longer be bound by its dispute mechanisms, which include not only the Annex VII tribunals, but also the International Tribunal on the Law of the Sea (ITLOS). Russia does however remain a signatory to the UN Charter, and therefore by default the International Court of Justice (ICJ). It should not be assumed that the events and public statements in December are necessarily linked, or indeed part of a coordinated messaging campaign. Rather, they may instead be a reaction to external pressure and indicative of a growing dissatisfaction. Russia sees itself being ostracised by the international community in areas previously assumed to be independent and impartial. The declaration regarding the Sea of Azov is also undoubtedly part of Russia wider messaging regarding the ongoing war in Ukraine. Further afield, China has also indicated a wish to move away from its provisions, with public statements indicating that it does not view UNCLOS as the single authoritative source on the law of the sea, and rejections of UNCLOS arbitration with respect to territorial disputes in the South China Sea. Although at present unlikely, if Russian rhetoric turns to action and it withdraws from a treaty it believes is no longer fit for (its) purpose, and if China then follows (two very big ‘ifs’), it would spell the end of the current near-global consensus on the governance of the oceans. The world could enter an era of competing rules-based systems with consequent impact on territorial claims, safety and environmental regimes, resource exploitation, and the flow of trade. Crucially, this could also impact how new technologies such as uncrewed vessels are governed at sea. The UK’s approach to international law, and the law of the sea, should not, and need not change, but the Royal Navy may be required to do more constabulary operations, including freedom of navigation patrols and protection of economic nodes and sea lines of communication.

### Contention 4: South China Sea (UNCLOS)

#### Ratification increases US credibility, naval power, and legal critique, allowing the US to better counter Russia/China

Malaver 24 [Ensign Lara Malaver, U.S. Navy member with a degree in political science from the Naval Academy, 12-31-2024, "It is Time for the United States to Ratify UNCLOS", U.S. Naval Institute, https://www.usni.org/magazines/proceedings/2021/june/it-time-united-states-ratify-unclos

Combatting China and Russia The U.S. National Defense Strategy of 2018 focuses heavily on the need for the United States to combat the influence of revisionist powers China and Russia, who have gained a greater hold on the global stage in the past 20 years. As a non-signatory of UNCLOS, the United States has hindered its influence over these two adversaries regarding the law of the sea, despite explicitly recognizing the significance of each state’s growing power in strategic documents. The Arctic has experienced unprecedented high temperatures in recent years and continues to melt, opening summer navigation routes and making resources available that have not been easily accessible in the past.15 This, of course, has opened international discourse concerning which states have rights to what resources in the Arctic. In the U.S. Senate’s Committee on Foreign Relations hearings in 2012, both then–Secretary of State Hillary Clinton and Secretary of Defense Leo Panetta stressed the opportunities that are waiting in the Arctic.16 While the United States is a member of the Arctic Council, it is the only member that is not a signatory of UNCLOS, putting it at a disadvantage as the convention will have the ultimate say on how resource and maritime claims are decided.17 Russia has already attempted to claim much of the Arctic, sending its own submarines to the North Pole and planting a flag on the ocean bottom as a symbol of its claim, which is widely disputed.18 When the United States refutes such claims on the basis of international law, Russia and China point out that it has no legal standing because it has not ratified UNCLOS. The cost of doing so is nonexistent, and the reward is the ability to check Russia more effectively. In the South China Sea, a graver situation has developed involving territorial conflict between China and at least five other nations. China began making artificial islands in 2013, developing 3,200 acres of artificial landmass that it used to claim additional airspace, territorial waters, and a larger exclusive economic zone (EEZ) that overlaps those of other states who are party to UNCLOS. The United States has challenged China’s claims, again with the aim of containing Beijing’s influence over South East Asia. Like Russia, however, China sees no reason to respect the U.S. position because it is not a signatory of UNCLOS.19 Some may argue that a continuous display of U.S. naval strength in China’s backyard (through freedom of navigation operations) is enough to counter Chinese hegemony. But diplomatic power is just as important, especially because other smaller and less powerful nations in the region need help that the United States is challenged to give as an outsider to UNCLOS. In fact, one may argue that during the past 20 years, Washington has relied so heavily on military strength that U.S. soft power has diminished. Being on the outside of the international community has further emboldened revisionist powers such as China and Russia. U.S. Military Position Since the convention was adopted in 1982, every Chairman of the Joint Chiefs of Staff has supported its ratification.20 Although there were initial concerns regarding a threat to national security, they were never grounded in evidence, and it has been argued by many that the treaty would increase the capabilities of the U.S. Navy. The Navy Judge Advocate General supports UNCLOS, stating: The Convention is in the national interest of the United States because it establishes stable maritime zones, including a maximum outer limit for territorial seas; codifies innocent passage, transit passage, and archipelagic sea lanes passage rights; works against “jurisdictional creep” by preventing coastal nations from expanding their own maritime zones; and reaffirms sovereign immunity of warships, auxiliaries and government aircraft.21 This sentiment was echoed by then–Chairman of the Joint Chiefs of Staff General Martin Dempsey, U.S. Army, in his 2012 statement before the Senate Committee on Foreign Relations: “Joining the Convention would strengthen our ability to apply sea power. . . . It reinforces the sovereign immunity of our warships as they conduct operations. . . . We currently rely on customary international law and assert it through our physical presence.” Dempsey added that the U.S. failure to ratify UNCLOS enables the disagreeable behavior of adversaries and thus allows a greater possibility for escalation of regular military operations into more dire situations.22 The Heritage Foundation, which was one of the most vocal groups in fighting the initial accession to UNCLOS, argues that because the United States has remained a non-signatory for so long, there is no reason to change now, and the state’s focus should primarily be on maintaining a superior navy to support its own maritime bidding.23 However, this view ignores the power of diplomacy; as a nonmember of the treaty, the United States has less influence over the ongoing ocean policy discussions of today. Joining the convention would increase U.S. influence over the conversation now, and thus help to solidify U.S. maritime policy and strengthen influence abroad. Nearly 40 years ago, the Reagan administration and the U.S. Senate backed away from UNCLOS for reasons that made little sense then and none today. Since then, a number of presidents, including Bill Clinton, George H. W. Bush, and Barack Obama, have unsuccessfully lobbied for the Senate to ratify it. For the United States to retake its position as a global leader, and for the U.S. Navy to be seen as a legitimate extension of that leadership, it is time for the Senate to finally give its advice and consent to accede to UNCLOS. The Navy’s surface combatants effectively project American power abroad and enforce freedom of the seas in routine freedom of navigation operations. This mission has become especially significant in the wake of aggressive actions and provoking claims at sea made by our adversaries abroad. However, exerting military strength is not enough. The formal acceptance of UNCLOS by the United States will diplomatically support national interests abroad, secure American influence in the maritime domain, and more proactively underpin the efforts of the U.S. surface navy.

#### Ratification increases US credibility and removes the Russian/Chinese diplomatic high ground

Overfield 21 [Cornell Overfield, research analyst at CAN, 4-11-2024, "How to Defend U.S. Rights to a Million Square Kilometers of Ocean Floor", Foreign Policy, https://foreignpolicy.com/2024/04/11/unclos-continental-shelf-united-states-senate-ratify/]/Kankee

On March 25, the Russian Ministry of Foreign Affairs declared that it would not recognize the U.S. continental shelf limits announced last December, because the United States, which has still yet to ratify the United Nations Convention on the Law of the Sea (UNCLOS), acted unilaterally and illegally. Washington’s claim to exclusive rights to resources in and on almost 1 million square kilometers of seabed in the Arctic, Atlantic, and Pacific oceans was unilateral. But it was also legal. Finally ratifying UNCLOS would pull the carpet out from under cynical Russian and Chinese attempts to paint the United States as an international rule-breaker at sea. Perhaps the latest push to convince Republican senators that UNCLOS ratification is in the national interest will bear fruit. But the Biden administration must not wait idly. The State Department should lean into public messaging that explains the simple legal basis of U.S. rights to domestic and international audiences. Behind the scenes, Washington should be organizing a coalition of like-minded states to state their support for all states, including the United States, to a full continental shelf. More than 40 years on from its negotiation, UNCLOS remains unratified by the United States despite repeated efforts by presidents from both parties to secure Senate approval. Washington views UNCLOS as largely reflecting customary law binding on all states, including the United States, but remaining outside the treaty leaves Washington vulnerable to accusations that its disagreements with other states over maritime issues are illegitimate or based on nebulous, cherry-picked law. Last December, the United States updated the limits of its continental shelf, the seabed extending from the U.S. coastline. The move put almost 1 million square kilometers of seabed—rich with complex ecosystems, oil and gas, and polymetallic nodules—under U.S. jurisdiction. Under international law, countries have exclusive rights to resources in and on the continental shelf, the region of the seabed that is a continuation of land above sea level. UNCLOS establishes a set of science-based rules for determining the outer limits of a shelf and establishes an international body, the Commission on the Limits of the Continental Shelf (CLCS), to review supporting scientific data submitted by coastal states. (The United States believes it could submit its data to the CLCS even before ratifying UNCLOS but has not yet done so.) UNCLOS also requires some profit-sharing with the international community for commercial activity on the shelf beyond the exclusive economic zone (EEZ), the area stretching up to 200 nautical miles from shore. The EEZ and the continental shelf are often incorrectly confused, but one of the many key differences is that the continental shelf has a longer and firmer history that predates UNCLOS. The right to a full continental shelf is well established in customary international law and the International Court of Justice’s rulings. Indeed, the United States kicked off the formation of those rules with the Truman Proclamation in 1945. Additionally, the United States (as well as Russia) is a party to the 1958 Convention on the Continental Shelf, which also affirms the right to a continental shelf. The Russian foreign ministry alleged that Washington’s “unilateral steps are not in accordance with established international law, rules, and procedures.” It noted that the Russian delegation at the International Seabed Authority had criticized the United States’ “chosen course, which uses norms of international law stressing rights and completely ignoring obligations,” as just the latest example of its attempts to exploit UNCLOS purely for its own interests. This, along with some scholarly and expert commentary, appears to fixate on the idea that by clarifying the limits of its continental shelf in line with UNCLOS standards, the United States is somehow getting more than it deserves as a nonparty to UNCLOS. In fact, the U.S. commitment to the shelf criteria laid out in UNCLOS likely limits it more than the standards that actually apply to it as a matter of treaty law. The 1958 convention simply defines the continental shelf as the seabed and subsoil “to a depth of 200 metres or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas.” Under the 1958 convention, if you can mine it, you can claim it—and given the state of mining technology, most regions could arguably be exploited. In contrast, UNCLOS introduces a set of limiting technical criteria such as the thickness of the shelf or distance from shore. Setting aside the question of whether the UNCLOS criteria are customary international law (the answer: probably), the United States could well have made a more expansive claim under the 1958 convention but chose to limit itself and play by the same rules as other countries. Russian and Chinese complaints about U.S. rule-breaking have an easy fix: The Senate should ratify UNCLOS. At a time when the United States stresses the idea of a rules-based international order, ratification would plug a glaring gap in the U.S. position that opens it to charges of hypocrisy. Conservative critics of UNCLOS at the Heritage Foundation and on Capitol Hill are undermining U.S. competition with China. Their position impedes U.S. access to critical resources. It misses opportunities to strengthen alliances in the Western Pacific around a shared commitment to uphold UNCLOS against Beijing’s excessive claims and illegal behaviors. And it cedes ground to China in a vitally important rhetorical battle about the power and role of international rules as a check on dangerous behavior. But the Biden administration should not wait for Republicans to back UNCLOS to act. The U.S. case and position are simple and defensible even if it would be a slam dunk if the country were also a party to UNCLOS. The administration should push a message in domestic and international media that the rules-based international order is more than one convention, that U.S. claims rest on a strong legal foundation based on this larger ecosystem of rules and treaties, and that the United States is a major provider of global order at sea. Domestically, the Biden administration can also play up the acquisitive element of the U.S. position by putting the claim in geographic and economic context and highlighting the opportunities it presents for environmental conservation and economic growth. Additionally, the United States should seek support from like-minded states such as Canada, Japan, and European Union members to secure explicit, public statements supporting the right of all states, including the United States, to a full continental shelf. Such statements would support U.S. messaging that it is not acting unilaterally, cherry-picking law to its own benefit. Allies in Europe and East Asia are obvious candidates for such a statement, but Washington could look to the limited number of other UNCLOS nonparties, such as Colombia and Peru, for non-Western reinforcement. The U.S. shelf is justified by law and extensive scientific survey. But resting on this is to miss an opportunity to further the U.S. goal of defending a rules-based international order against Russian and Chinese efforts to undermine and replace this system. Both public and traditional diplomacy can reinforce the U.S. position and help fend off charges that U.S. rhetoric about a rules-based international order is a self-serving farce. And just as Russia’s invasion of Ukraine brought the very NATO expansion Moscow sought to avert, perhaps advocates of UNCLOS can exploit Beijing’s and Moscow’s latest cynical accusations to spur Senate Republicans to long-overdue action: ratifying UNCLOS.

#### Ratification bolsters the US SCS position and undercuts critics

Darmawan 21 [Aristyo Rizka Darmawan, Lecturer in International Law and researcher at the Centre for Sustainable Ocean Policy at Universitas Indonesia, 2-5-2021, "The USA and UNCLOS: Time to Ratify", Fulcrum, https://fulcrum.sg/the-usa-and-unclos-time-to-ratify/]/Kankee

There is some unfinished business in the US foreign policy from well before Donald Trump’s single term as president that the Biden Administration and Democrat-controlled Senate should complete. Ratifying the United Nations Convention on the Law of the Sea (UNCLOS) would advance the administration’s foreign policy priorities and help it in Southeast Asia and the wider Indo-Pacific live up to its rhetoric on American leadership and multilateralism. Despite participating in all of the UNCLOS negotiations from 1974 to 1982, the US only signed the convention in 1994. Since then the Senate has failed to ratify it despite the introduction of an UNCLOS implementing agreement to address American reservations about the seabed chapter that delayed US signing on. The executive’s last serious effort to convince the Senate to ratify UNCLOS came in 2004 when the Joint Chiefs, the Chief of Naval Operations, all combatant commanders, and energy companies with seabed interests encouraged the Senate to consider ratification. Currently, the US only recognises most parts of UNCLOS as customary international law, a weaker position than ratification and one that leaves the US open to criticism from UNCLOS ratifiers like China. President Biden should seek to leverage his years in Congress and the relationships he has built over this time in the Senate to mount a larger ratification campaign than the one that failed fifteen years ago. Seasoned US legal experts though think that UNCLOS ratification will remain in the “too hard basket” and the Biden administration will seek to revive US leadership elsewhere. The latest developments in the Indo-Pacific, however, suggest there has never been a more important time for the US to join the 168 parties that have ratified the convention of the global maritime rules-based order. As China’s influence grows and challenges to the international maritime legal order mount, particularly in the South China Sea, American efforts to push back and rally others against this Chinese challenge are undercut by UNCLOS non-ratification. In the last several years, China has become more aggressive in asserting its extensive claims in the South China Sea. There has been a serious standoff involving the China Coast Guard and other claimant states such as the Philippines, Malaysia, and Vietnam. Earlier this year, China enacted a Coast Guard Law that authorises its Coast Guard to fire on foreign vessels in their claimed maritime area if deemed necessary. With this new law, it is most likely that there will be more maritime incidents and more dangerous ones in the South China Sea. In response, even though the US has not ratified UNCLOS, it has tried to defend and enforce the freedoms of the sea as provided for by UNCLOS by conducting regular freedom of navigation operations (FONOPs) to challenge the maritime rights claimed by coastal states that the US holds as unlawful under UNCLOS. These include China’s unlawful claims in the South China Sea. Last year, the US Coast Guard issued its illegal, unreported, and unregulated fishing (IUUF) strategic outlook that underscores the importance of a US leadership role in eradicating IUUF. US FONOPs and IUFF activities in Southeast Asia would gain more support and legitimacy if the US ratified UNCLOS as would the pursuit of its desired leadership role. It would also preclude further Chinese criticisms of US non-ratification. It is the US’ interest to underwrite the rules-based maritime order for the peaceful and secure freedom of navigation and to counter China’s hegemonic and bullying actions in the South China Sea. Taking into account the changing geopolitical situation and the maritime security challenges that face the Indo-Pacific today, US ratification of UNCLOS would enhance the legitimacy and acceptance of US FONOPs and show America’s strong commitment to preserving international law and the rules-based international order in the Indo-Pacific. President Biden and the US Senate the time has come to join UNCLOS.

#### SCS tensions risk US-China war – UN involvement is key

Wittner 20 [Lawrence S. Wittner, professor of History at the University of New York/Albany with a Ph.D. in History from Columbia University, 08-04-2020, "China and the United States Could Avoid an Unnecessary War", ZNetwork, https://znetwork.org/zblogs/china-and-the-united-states-could-avoid-an-unnecessary-war/]/Kankee

Although few Americans seem to have noticed, China and the United States are currently on a collision course—one that could easily lead to war. Their dispute, which has reached the level of military confrontation, concerns control of the South China Sea. For many years, China has claimed sovereignty over 90 percent of this vast, island-studded region—a major maritime trade route rich in oil, natural gas, and lucrative fishing areas. But competing claims for portions of the South China Sea have been made for decades by other nations that adjoin it, including Brunei, Malaysia, the Philippines, Taiwan, and Vietnam. Starting in 2013, China began to assert its control more forcefully by island-building in the Paracel and Spratly Islands—expanding island size or creating new islands while constructing ports, airstrips, and military installations on them. Other countries, however, protested Chinese behavior. In 2016, the Permanent Court of Arbitration at the Hague, acting on a complaint by the Philippines that Chinese action violated the freedom of navigation guaranteed by the UN Convention on the Law of the Sea, decided in favor of the Philippines, although it did not rule on the ownership of the islands. In response, the government of China, a party to the UN treaty, refused to accept the court’s jurisdiction. Meanwhile, the U.S. government, which was not a party to the treaty, insisted on the treaty’s guarantee of free navigation and proceeded to challenge China by sailing its warships through waters claimed by the Chinese government. Actually, the positions of the Chinese and U.S. governments both have some merit. The Chinese, after all, conducted a variety of operations in this maritime region for millennia. Also, some of the islands are currently controlled by other claimants (such as Vietnam), and China has been working for years with the Association of Southeast Asian Nations on a Code of Conduct that might finally resolve the regional dispute. Nevertheless, the U.S. government can point to China’s provocative militarization of the islands, the rejection of China’s stance by most other nations in Southeast Asia, and the ruling of the Permanent Court of Arbitration. But the bottom line is that the issue of legitimate control remains unclear and, meanwhile, both the Chinese and U.S. governments are engaging in reckless behavior that could lead to disaster. The U.S. military buildup in the South China Sea is quite striking. As defense analyst Michael Klare wrote recently: “Every Pacific-based US submarine is now deployed in the area . . . the Air Force has sent B-1 bombers overhead; and the Army is practicing to seize Chinese-claimed islands.” Furthermore, in the past few months, the U.S. Navy has repeatedly sent missile-armed destroyers on provocative “freedom of navigation operations” into the waters just off the Chinese-occupied islands. In July alone, the U.S. government deployed two nuclear-powered aircraft carriers (the USS Nimitz and the USS Ronald Reagan) to the South China Sea, accompanied by squadrons of cruisers, destroyers, and submarines. This powerful U.S. armada was reinforced by two supersonic bombers and a nuclear-capable B-52 Stratofortress. In response, China’s government has vigorous reasserted China’s claims in the South China Sea. To demonstrate its determination, it has frequently deployed ships and planes of its own to shadow or harass American warships, sometimes escorting them out of the area. At the same time, it has stepped up Chinese naval operations in the East and South China Seas. In April, China’s first operational aircraft carrier, the Liaoning, moved into the region. “China has several times experienced the threats posed by the U.S. in the [South China] Sea,” a retired Chinese naval officer announced on government media. But “China’s resolve to safeguard its territorial integrity, sovereignty, and maritime interests will not waver [after] the latest threat posed by the U.S. The Chinese military is prepared and will deal with the threat.” This growing military confrontation has been accompanied by an escalating war of words. Although previous U.S. policy called for a peaceful resolution of the South China Sea dispute between China and its neighbors, U.S. Secretary of State Mike Pompeo recently announced a much harder line. In an official statement on July 13, he declared that “Beijing’s claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them.” The United States “stands with our Southeast Asian allies and partners in protecting their sovereign rights.” On July 23, Pompeo issued an inflammatory, across-the-board denunciation of China’s foreign and domestic policies, proclaiming that “the free world will triumph over this new tyranny.” Responding to Pompeo, a spokesperson for the Chinese Foreign Ministry claimed that China was working with all parties to the South China Sea dispute to settle it through negotiations. By contrast, he said, U.S. military operations in the area were designed to create tensions in the region. Furthermore, it was the U.S. government that violated international law and withdrew from international organizations and treaties. Clearly, despite their professed concern for international law, the governments of the United States and China are engaged in a 21st century-style gunboat diplomacy—one that, either intentionally or unintentionally, could escalate into war, even nuclear war. If these two nuclear-armed governments are serious about settling the dispute over control of the South China Sea, they should call a halt to their provocative military operations and leave the job of sorting things out to the United Nations. After all, resolving international conflicts is why the United States, China, and other countries created the world organization in the first place. No single nation, however powerful its military forces, has the respect and credibility in the world community that the United Nations enjoys. Nor does it have the legitimacy. It’s time the governments of these two nations recognized these facts and ceased their threatening and dangerous military behavior.

#### Ratification avoids escalatory SCS miscalculation, increases US credibility, and strengthens alliances

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B. Position the United States to Challenge Divergent Practices Defense officials acknowledge that U.S. credibility is compromised since it is shut out of important multilateral venues.390 This includes, of course, the ongoing COC negotiations. If concluded, the COC would offer a competing interpretation of the law of the sea.391 Further, as a regional instrument, the COC would hasten the creation of customary norms because of the SCS’s significance to global transit and UNCLOS parties’ obligation to settle disputes through bilateral and regional means.392 For example, it is possible the COC will codify a coastal State’s right to require pre-authorization of warships to transit the territorial sea.393 This provision will be binding on the SCS parties. Most other States will likely acquiesce to the new norm so as to maintain friendly relations with China, a significant regional power and trading partner.394 The United States, however, is uniquely positioned, not merely because it can better afford the economic costs of challenging China, but because it offers an economic alternative for allies to rally behind. However, such allies will remain hesitant if the United States’ only means of mounting a challenge is through gunboat diplomacy.395 Without the legitimacy and stability UNCLOS provides, the United States is at a marked disadvantage for building a coalition to challenge divergent interpretations of the law.396 Ratification would not single-handedly interrupt the COC’s disruptive potential. But it would empower the United States and its allies with the tools needed to confront Chinese overreach.397 In particular, it would offer diplomatic avenues to avoid conflicts as well as peaceful dispute settlement mechanisms to resolve them.398 But more important, it would allow the United States to present a unified front along with its allies, backed by the authority of the law, with the real potential of prosecuting its interpretation of the law of the sea on the international stage. 1. Stronger Relations with Regional Allies Nonmembership impedes U.S. credibility.399 As Admiral John M. Richardson noted, “[W]e undermine our leverage by not signing up to the same rule book by which we are asking other countries to accept.”400 But ratification would do more than simply avoid diplomatic sanctimony;401 it would overcome concrete challenges that stand in the way of building meaningful relationships with international partners.402 At the same time, China continually cites U.S. nonmembership to dismiss U.S. criticism off hand.403 Strategic and diplomatic experts note that U.S. nonmembership inhibits its ability to cooperate, even with allies, in areas related to the law of the sea.404 Because the United States cannot operate within the framework to challenge divergent behavior, its only practical recourse is FONOPS.405 This leaves allies uneasy that they, not the United States, will bear the brunt of Chinese reprisals. The United States can assume the risk and attendant costs of such disruptive measures, but many of its allies cannot.406 Thus, U.S. allies see U.S. nonmembership as a liability and as a condition more likely to disrupt and frustrate regional stability than achieve strategic goals.407 Ratification would help accelerate the convergence of State practice by assuaging these concerns and enabling more meaningful coalitions. 2. Access to International Courts Ratification also provides useful tools to challenge divergent practices, most notably access to dispute settlement mechanisms. The Part XV regime provides an efficient mechanism to enforce the law in its current form.408 The lack of access to dispute fora frustrates the United States’ ability to weigh in when adversaries challenge its or its allies’ interpretation of the law. For example, when the United States asked to participate in the South China Sea Arbitration in support of the Philippines, the tribunal denied Washington observer status.409 Similarly, throughout the 2018 Kirk Strait incident,410 the United States was unable to mount a direct legal challenge in defense of Kyiv after Russia seized three Ukrainian ships and their crew in violation of international law, even after the International Tribunal for the Law of the Sea (ITLOS) voted 19–1 in a provisional order that Russia must return the ships and crews to Ukrainian custody.411 Without access to international tribunals, the United States cannot obtain a conclusive answer on the interpretation of the law, which is functionally the most decisive means of both encouraging convergence of State practice and discouraging divergent practice.412 3. Reduce Tensions in the South China Sea Ratification would lend the United States legitimacy and credibility in the maritime domain. Ratification would signal U.S. seriousness in maintaining a robust FON policy while at the same time demonstrating its commitment to peaceful, nonescalatory, and nonprovocative means of managing great power competition, especially in the SCS where rising tensions have the potential of global implications.413 The U.S. Navy boasts impressive size, capability, and competence. But this does not make it the only, or even the best, tool for effecting U.S. policy. As President Obama remarked, “Just because we have the best hammer does not mean that every problem is a nail.”414 Defense experts continue to warn that “the force of arms does not have to be and should not be our only national security instrument.”415 Further, FONOPS are deleterious to other avenues of resolution. They send confusing signals to allies and adversaries alike. Most obviously, FONOPS place disputing vessels in close proximity, increasing the potential for accidents, which are dangerous at sea but when coupled with the risk of escalation can quickly become catastrophic.416 Ratifying the treaty would ensure that when the United States does resort to FONOPS, the message is credible and clear.417 C. Shape the Future of the Law of the Sea UNCLOS provides a single framework for shaping development of the law of the sea through both settlement and amendment mechanisms.418 As new issues arise, the UNCLOS framework, and the formal and informal channels between member States, will be the first place discussions take place. By choosing not to participate in these discussions, the United States is closing the door on the opportunity to shape the future of the law of the sea.419 The law of the sea, as well as the global oceans themselves, is under constant stress. Climate change, for example, is opening new areas of the law, both physically and conceptually.420 UNCLOS is the only legal framework to govern emerging disputes in the Arctic as melting icecaps expose navigable sea lanes; however, the United States is the only Arctic State that has not ratified the treaty.421 Similarly, advancements in passive intelligence, surveillance, and reconnaissance (ISR) capabilities;422 the emergence of uncrewed maritime vehicles;423 shifting attitudes toward nuclear powered vessels;424 and even high orbit satellites425 are all law of the sea challenges that have direct effect on U.S. FON.426 By not being a member, the United States has abdicated its seat at the table where these debates are taking place. UNCLOS establishes a conceptual starting point for balancing the principles of freedom and sovereignty to guide future development.427 This balance, however, is susceptible to erosion.428 U.S. ratification would signal its commitment to the balance struck in UNCLOS and provide like-minded States the diplomatic support to advocate for the same. CONCLUSION The reach of the modern law of the sea can be dizzying. It exists on a foundation of both customary international law and conventional treaty law. It implicates everything from national security to trade, fishing, energy, the environment, and individual enjoyment of the oceans. And it occupies a rare status in international relations as practically all States recognize the clear benefit and need of legal standardization. If past is prologue, there is little doubt that the global oceans will continue to be a central arena of great power competition—and the SCS will be its main stage. As powers vie for influence in the SCS, as emerging technologies and geopolitical winds shift, and as the law develops to keep pace, tensions will remain. In particular, as competing superpowers, the United States and China, maneuver to entrench their visions of the rules governing the global oceans, their navies, diplomats, and proxies will be placed in uncomfortably close quarters. To repurpose the proverbial sentiment, when great ships play chicken the wake disrupts the sea. A single strategic miscalculation or tactical misstep when navigating these tensions could lead to disastrous consequences. Getting it right is important. The U.S. position on the law of the sea stands on shaky legs. The United States cannot rely on customary law to protect key U.S. FON provisions. Customary law is inherently indeterminate, volatile, and subject to reinterpretation. Ratification bypasses these shortcomings by providing a firm legal foundation with embedded dispute settlement mechanisms, which together offer stability, predictability, and a rule set that is remarkably favorable to U.S. interests. Of course, opponents raise valid concerns. Ratification would subject the United States to international courts, but the benefits of having recourse to a court with the jurisdiction to peacefully settle disputes has been undervalued. Far from being an abdication of congressional responsibility or a degradation of U.S. sovereignty, ratification would amplify the voice of U.S. policymakers to shape the law and to express and protect U.S. interests. Ratification would open the doors to important venues for U.S. leadership, thereby augmenting, not undermining, sovereignty. After all, given that the United States already abides by the treaty provisions, formal accession to the treaty would signal to the world that U.S.-styled FON is and will continue to be the global norm. In sum, global oceans challenges will continue to complicate U.S. interests and security. The law, the world, and the sea are all rapidly changing. The question is, will the United States be positioned to effectively cope? Although at one point ratifying UNCLOS may have threatened U.S. interests, the strategic environment has shifted. Today, it is not ratifying that carries the greater risk.

#### Ratification helps solve Arctic and SCS crises

Schrepferman 19 [Will Schrepferman, Associate Editor and Staff Writer for the HIR, 10-31-2019, "Hypocri-sea: The United States’ Failure to Join the UN Convention on the Law of the Sea", Harvard International Review, https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/]Kankee

The United Nations Convention on the Law of the Seas (or UNCLOS) has been described as “the constitution of the oceans.” Originally finalized in 1982, UNCLOS’ 320 articles and nine annexes represent arguably the most holistic codification of international law in history. One hundred and fifty seven nations have signed on to the treaty and agreed to its wide-ranging provisions on topics such as coastal sovereignty, conservation and ocean resource management, and the freedom of the high seas. One thing, though, is missing from the Convention: the signature of the United States of America. The United States faces critical issues that fall under the purview of UNCLOS, and its refusal to accede to the treaty undermines its ability to conduct foreign policy. The Arctic and the South China Sea America's relationship with UNCLOS is affecting two key issues in the Arctic Ocean and the South China Sea. The Arctic is strategically significant for several reasons. First, the United States has several refueling bases and missile stations located in the Arctic circle, impacting national security; second, Russia has claimed territory in the region on the basis of an extended continental shelf, creating a geopolitical conflict over resource extraction. The United States has implicitly opposed these claims by emphasizing its desire to conduct business in the Arctic within the scope of international law. Similarly, the South China Sea is fraught with national security and geopolitical issues for the United States. China claims vast swaths of territory in the South China Sea based on the historical precedence of the so-called “Nine-Dash Line,” which it has used for justification of expanding military assets and claims to key islands in the region over the course of recent decades. These claims are disputed internationally, including by the United States, which as recently as August of 2019 conducted operations in the region. Commander Ream Mommsen of the United States Navy’s Seventh Fleet explained that these exercises were intended “to challenge excessive maritime claims and preserve access to the waterways as governed by international law.” The United States and UNCLOS Both of these issues share a similar quality: the United States justifies its own actions and seeks to oppose those of Russia in the Arctic and China in the South China Sea on the grounds of international law. On the former issue, UNCLOS explicitly lays out the process and limitations of continental shelf territorial claims and resource extraction. On the latter, it lays out explicitly the process for claiming territory along the basis of islands and historical precedent. However, the United States cannot claim Russia and China to be in violation of a treaty that it is not a party to. When UNCLOS was initially signed in 1982, the Reagan administration refused to accede based on disagreements regarding deep seabed mining. Despite revisions to the treaty in 1994, the Senate refused to hold hearings on the matter. Although Senator Richard Lugar of Indiana finally held hearings in 2004 and the Senate Foreign Relations Committee unanimously recommended adopting the treaty, no further action was taken by the Senate. Opponents of ratification cite their main concern as not wanting to give up any of the United States’ sovereignty; Senators Rob Portman and Kelly Ayotte stated in a 2012 letter that “No international organization owns the seas.” This repeated inaction and bureaucratic slow-balling has left administration after administration in limbo. Thad Allen, co-chair of the Council on Foreign Relations’ Independent Task Force on the Arctic, describes how UNCLOS “is the redoubtable international regime for governing how nations interact with each other, how claims are made beyond the extent of the continental shelf, and how nations actually have a basis for legal claims, for boundary disputes, and so forth. There is no other document, treaty, or framework in place that does that.” The United States is unable to have a voice, or at the very least its voice is significantly undermined, by not being a part of that process. The same is true of the South China Sea; Senator Ben Cardin (D-MD) argues that the United States’ failure to join UNCLOS provides justification to China for their flouting of international law in the South China Sea. In order to uphold international law, Cardin states that joining UNCLOS “would communicate that for the United States, resolution of maritime disputes in the South China Sea is not a question of being for or against any particular country or its claims, but rather for being on the side of international law, institutions and norms.” The United States’ failure to join UNCLOS is representative of the broader foreign policy trend to reject multilateral engagement for unilateral interests. This is a poor precedent to set; as illustrated by the Arctic and the South China Sea, the United States could do far more for its interests and the world’s as a whole by embracing a more multilateral approach and acceding to the Convention.

#### Ratification makes US critique not ring hollow, increasing its deterrent effect on China

Deol 22 [Nealie Deol, researcher at the Brown Political Review, 4-26-2022, "How Ratifying UNCLOS Can Help the US Counter China’s Aggressive Activities and Unlawful Maritime Claims in the South China Sea", Brown Political Review, https://brownpoliticalreview.org/2022/04/ratify-unclos-to-counter-china/]/Kankee

The US State Department recently concluded that the People’s Republic of China’s (PRC) maritime claims in the South China Sea contravene international law under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Indeed, the PRC has baselessly asserted sovereignty over most of the Sea and leveraged such purported rights into environmentally damaging island construction projects—all of which violate UNCLOS, as determined by an international tribunal. The State Department’s analysis, however, suffers from one glaring piece of hypocrisy: The United States itself has yet to ratify the convention. Even though the United States participated in all UNCLOS negotiations from 1974 to 1982 and currently recognizes the treaty as customary international law, Republican circles have long stymied accession on the belief that it would compromise US sovereign power and do little to counter the PRC’s incursions in the South China Sea. Until the United States joins the 167 other nations, plus the EU, that have already ratified UNCLOS, its condemnations of the PRC lack credibility and fail to deter Beijing’s transgressions. The recent legislative push by Democratic members of congress to uphold UNCLOS thus presents a crucial opportunity for the country to strengthen its pushback against the PRC by aligning with the international community on a shared legal framework for maritime conduct. The PRC has consistently engaged in aggressive land reclamation projects in the South China Sea with detrimental environmental repercussions. Starting in 2015, the PRC began constructing artificial islands in the disputed archipelago of the Spratly Islands to serve as military outposts. The PRC has developed installations on these islands ranging from airstrips and ports, which extend the reach of its planes and ships, to radar facilities, which enhance its surveillance capabilities over the surrounding area. While the PRC’s militarization of the South China Sea evidently carries significant geopolitical and security implications for the adjacent nations, it has on a more immediate level harmed the nearby marine environment. The dredging process required for island building has destroyed many of the South China Sea’s coral reefs, which harbor the largest concentration of marine biodiversity on the planet. Dredging also creates plumes of sediment and corrosive sand, which mix with toxic contaminants from ships and block sunlight and oxygen from reaching underwater species. Scientists have quantified the scope of these plumes and the resulting decreases in absorption and chlorophyll levels, concluding that island building considerably damaged the biological health of the South China Sea. The PRC bases its activities in the South China Sea on historic rights to the region, but these claims violate international law under UNCLOS. Dating back to 1947, the PRC has insisted that the vaguely defined sector enclosed by a U-shaped nine-dash line running along the coasts of Vietnam, Malaysia, Brunei, Indonesia, the Philippines, and Taiwan falls under its domain. Specifically, the PRC asserted sovereignty over the features and waters within the line and historic rights over fishing, navigation, and resource development. A five-judge tribunal at the Permanent Court of Arbitration, however, unanimously and unequivocally invalidated the PRC’s nine-dash line and historic rights claims in 2016—three years after the Philippines initiated proceedings against the PRC to clarify their respective maritime entitlements. The tribunal determined that, “to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent they were incompatible with the exclusive economic zones provided for in [UNCLOS].” In other words, the Philippines’ sovereign rights in the exclusive economic zone granted by UNCLOS trumped whatever precedent the PRC had relied on. Furthermore, the tribunal commented on China’s island building operations, clarifying that the natural conditions of some of the maritime features on which they were erected prohibited them from ever being officially classified as islands with their own exclusive economic zones. The PRC received censure for “caus[ing] severe harm to the coral reef environment and violat[ing] its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species” given its ratification of UNCLOS (among other ostensible environmental commitments). The PRC, which refused to participate in the tribunal’s proceedings from the beginning, unsurprisingly rejected the above conclusions in a white paper reiterating its South China Sea claims. While this revised articulation did not allude to the nine-dashed line, the PRC asserted sovereignty over four main groups of islands and maritime features and declared exclusive economic zones around them. Drawing on familiar justifications rooted in historic rights, the PRC based its “territorial sovereignty and relevant rights and interests in the South China Sea” on the contention that “China is the first to have discovered, named, and explored and exploited [the maritime features] and relevant waters, and the first to have exercised sovereignty and jurisdiction over them continuously, peacefully, and effectively.” Subsequent notes verbales from the PRC to the Secretary-General of the UN between 2019 and 2021 showed the PRC continuing to appeal to “the long course of historical practice,” “historic rights,” and “abundant historical and legal evidence” to uphold its aggressive activities in the South China Sea. In some communications, the PRC even went so far as to argue that it was acting in accord with UNCLOS and all relevant international law. The United States under both the Trump and Biden administrations has, in alignment with the tribunal’s decision, objected to the PRC’s maritime claims in the South China Sea on the grounds that they violate international law. Such denunciations, however, lack credibility given that the United States has still not ratified UNCLOS despite having participated in its formulation. Republicans like Senator Rob Portman of Ohio, who voted to prevent ratification in 2012, have for years harbored concerns that UNCLOS would inhibit US interests abroad and expressed skepticism about international bodies’ ability to enforce its provisions. In the case of the PRC’s South China Sea claims, this mindset is counterintuitive and defeatist. US military leadership supports ratification, as evidenced by recent confirmation hearings. Commandant of the US Coast Guard, Admiral Karl Schultz gave his “full-throated” approval, while Vice Chairman of the Joint Chiefs of Staff Admiral Christopher Grady identified that the US “undermines [its] leverage by not signing up to the same rule book which we are asking other countries to accept.” A newfound push by Democratic members of Congress to ratify UNCLOS presents a pivotal opportunity for the United States to bolster its opposition to the PRC’s spurious maritime claims in the South China Sea. In February, the House passed a motion expressing that it was in US national interest to ratify UNCLOS in light of the PRC’s increasingly disruptive operations. As Representative Ami Bera, a cosponsor of the amendment and Chairman of the House Subcommittee on Asia, the Pacific, Central, and Nonproliferation, articulated, “Ratifying UNCLOS strengthens [US] ability to support [its] allies and partners in advancing a free, open, secure Indo-Pacific, and gives the United States more leadership and credibility as [it] continues to fly, sail, and operate wherever international law allows.” Ratification would require President Biden’s support, a vote of approval from the Senate Foreign Relations Committee, and 67 votes out of an evenly divided Senate. While the latter seems an impossible feat, Biden would do well to advocate the importance of UNCLOS, for the issues of the South China Sea go beyond mere territorial spats. Rather, they pertain to broader national priorities of promoting a rules-based maritime order, protecting marine environments, and emphasizing international solidarity in a time of conflict and upheaval.

#### China threatens maritime law and the oceanic global commons – US ratification is a key counterbalance

Pedrozo 22 [Raul (Pete) Pedrozo, Howard S. Levie Professor of the Law of Armed Conflict at the Stockton Center for International Law at the U.S. Naval War College and Principal Deputy Staff Judge Advocate, U.S. Indo-Pacific Command, 2022, “Reflecting on UNCLOS Forty Years Later: What Worked, What Failed,” International Law Studies, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3033&context=ils]/Kankee

That explains why all U.S. administrations since the modification of Part XI in 1994 have supported U.S. accession to UNCLOS. As both a coastal State with one of the largest and richest EEZs in the world and the world’s preeminent naval power, the United States will benefit by becoming a party to UNCLOS. The three primary benefits inherent in the Convention include: • UNCLOS advances U.S. interests as a global maritime power by preserving the right of U.S. naval and air forces and commercial vessels engaged in maritime trade to access the world’s oceans to advance U.S. national security and economic interests. • UNCLOS advances U.S. coastal State interests by providing exclusive sovereign rights to the living and non-living resources in the EEZ and on the continental shelf. The deep seabed mining regime in Part XI was fundamentally changed to appease the United States and other industrialized nations, satisfactorily addresses all of President Reagan’s 1982 objections, and now provides an acceptable, stable regime for mining deep seabed minerals if such activities occur in the future.386 Since the end of the Second World War, the United States has led efforts to develop a “widely accepted international framework governing uses of the seas.”387 UNCLOS achieves that objective. Granted, U.S. accession to the Convention will not make excessive claims fade away overnight. There will always be States that will purport to assert competencies and authorities at sea that are inconsistent with long-standing international norms. China, for example, is a serial violator of the Convention despite being a party since 1996.388 Virtually all its domestic maritime laws and regulations are inconsistent with UNCLOS and customary international law. China’s recent refusal to observe the 2016 decision of the arbitral tribunal in the South China Sea arbitration case reconfirms Beijing’s disdain for the international rules-based legal order codified in the Convention and its propensity to disregard its international legal obligations. China claims illegal straight baselines along its mainland coast, around the Paracel Islands, and portions of the Senkaku (Diaoyu) Islands. Most of China’s mainland coast does not meet the geographic criteria in Article 7 for establishing straight baselines. Moreover, as a continental State, China’s use of archipelagic straight baselines to enclose the Paracels and Senkakus is clearly inconsistent with Articles 46 and 47. China also claims the Gulf of Bohai (Pohai) and the Hainan (Qiongzhou) Strait as internal historic waters. Yet, neither claim meets the criteria for establishing a valid claim to historic waters. Contrary to Article 17, China illegally conditions the right of innocent passage of foreign warships on prior consent. Beijing also unlawfully claims security jurisdiction in its contiguous zone, contrary to the precise language of Article 33, which limits coastal State competencies in the zone to customs, fiscal, immigration, and sanitary matters. China additionally purports to regulate foreign military activities in the EEZ, which is inconsistent with Article 58, long-standing State practice, and the negotiating history of the Convention. Similarly, China’s 2002 Surveying and Mapping Law illegally asserts jurisdiction over all marine data collection in its EEZ even though Article 56 only grants coastal States exclusive jurisdiction over MSR. Finally, China’s attempt to regulate overflight of its EEZ by establishing an Air Defense Identification Zone in international airspace in the East China Sea has no basis in UNCLOS, the Chicago Convention, or customary international law. China’s flagrant disregard of the international legal order and unsettling pattern of coercive behavior undermines the rule of law and the liberal order of the world’s oceans. As the world’s preeminent maritime power, the United States can best help counterbalance China’s egregious maritime claims and disdain for international norms and standards by becoming a party to UNCLOS. By joining the Convention, the United States will be in a better position to ensure that the law of the sea is interpreted and evolves in a way that preserves the rules-based legal order that has brought peace and stability to the world’s oceans.

#### Freedom of the seas prevents economic collapse, rampant piracy, and Russian/Chinese maritime grabs

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Very few Americans—or, for that matter, very few people on the planet—can remember a time when freedom of the seas was in question. But for most of human history, there was no such guarantee. Pirates, predatory states, and the fleets of great powers did as they pleased. The current reality, which dates only to the end of World War II, makes possible the commercial shipping that handles more than 80 percent of all global trade by volume—oil and natural gas, grain and raw ores, manufactured goods of every kind. Because freedom of the seas, in our lifetime, has seemed like a default condition, it is easy to think of it—if we think of it at all—as akin to Earth’s rotation or the force of gravity: as just the way things are, rather than as a man-made construct that needs to be maintained and enforced.

But what if the safe transit of ships could no longer be assumed? What if the oceans were no longer free? Every now and again, Americans are suddenly reminded of how much they depend on the uninterrupted movement of ships around the world for their lifestyle, their livelihood, even their life. In 2021, the grounding of the container ship Ever Given blocked the Suez Canal, forcing vessels shuttling between Asia and Europe to divert around Africa, delaying their passage and driving up costs. A few months later, largely because of disruptions caused by the coronavirus pandemic, more than 100 container ships were stacked up outside the California Ports of Long Beach and Los Angeles, snarling supply chains throughout the country. These events were temporary, if expensive. Imagine, though, a more permanent breakdown. A humiliated Russia could declare a large portion of the Arctic Ocean to be its own territorial waters, twisting the United Nations Convention on the Law of the Sea to support its claim. Russia would then allow its allies access to this route while denying it to those who dared to oppose its wishes. Neither the U.S. Navy, which has not built an Arctic-rated surface warship since the 1950s, nor any other NATO nation is currently equipped to resist such a gambit. Or maybe the first to move would be Xi Jinping, shoring up his domestic standing by attempting to seize Taiwan and using China’s anti-ship ballistic missiles and other weapons to keep Western navies at bay. An emboldened China might then seek to cement its claim over large portions of the East China Sea and the entirety of the South China Sea as territorial waters. It could impose large tariffs and transfer fees on the bulk carriers that transit the region. Local officials might demand bribes to speed their passage. Once one nation decided to act in this manner, others would follow, claiming enlarged territorial waters of their own, and extracting what they could from the commerce that flows through them. The edges and interstices of this patchwork of competing claims would provide openings for piracy and lawlessness. The great container ships and tankers of today would disappear, replaced by smaller, faster cargo vessels capable of moving rare and valuable goods past pirates and corrupt officials. The cruise-ship business, which drives many tourist economies, would falter in the face of potential hijackings. A single such incident might create a cascade of failure throughout the entire industry. Once-busy sea lanes would lose their traffic. For lack of activity and maintenance, passages such as the Panama and Suez Canals might silt up. Natural choke points such as the straits of Gibraltar, Hormuz, Malacca, and Sunda could return to their historic roles as havens for predators. The free seas that now surround us, as essential as the air we breathe, would be no more. If oceanic trade declines, markets would turn inward, perhaps setting off a second Great Depression. Nations would be reduced to living off their own natural resources, or those they could buy—or take—from their immediate neighbors. The world’s oceans, for 70 years assumed to be a global commons, would become a no-man’s-land. This is the state of affairs that, without a moment’s thought, we have invited. Everywhere I look, I observe sea power manifesting itself—unacknowledged—in American life. When I drive past a Walmart, a BJ’s Wholesale Club, a Lowe’s, or a Home Depot, in my mind I see the container ships moving products from where they can be produced at a low price in bulk form to markets where they can be sold at a higher price to consumers. Our economy and security rely on the sea—a fact so fundamental that it should be at the center of our approach to the world. Despite my experience, I was never able to convince my mother. She spent the last years of her working life at the Walmart in my hometown, first at the checkout counter and then in accounting. My mother followed the news and was sharply curious about the world; we were close, and spoke often. She was glad that I was in the Navy, but not because she saw my work as essential to her own life. “If you like Walmart,” I often told her, “then you ought to love the U.S. Navy. It’s the Navy that makes Walmart possible.” But to her, as a mother, my naval service mostly meant that, unlike friends and cousins who deployed with the Army or Marine Corps to Iraq or Afghanistan, I probably wasn’t going to be shot at. Her perspective is consistent with a phenomenon that the strategist Seth Cropsey has called seablindness. Today, it is difficult to appreciate the scale or speed of the transformation wrought after World War II. The war destroyed or left destitute all of the world powers opposed to the concept of a mare liberum—a “free sea”—first enunciated by the Dutch philosopher Hugo Grotius in 1609. The United States and Great Britain, the two traditional proponents of a free sea, had emerged not only triumphant but also in a position of overwhelming naval dominance. Their navies were together larger than all of the other navies of the world combined. A free sea was no longer an idea. It was now a reality. In this secure environment, trade flourished. The globalizing economy, which allowed easier and cheaper access to food, energy, labor, and commodities of every kind, grew from nearly $8 trillion in 1940 to more than $100 trillion 75 years later, adjusted for inflation. With prosperity, other improvements followed. During roughly this same period, from the war to the present, the share of the world’s population in extreme poverty, getting by on less than $1.90 a day, dropped from more than 60 percent to about 10 percent. Global literacy doubled, to more than 85 percent. Global life expectancy in 1950 was 46 years. By 2019, it had risen to 73 years. All of this has depended on freedom of the seas, which in turn has depended on sea power wielded by nations—led by the United States—that believe in such freedom. But the very success of this project now threatens its future. Seablindness has become endemic.

### Contention 5: Deep Sea Mining Good (UNCLOS)

#### Deep sea mining is impossible absent UNCLOS ratification

BWC 24 [Better World Campaign Admin, 5-7-2024, "High Stakes on the High Seas: What the U.S. Stands to Gain from the UN Law of the Sea", Better World Campaign, https://betterworldcampaign.org/blog/what-the-u-s-stands-to-gain-from-the-un-law-of-the-sea]/Kankee

The ocean floor contains some of the most valuable minerals in the world. These substances – including cobalt, nickel, and manganese – fuse together in formations called nodules and are used in everything from electric cars to essential infrastructure. In 1982, as demand for such products spiked and improved engineering capabilities made deep sea mining both more efficient and more lucrative, the United Nations adopted the Convention on the Law of the Sea (UNCLOS). Its aim was to set up guardrails for mining in order to avoid the inevitable free-for-all by nations seeking to benefit, as well as codify existing international laws on freedom of navigation. Importantly, it also established the International Seabed Authority, which helps to regulate the many facets of the growing deep sea mining industry. Since then, 168 countries – including China – have signed onto this “ocean’s constitution.” And although the U.S. is not yet a party to the Law of the Sea, that soon may change. Why It Matters When UNCLOS was originally adopted by the UN General Assembly, then-President Clinton was quick to sign – a decision backed by defense, environmental and business groups. The coalition only grew, and by the time the U.S. Senate debated ratification in 2012, it included one of the broadest contingencies of supporters to any treaty – including the U.S. Navy and Coast Guard, the Natural Resources Defense Council, Ocean Conservancy, World Wildlife Fund, American Petroleum Institute, Chamber of Commerce, AFL-CIO and Seafarers Union. Unfortunately, a vocal minority in the Senate greeted the treaty with skepticism, claiming that the pact would undercut American sovereignty at worst, or at least, that adherence to the treaty would prove too onerous for companies wishing to dive into the industry. With a two-thirds majority of the Senate required for ratification, this minority viewpoint was enough to sink the treaty’s chances. With deep sea mining bubbling back to the surface, however, a push for Senate ratification is inspiring a chorus of proponents to speak out. In March, hundreds of former diplomats, military personnel, and policymakers sent a letter urging Congressional action. Their message was clear: ratify UNCLOS. Led by retired Ambassador John Negroponte, the signatories argued, “In the decade since UNCLOS was last considered by the Senate, China and Russia have taken advantage of [U.S.] absences to work actively to undermine critical United States economic and national security interests.” They warned that non-participation has already caused the U.S. to lose half of its designated deep seabed mine sites, “each containing a trillion dollars in value of the strategic minerals.” “Continued inaction,” they note, “means a likely quick loss of our remaining two designated sites. Moreover, China has moved forward to obtain five sites and the Russian Federation three and they are moving to obtain a monopoly on refining of these strategic minerals.” Their point on China is an important one. In a subsequent interview, Amb. Negroponte expressed further concern over U.S. absence from the Law of the Sea. “If [China] ends up being the largest producer and we’re not producing at all from the ocean… I think then that might place us in a difficult economic position,” he said. “If we’re not at the table and we’re not members of the Seabed Authority, we’re not going to have a voice in writing the environmental guidelines for deep seabed mining.” His remarks are well-founded. In the last two decades, China has secured five deep sea exploratory sites spanning 90,000 square miles, the most of any country. By contrast, the U.S. – because we’re not currently a party to the treaty – has none. This is also occurring at a time when Beijing is growing more assertive in the South China Seas and throughout the Pacific, where climate change threatens to wipe many small island nations off the map, leaving an untapped bounty beneath the surface. As Negroponte notes, “With respect to deep seabed mining, [China] is eating our lunch.” Writing for Foreign Policy, reporter Christina Lu puts a finer point on the strategic imperative for ratification: “U.S. lawmakers’ turn to deep-sea mining is part of Washington’s broader effort to secure alternative critical mineral supply chains and minimize potential vulnerabilities that Beijing could take advantage of. China commands the processing and refining of many of these minerals and metals — including powerful rare earth elements — a dominance that it has previously leveraged to hit back against other powers.” Russia, too, is taking advantage of U.S. non-participation in UNCLOS, leveraging its position within the body to “secure unprecedented rights in ice-covered areas and obtain recognition for sovereign rights over a sizeable continental shelf.” Jan Jakub Solski goes on to note, “The outer continental shelf regime, often considered the primary ‘carrot’ of UNCLOS, has worked in Russia’s favor, exemplified by its status as the first country to apply to the CLCS.” Absent U.S. ratification, American ships and aircraft are vulnerable to legal challenges when transiting the oceans. The U.S. can’t sponsor license applications for American companies hoping to mine in international waters. American businesses aren’t guaranteed access to our two deep seabed sites to mine critical strategic minerals. And the U.S. lacks a vital seat on the Council of the International Seabed Authority, which would provide us with a voice and a vote in important environmental rules for seabed mining. Fact is, the UN Law of the Sea is an extension of national security principles and economic interests, not a contradiction. We’d be wise to jump on board.

#### Non-participation already caused the loss of seabed mining rights from ISA

Mccartney 24 [Micah Mccartney, reporter for Newsweek educated at Missouri Southern State University, 4-8-2024, "What is UNCLOS? US advised to ratify law of the sea treaty", Newsweek, https://www.newsweek.com/us-advised-ratify-united-nations-sea-treaty-1885946]/Kankee

"In the decade since the Law of the Sea Treaty was last considered by the Senate, China and Russia have taken advantage of our absence to work actively to undermine critical United States economic and national security interests," the letter said. Without ratification, the U.S. cannot take a seat at the International Seabed Authority, the Kingston, Jamaica-headquartered U.N. organization established by UNCLOS that regulates deep-sea exploration and mining of natural resources. The letter said the country has already lost out on two of four deep seabed mine sites it could have claimed, each with an estimated trillion dollars' worth of strategic minerals like copper, rare earths, cobalt, nickel, and manganese, "minerals critical for United States security dominance as well as the transition to a greener twenty-first century." "UNCLOS is a fatally flawed treaty," Steven Groves, Margaret Thatcher fellow at the Margaret Thatcher Center for Freedom at The Heritage Foundation, told Newsweek. "Joining the convention would result in a dangerous loss of American sovereignty. It would require the U.S. Treasury to transfer billions of dollars to an unaccountable international organization in Jamaica, which in turn is empowered to redistribute those American dollars around the world. The Heritage Foundation and other conservative advocacy groups were considered instrumental in rallying enough opposition during the last attempt at ratification, in 2012, before the treaty reached the Senate floor for a full vote. "Strategically, the U.S. failure to ratify a treaty it helped negotiate and which has been almost universally embraced by the international community undermines its claim to defend the rules-based order," Greg Poling, director of the Southeast Asia Program at the Center for Strategic and International Studies think tank in Washington, D.C., told Newsweek. "Economically, the U.S. failure to ratify has left it out of the International Seabed Authority and prevented it from filing an extended continental shelf claim even as deep seabed mining is about to become a reality, so U.S. companies get to sit on their hands as China leads the way on a major new industry. Moving forward with the treaty would also lend Washington more credibility in its critiques of China's long-running territorial disputes in the East and South China Seas. "Ratifying UNCLOS would shore up U.S. allies' confidence in the United States; it would remove a People's Republic of China talking point that the U.S. says it supports the rules-based order but won't sign up to the rules," Bonnie Glaser, managing director of the Indo-Pacific Program at the German Marshall Fund of the United States, told Newsweek. Newsweek reached out to the Chinese Foreign Ministry for comment.

#### China is winning the deep-sea mining race now, cementing their monopoly on rare earths – that threatens US military dominance

Kuo 23 [Lily Kuo, Washington Post's China bureau chief, 10-19-2023, "China is set to dominate the deep sea and its wealth of rare metals", Washington Post, https://www.washingtonpost.com/world/interactive/2023/china-deep-sea-mining-military-renewable-energy/]/Kankee

When the 5,100-ton Dayang Hao, one of China’s most advanced deep-water expedition vessels, left port south of Shanghai two months ago, a red-and-white banner — the kind used to blast Communist Party exhortations — reminded the crew of their mission: “Strive, explore, contribute.” The Dayang Hao was bound for a 28,500-square-mile stretch of the Pacific Ocean between Japan and Hawaii where China has exclusive rights to prospect for lumpy, golf-ball-size rocks that are millions of years old and worth trillions of dollars. It is China’s latest contract, won in 2019, to explore for “polymetallic nodules,” which are rich in manganese, cobalt, nickel and copper — metals needed for everything from electric cars to advanced weapons systems. They lie temptingly on the ocean floor, just waiting to be hoovered up. Whether working deep at sea or on land at the headquarters of the United Nations’ seabed regulator here in Kingston, Beijing is striving to get a jump on the burgeoning industry of deep-sea mining. China already holds five of the 30 exploration licenses that the International Seabed Authority (ISA) has granted to date — the most of any country — in preparation for the start of deep-sea mining as soon as 2025. When that happens, China will have exclusive rights to excavate 92,000 square miles of international seabed — about the size of the United Kingdom — or 17 percent of the total area currently licensed by the ISA. The ocean floor is shaping up to be the world’s next theater of global resource competition — and China is set to dominate it. The sea is believed to hold several times what land does of these rare metals, which are critical for almost all of today’s electronics, clean-energy products and advanced computer chips. As countries race to cut greenhouse gas emissions, demand for these minerals is expected to skyrocket. When deep-sea mining begins, China — which already controls 95 percent of the world’s supply of rare-earth metals and produces three-quarters of all lithium-ion batteries — will extend its chokehold over emerging industries like clean energy. Mining will also give Beijing a potent new tool in its escalating rivalry with the United States. As a sign of how these resources could be weaponized, China in August started restricting exports of two metals that are key to U.S. defense systems. “If China can take the lead in seabed mining, it really has the lock on access to all the key minerals for the 21st-century green economy,” said Carla Freeman, senior expert for China at the United States Institute of Peace. In the case of polymetallic nodules, that means sending robotic vehicles as deep as 18,000 feet to the vast, dark seafloor, where they will slowly vacuum up about four inches of seabed, then pump it up to a ship. The area marked for mining, though less than 1 percent of the total international seabed, would still be huge. The 30 exploration contracts cover 540,000 square miles but are concentrated in an expanse of the Pacific called the Clarion-Clipperton Zone. Spanning 3,100 miles, it is wider than the contiguous United States and contains up to six times the cobalt and three times the nickel in all land-based reserves. In its quest to dominate this industry, China has focused its efforts on the Kingston-based ISA, housed in a weathered limestone building overlooking the Caribbean Sea. By wielding influence at an organization where it is by far the most powerful player — the United States is not a member of the ISA — Beijing has a chance to shape international rules to its advantage. This approach is key to Xi Jinping’s bid for global preeminence. China’s strongest leader in decades, Xi is set on transforming China into a global power that is no longer beholden to the West, including by becoming a maritime power able to compete militarily with the United States. “If you want to become a global power, you have to maintain the security of your sea lanes and interests. So becoming a maritime power is inevitable,” said Zhu Feng, executive director of the China Center for Collaborative Studies of the South China Sea at Nanjing University. The United States has done little to respond to China’s moves in the deep sea. It is only an observer at the ISA, meaning it’s at risk of being sidelined as the rules for this future industry are being made. Unlike China, U.S. companies do not have any exploration contracts with the ISA, and critics say Washington lacks a clear plan on how to compete in this new industry. “The logic is that if we don’t make the rules, they will,” said Isaac Kardon, the author of “China’s Law of the Sea” and a senior fellow at the Carnegie Endowment for International Peace. “These are frontier areas of international law where there’s not an obvious regime, and it’s especially appealing because the U.S. isn’t there,” he said. “It’s an obvious front in whatever this great-power competition is.”

#### Deep-sea mining under UNCLOS is key to maintaining US dominance over China

Lu 24 [Christina Lu, reporter at Foreign Policy, 3-29-2024, "Washington Wants In on the Deep-Sea Mining Game", Foreign Policy, https://foreignpolicy.com/2024/03/29/us-deep-sea-mining-critical-minerals-china-unclos/]/Kankee

As the United States hunts for critical minerals—the materials underpinning vital technologies ranging from electric vehicle batteries to advanced weapons systems—an increasing number of U.S. lawmakers from both major parties are urging the Biden administration to take its search under the sea. The seafloor is home to an untapped bounty of mineral-rich formations that mining proponents are eager to exploit—and soon. It’s a highly controversial idea that has sparked pushback from hundreds of scientists, governments, and big automakers. But the proponents’ arguments have resonated with some lawmakers in Washington, where concerns over China’s critical mineral supply chain dominance are pervasive, and the Biden administration has been desperate to slash U.S. dependence on Beijing. “There is a growing interest in deep-sea mining for the simple reason that they hope it would cut reliance on China,” said Tom Moerenhout, an expert at Columbia University’s Center on Global Energy Policy. The U.S. lawmakers’ turn to deep-sea mining is part of Washington’s broader effort to secure alternative critical mineral supply chains and minimize potential vulnerabilities that Beijing could take advantage of. China commands the processing and refining of many of these minerals and metals—including powerful rare earth elements—a dominance that it has previously leveraged to hit back against other powers. Yet even as U.S. interest grows, there’s a major catch: No such deep-sea mining industry exists, and key questions of technical and economic viability loom over prospective operations. On the regulatory side, commercial mining operations have been prohibited in international waters until the International Seabed Authority (ISA), the governing body established by the U.N. Convention on the Law of the Sea, writes a mining code for the nascent industry—an ongoing process that has been complicated by a raft of tangled compliance, environmental, and financial questions. And even if commercial mining operations do begin in international waters, Washington—which never ratified the 1982 Law of the Sea Treaty over concerns that it would face too many deep-sea mining restrictions—can’t take part in the scramble. Companies that want to mine in international waters have to secure a state sponsor before applying for a mining license. Since the United States isn’t a party to the treaty, it can’t sponsor license applications. The issue flared in debates at the ISA’s latest negotiations, running from March 18 to March 29, when both China and Russia argued that the United States’ lack of ratification nullified its claims to an extended stretch of the seabed, the Financial Times reported. The U.S. delegation pushed back, but not being a member, it only has observer status and thus less power. The fact that the United States is not a party to the treaty “just means that we don’t participate at all,” said Alex Gilbert, a researcher at the Colorado School of the Mines. “It doesn’t mean that we participate on our terms, it just means that we’re excluded.” Washington is facing pressure to change its position. Last November, U.S. Sens. Mazie Hirono, Lisa Murkowski, and Tim Kaine reintroduced a resolution urging the U.S. Senate to ratify the Law of the Sea Treaty. Hirono and Kaine are Democrats; Murkowski is a Republican. And earlier in March, nearly 350 former diplomats, officials, and military leaders, including former U.S. Secretary of State Hillary Clinton, signed a letter to the Senate Committee on Foreign Relations in which they echoed the senators’ calls. “We have already lost two of our four ‘USA’ designated deep seabed mine sites,” which contain “minerals critical both for United States security dominance as well as the transition to a greener twenty-first Century,” the signers wrote. They added that “[c]ontinued inaction on the Treaty means a likely quick loss of our remaining two ‘USA’ designated sites,” while China and Russia have obtained more sites. One day after the letter was released, Republican Reps. Carol Miller of West Virginia and John Joyce of Pennsylvania introduced a bill in the House, known as the “Responsible Use of Seafloor Resources Act,” that would task the Commerce Department and White House Office of Science and Technology Policy with producing reports on legislation related to seafloor mining as well as an analysis on the benefits of importing the seafloor’s resources and then domestically processing them. “The United States should not be beholden to China for critical minerals,” Miller said in a statement accompanying the bill. “The Responsible Use of Seafloor Resources Act will significantly reduce supply chain vulnerabilities and bolster American manufacturing and jobs, while combatting Chinese production of critical minerals.” The flurry of efforts comes months after a group of 31 Republican lawmakers, led by Reps. Elise Stefanik and Rob Wittman, wrote a letter in December urging U.S. Defense Secretary Lloyd Austin to consider deep-sea mining as a “new vector of competition with China” as part of the Defense Department’s mandate to make national defense supply chains more resilient. The Pentagon has been working on a report assessing the United States’ domestic processing ability for the deep-sea mining nodules.

#### Underwater mapping through deep sea mining increases US warfighting capabilities

Weedon 19 [Alan Weedon, journalist at the ABC's Asia Pacific Newsroom, 10-18-2019, "How the ocean floor is changing war strategy", ABC, https://www.abc.net.au/news/2019-10-19/the-seabed-might-be-warfares-next-frontier/11606522]/Kankee

The Earth's resources have long been a trigger for armed conflict — be it over oil, water, or food. But in the coming decades, conflicts over resources may increasingly take place under water, given the ocean floor's potential for both resource mining and military surveillance. Scattered across the seabed are compounds that contain rare earth elements — they're the building blocks of our modern world, and are used to make smartphones, electric cars, advanced medicines and missiles, among a raft of other technologies. The world's reliance on China as a source for rare earth elements came into the spotlight this year during US-China trade war tensions, after Beijing threatened to restrict its rare earth exports in May. A number of countries and companies are sending vessels to scour the sea floor to assess whether deep-sea mining is commercially viable. But what exactly will this look like — and will it change the world's security landscape? How are rare earth minerals mined underwater? Deep sea mining exploration began in the 1960s with the discovery of high-grade manganese nodules: compounds about the size of an egg or a potato, lying at the bottom of the sea. These polymetallic nodules carry multiple metals like cobalt, nickel and copper in the one deposit — and they also have the potential to contain rare earth elements. "They lie like potatoes on the seabed in soft sediments, and they're quite dense in some places," Neville Exon, a professor in geoscience and sedimentology at the Australian National University, told the ABC. These high-grade manganese nodules are very valuable to mining companies, but there's a catch. For deep sea miners seeking a more long-term source of rare earth elements, there are two other options. One is relatively easy: fissures on the seafloor, known as hydrothermal vents, can spew out mineral-rich deposits which end up landing on the seabed nearby, meaning a mining company would just need to design the right tools to pick them up. The other is more complex: similar deposits also exist in the crusts of underwater volcanic mountains, which miners could essentially scrape off. However the terrain would be steep, and Professor Exon said these crusts can be up to a metre thick. Who's finding these metals, and where? So far, there are two commercially viable locations for mining nodules with rare earth elements, according to Professor Exon. One is found off India's southern coast, and the other is in the north-eastern Pacific at depths of up to 5,000 metres, known as the Clarion Clipperton Zone. Deep Sea Mining Watch — an online interactive map of deep sea mining research projects conducted over the past few years — shows a cluster of mining vessels in the region. They belong to a number of deep sea mining exploration projects launched by Asian, European and Pacific states including China, Russia and France. But Professor Exon explained it was the Manus Basin — a marine region in the Bismarck Sea between the Papua New Guinean islands of New Britain and New Ireland — which may prove to be commercial deep sea mining's "white hope". He said the Manus Basin formed mineral-rich deposits incredibly quickly, something Canadian deep sea mining company Nautilus found out first-hand when they lost a piece of equipment in the basin. Compared to the potato-like, high-grade manganese nodules, he said this kind of deep sea mineral deposit could be seen as "renewable in a way". Could deep sea mining aid military ambition? Manabrata Guha, a researcher in war theory at UNSW Canberra, told the ABC any country's deep sea mining exploration projects could potentially be converted to military applications. This could theoretically happen if a company's exploration documentation, like topographic or thermal maps of the seabed, was given over to aid a military. Currently, militaries of all stripes are vulnerable on the ocean floor, simply because humanity doesn't have much detailed knowledge about it in the first place. Just 9 per cent of the ocean floor is mapped in high resolution, compared to about 99 per cent of the surface of Mars — a blind spot that affects both deep sea miners and military planners. This came to a head most famously in 2005, when a US submarine crashed into an undersea mountain sitting about 160 metres below sea level. This is all worth keeping in mind, because while the Pacific Ocean is set to be the sea with the most mining potential, it is also home to this century's most consequential geopolitical tension: the rise of China, and the US's response to it. Currently, China has five deep sea mining exploration leases — the most out of any country. They're administered by the UN's International Seabed Authority, but the rules defining how this exploration is conducted are adhered to on a voluntary basis. How could the seafloor be used for war? Leszek Buszynski, a professor at the Australian National University's Strategic and Defence Studies Centre, said tensions between China and the US were already playing out in the western Pacific, regarding China's territorial claims in the South China Sea. That body of water is rich in resources, and is home to competing territorial claims from various South-East Asian countries. China claims almost all of the South China Sea, and has converted a number of low-lying reefs into military installations. Professor Buszynski said China's efforts in the South China Sea indicated a "long-term goal" to reduce the US's military dominance in the western Pacific. But Dr Guha said a greater understanding of the South China Sea's ocean floor could give the US the ability to counter China's efforts and aid its broader "Swiss cheese-style" war strategy. First voiced by US Navy Admiral Samuel J Locklear III, this analogy visualises an adversary's military defences as a block of Swiss cheese, where each hole is seen as a potential vulnerability, which the US could exploit. Dr Guha told the ABC this concept could be expanded beyond its battle-centric focus to also include attacks on civilian infrastructure, finance and cultural systems. One example Dr Guha cited, specific to the military domain, was the potential for the US to deploy seabed sensors in the Malacca Strait — a shipping route between Malaysia and Indonesia vital to international trade — in order to track Chinese naval movements. In turn, the Chinese could do the same to Western-allied vessels in the South China Sea. Dr Guha added that any military with a superior knowledge of the seabed could weaponise their information, by intentionally releasing false maps or thermal readings, with the aim of sabotaging an adversary's deep sea strategy. "The undersea domain provides another vector, another potential 'hole' that the Americans would look to penetrate," he said, adding that the US's underwater technology was 20 to 30 years ahead of China's. "You want to pick and choose where you hurt the adversary to such an extent that their whole system collapses.

#### Chinese rare earth monopoly threatens national security and the defense industrial base

Carrell 20 [Raeanna L. Carrell, lawyer and graduate from the Indiana University Maurer School of Law, 04-2020, “Putting the “Us” Back in the U.S. Defense Industrial Base: The Case of Rare Earths,” Journal of Public and Environmental Affairs, https://scholarworks.iu.edu/journals/index.php/jpea/article/download/30323/34728/73239]/Kankee

The end of the Cold War led to a reduction in U.S. military spending and a greater reliance on market forces (and private sector firms) to support the defense industrial base. The foreign share of the defense industrial base grew. Today, the defense industrial base is totally reliant on foreign nations for the procurement of each of the following: electronics (Department of Defense 2018); high-tenacity, military grade polyester fiber (Department of Defense 2018); certain specialty chemicals for munitions and missile use (Metal/Center News 2013); proprietary carbon fibers used in missiles, satellites, space launches, and other purposes (Department of Defense 2018); and image intensifier tube core glass critical to U.S. night vision systems (Department of Defense 2018). A contemporary national security problem is U.S. dependence on strategic competitor nations— those nations (e.g., Russia and China) that aim to upset the current international order and, more specifically, undercut U.S. global preeminence. According to the Department of Defense (2018), this problem stems from two macroeconomic factors: (1) the decline of U.S. civilian manufacturing base capabilities and (2) the rise of competitor nations. The DOD report (2018) placed great emphasis on China as the primary revisionist power threat to U.S. national security via the defense industrial base. China’s strategy of economic expansion has for many years employed both legal and illicit means to undermine free market principles and increase its global market share of critical materials and technologies (United States Trade Representative 2018). As a result, the U.S. is dependent on China for many materials critical to the health and function of the defense industrial base. Rare earth minerals represent a particularly significant example of U.S. dependence on China. Indeed, rare earths can be considered a critical case study (Yin 1994) of foreign dependence—if the U.S. can successfully lower the national security risk for this class of compounds, then it can successfully manage other cases of foreign dependence that pose a similar or less significant threat. This paper describes a discrete set of policy options for increasing the resiliency of the U.S. defense industrial base to supply shocks from China and a strategy formulation process based on these discrete options. WHAT ARE RARE EARTHS? Rare Earth Elements (REEs) are a set of 17 metallic elements (Figure 1) which are abundant in number but occur in low concentrations in the Earth’s crust. Mining and refining REEs is economically costly; however, due to their unique magnetic, luminescent, and electrochemical properties, rare earths are responsible for breakthroughs in producing technologies that are lighter, smaller, more thermally durable, and more efficient or emissions friendly, among other improvements (Rare Earth Technology Alliance 2018). Figure 2 lists modern-day products made from rare earth elements. The largest segment of consumption for rare earth elements (and fastest growing segment) is permanent magnets, which represent 31% of global consumption in 2016 (Gayonnet 2018). Permanent magnets based on rare earth elements are used in virtually all high-tech products (e.g., smart phones and other electronics), including those used in aerospace and defense applications. Ensuring that the defense industrial base has a secure and adequate supply of rare earth elements is a matter of national security. Between 2016 and 2017, the United States did not mine any rare earth elements domestically after the Mountain Pass mine in California was put on care and maintenance status in the fourth quarter of 2015 (U.S. Geologicial Survey 2018). Consequently, the U.S. was entirely reliant on foreign nations for the procurement and supply of rare earth elements. In 2018, the Mountain Pass mine restarted and the U.S. produced 15,000 metric tons of rare earths (United States Geological Survey 2019); however, most of those rare earths had to be sent overseas to be refined and processed into usable product (Gabriel 2019). In particular, the United States is almost entirely reliant on China—a strategic competitor, as China has captured 90-95% of the world’s market for mining and refining rare earths (Grasso 2013). Rare earths are critical components in more than 200 high-tech electronics and devices produced both for consumer and military use (Grasso 2013), and are critical for the functionality of several defense applications such as lasers, guidance systems, and radar and sonar systems (American Geosciences Institute 2018). They are critical in every domain—air, land, sea, space and cyberspace. THE 2010 SENKAKU ISLAND DISPUTE Should China choose to flex its soft power by restricting rare earth element (REE) exports, the U.S. defense industrial base could be significantly disrupted in the near term. Such concern is based on history: the Japanese and Chinese governments have long disputed which of the two countries is the rightful sovereign over a group of uninhabited islands, the Senkaku Islands. In 2010, China embargoed REE’s to Japan in response to a maritime dispute over jurisdiction of the Senkaku Islands in the South China Sea (Grasso 2013). This supply disruption had spillover effects in the U.S. as well. The United States relied—and relies still—on Japan for the procurement of permanent magnets and other REE components (Bradsher 2010). The 2010 embargo lasted for nearly two months. In that time, Japan experienced significant shortages, China refused to increase REE exports to any other country to make up for the gap in supply, and the price of REE experienced a global price spike of nearly ten times greater than pre-embargo prices (Bradsher 2010). The price spike, initiated by Chinese action and driven by market speculation, was temporary. By the end of 2010, prices tumbled as the market adjusted and other nations reclaimed the ability to produce their own supply of rare earths. Starting in the 1980s, China scale up its rare earth mining capabilities dramatically. By the 1990s, the strategy had paid off. China essentially controlled the global rare earth market (Plumer 2012). Vekasi (2019) attributed China’s dominant market share in rare earths to low production costs (e.g., labor costs), lower environmental standards, and its state-directed investment strategy. The 2010 incident resulted in demand destruction for the Chinese-controlled rare earth market, proving that it did not possess monopoly power. Japan developed a method for recycling rare earth elements from used electronics. In the U.S., the Mountain Pass mine in California resumed operation (it closed again in late 2015). Other companies started substituting other materials for rare earths in products, suggesting that rare earths were not always necessary. The United States, followed by the European Union and Mexico, filed a World Trade Organization (WTO) case against China, alleging that its rare earth export quotas violated the rules. The WTO agreed, and forced China to abandon the practice (Bradsher 2012). The 2010 embargo and its aftermath demonstrate the power of the market to adjust to abrupt changes in supply and demand. Nevertheless, it also demonstrates the threat of supply shocks to U.S. national security, and the need for greater resilience in the defense industrial base to withstand future supply shocks. Since the 2010 embargo, little has changed in the market landscape: China retains market power as a supplier of rare earths, controlling roughly 90% of the market (Gayonnet 2018). IDENTIFYING POLICY OPTIONS

#### No environment impact – deep sea mining is comparatively better and allows the green energy transition

Conca 22 [James Conca, Adjunct at WSU and an Affiliate Scientist at LANL, 2-11-2022, "Seafloor Mining For Critical Metals – A Brilliant Idea Or Another Environmental Catastrophe?", Forbes, https://www.forbes.com/sites/jamesconca/2022/02/11/seafloor-mining-for-rare-metals--a-brilliant-idea-or-another-environmental-catastrophe/]/Kankee

However, many environmental groups oppose the idea, saying it will be harmful to sensitive marine life, including to species that have not even been discovered yet. In a letter this week from Senator Lisa Murkowski to Secretary of Energy Jennifer Granholm, Murkowski put the issue of seafloor mining front and center, pointing out that the United States has not ratified the United Nations Convention on the Law of the Sea (UNCLOS), so we are not part of negotiations on regulations governing seabed mining. There is no debate that critical metals like Co, Li, Ni and Nd are essential to a low-carbon energy future if renewables and electric vehicles are to play a large role. There is also no debate that we are woefully short on supply of these metals, a supply that is generally an environmental and social nightmare. The waste from Li, graphite and high-purity-Si processing has destroyed whole villages and ecosystems in China, Indonesia and Bolivia, among others. America is still dealing with the acid mine drainage left from 120 years of mining. These problems will only get worse as land ore grades decline. And like blood diamonds, half of the Co supplies come from inhumane child labor practices. The reason this is so important is that many of the people who support the new energy revolution of non-fossil fuels and renewables, electric vehicles, conservation and efficiency, also care about the social issues that many of these technologies incorporate in their wake - corruption, environmental pollution, extreme poverty and child labor. Not the image sought by people at the shade-grown coffee shop surfing the internet for free-range eggs on their iPhones. So new metal sources should consider their life-cycle carbon footprint, environmental pollution and social justice effects. Everyone agrees that recycling what metals we have is an excellent thing to do, but we’ll need to produce around six times more critical minerals by 2040 than we do today, according to the International Energy Agency, even if we recycle 100%. Geologists have long known that the ocean floor is chock full of metals – Cu, Ni, Ag, Au, Pt and even diamonds. Manganese nodules are polymetallic rock concretions that lie loosely on the sea floor or buried shallowly in the sediment. These nodules occur in most oceans, even in some lakes, and are abundant on the abyssal plains of the deep ocean between 4,000 and 6,000 meters (13,000 and 20,000 ft). The nodules can be harvested from the sea floor bottom easily. The Clarion-Clipperton Zone is the largest of the most economic zones, about the size of Europe and extending from the west coast of Mexico to Hawaii. This zone is also front and center in the One Ocean Summit this week. The total mass of manganese nodules in this zone is over 21 billion tons, representing the planet’s largest source of EV battery metals. Other important areas include the Peru Basin, the Penrhyn Basin near the Cook Islands, and the central Indian Ocean. These areas are overseen by the United Nations International Seabed Authority (ISA). Unlike metal ores on land which rarely have metal yields above 20%, and are often less than 2%, these seabed nodules are 99% usable minerals – 33% metal and the rest can be converted into useful products like construction aggregate and fertilizer since there are no toxic levels of heavy elements like mercury or arsenic. In the face of increasing adoption of electric vehicles, concern is growing as to the waste generated in the production of battery metals like Ni, Cu, Co and Mn, which averages between 40-61 tons for a typical car with a 75kWh battery. Last month, a new peer-reviewed study found that processing nodules into critical battery metals could reduce lifecycle solid waste streams by between 59-93%, including a 79-96% reduction in tailings. So there’s no toxic tailings or mining waste like on land, no deforestation, no open pits, no contaminated rivers or aquifers, and no tailings impoundments Seabed mining doesn’t use child labor like much of the land mining does. And it has a life-cycle carbon footprint that is 90% less than land mining. A study by Paulikas et al. (2020) along with other peer-reviewed studies, compares land and ocean mining from several viewpoints and the results show that ocean mining is 70% to 99% less impactful on the environment than land mining in all categories. So what’s not to like about this? Pretty much just the habitat effects. The mining, pumping and cleaning of the manganese nodules can create sediments, noise and vibrations. So the big question, and the final decision, is – are the advantages in carbon, pollution and social justice more important than the ecosystem damage to the ocean floor? And can we minimize that ecosystem damage? The Metals Company certainly thinks so. Metals is a Canadian company working in an ISA-granted portion of the Clarion-Clipperton Zone. They have been carrying out a multi-year environmental impact assessment to fully understand and to mitigate against potential harm to the environment. There are a few key elements about the area, and the process, that are important. The Clarion Clipperton Zone is one of the least productive areas of the ocean, with one of the lowest biomass environments on the planet, very like deserts on land. The Abyssal CCZ is home to 300 times less biomass than in an average biome on land, and up to 3000 times less compared to rainforest regions where a lot of conventional mining takes place. There are no plants, 70% of life exists as bacteria, and most organisms are smaller than 4 cm. I don’t want to trivialize any organism but Robert E. Heinlein noted there ain’t no such thing as a free lunch, so we have to mine the areas with the least organisms and diversity since we will mine somewhere. Either that or stick with fossil fuels. As to sediment released into the water column, the first port of call is to minimize the amount that is raised to the surface with the nodules, something engineers are hard at work on. For the sediment that is returned into the midwater column, however, a recent study by researchers at MIT found that while there was speculation this material would bind together and fall quickly to the seafloor, ocean mixing processes prevented sediment particles from flocculating, resulting in the rapid dilution of the discharge by around 1,000 times to near background levels – leaving what is essentially clear water to the naked eye. Experimental work shows that 20 concurrent operations collecting 3Mpta (wet) of nodules would be required for particle concentrations to rise above background levels measured in the CCZ. In addition, if all particles introduced into the water column by these operations rapidly sink to the seafloor CCZ area, the resulting fallout would be 0.02 micrograms per year—just 2% of the observed normal sedimentation rate in the CCZ of 1 microgram per year. Based on 11 seafloor disturbance and commercial mining studies, ecological recovery rates for nodule collection are much lower than those for mining on land – decades versus millenia. The ISA has set aside more areas for protection (1.97 million km2) than is currently under exploration (1.31 million km2), including four additional Areas of Particular Environmental Interest in 2021 alone. On top of that, contractors will set side further areas and leave behind 15% of nodules to further aid recovery. Finally, research being conducting will determine where it is best to return the process water. It looks to be around 1,500 meters, well below the euphotic zone, where there is unlikely to be any significant impact on organisms in the water column and where the temperature difference between that water and the water on the ocean floor won’t cause significant effects. All told, these processes are unlikely to cause the widespread impacts so feared by many, including myself. Unlike land operations, most seabed collectors will only disturb the top 5 cm of the seafloor, and will direct a flow of water in parallel with the seafloor to uplift the nodules without actually touching them. This is not to say the operation will be perfect, but it will be much, much less impactful than any land operations, and is the most optimal method for getting these critical metals between now and 2050. Then hopefully, we will be recycling enough that any mining needed beyond that time will be minimal.

#### Rare earths from DSM aids batteries, rainforests, EVs, and global warming

Brigham 23 [Katie Brigham, Lead Producer for CNBC with a masters in journalism from Stanford, 09-20-2023, “Deep-sea mining could help solve the global critical minerals shortage, but it’s a lightning rod for controversy”, CNBC, https://www.cnbc.com/2023/09/20/deep-sea-mining-the-race-for-critical-minerals-used-in-clean-energy.html]/Kankee

Untapped potential Between 2020 and 2030, battery demand for nickel is set to increase by a factor of around 20, manganese demand is projected to rise about eightfold, and cobalt battery demand is expected to quadruple, according to Benchmark Mineral Intelligence, a company focused on tracking the metals integral to the energy transition. Nickel, copper, cobalt and manganese are found in abundance on the seafloor, in the form of polymetallic nodules, which are globular concentrations of minerals that cover up to 70% of the seafloor in certain areas.

In the Clarion-Clipperton Zone, “they estimate there’s more than 20 billion tonnes of nodules in the area,” Barron said. “When it comes to nickel, they estimate there’s around 270 million tonnes.” For comparison, the world produced about 3.3 million metric tons, or tonnes, of nickel last year. The Metals Company thinks the nickel market could benefit most from deep-sea mining, both because the mineral is integral to energy dense lithium-ion batteries, and because the ramp-up of nickel mining in Indonesia is causing massive deforestation in the country’s rainforests, which are vital carbon sinks. “What I am absolutely convinced of is that we can slow down or maybe even stop the growth in rainforest nickel,” Barron said. One area where The Metals Company holds an exploration license, called NORI, is ranked as having the largest undeveloped nickel deposit in the world and encompasses nearly 29,000 square miles of seafloor. Though that’s only about 0.02% of the entire seabed, the company says this resource, combined with another project area where the company has an exploration contract, contain enough nickel, copper, cobalt and manganese to power about 280 million EVs — that’s about the total number of cars (gas and electric) in operation in the U.S. today. Last year, The Metals Company commissioned Benchmark Mineral Intelligence to conduct a life-cycle analysis that modeled the environmental impact of collecting nickel, cobalt and copper from the seafloor and then processing these minerals on land in Texas. The analysis showed that The Metals Company’s proposed NORI-D project performed better than land-based mining and processing in the majority of impact categories measured, including global warming potential, which was generally 54%-70% lower. Deep-sea mining avoids the emissions associated with blasting, as well as sulfidic tailings, a waste material that can contaminate groundwater. “If these projects go ahead in the way that is being described and targeted today, it could actually show some significant benefit,” said Andrew Miller, COO of Benchmark Mineral Intelligence.

#### DSM is key to energy dominance and overcoming Chinese REE domiance

Vivoda 24 [Vlado Vivoda, ARC Fellow at Griffith Asia Institute at Griffith University and Editor-in-Chief of Resources Policy with a PhD in International Relations from Flinders University, along with a Bachelor of Arts (Hons) from the National University of Singapore and a Master of Arts in International Relations from the Australian National University, 10-2024, "Uncharted depths: Navigating the energy security potential of deep-sea mining", Journal of Environmental Management, https://www.sciencedirect.com/science/article/pii/S0301479724023296]/Kankee

Emerging technologies are also influencing the landscape of critical mineral supply chains. For example, advances in materials science are paving the way for the use of substitutes that can reduce dependence on specific critical minerals. In the realm of electronics and renewable energy technologies, research is focused on developing materials that can replace REEs in magnets used for wind turbines and EV motors (Depraiter and Goutte, 2023). Alternatives are being explored to reduce reliance on REEs, which are predominantly sourced from China (Widmer et al., 2015; Pavel et al., 2017; Omodara et al., 2019; Zheng et al., 2022). These substitutions could lead to a more diversified and resilient supply chain, mitigating the geopolitical risks associated with the concentration of REE production. The global production and supply chains of these critical elements are intricate, often concentrated in a handful of nations. China's command over REE production, accounting for over 80% of the global supply, is a prime example (Wübbeke, 2013; Castillo and Purdy, 2022). The DRC is a major supplier of cobalt, contributing nearly 70% of the worldwide demand (Sovacool, 2019; Deberdt and Le Billon, 2023). Such concentration engenders supply vulnerabilities, where geopolitical competition, social unrest, environmental policies, or economic shifts could instigate global supply chain disruptions (Vivoda et al., 2024a). The geopolitical landscape heavily influences the supply and demand dynamics of these minerals (Kalantzakos, 2020; Nuttall, 2021; Vivoda, 2023; Vivoda et al., 2024b). Issues such as resource nationalism, trade conflicts, and the volatility of resource-rich states can threaten the reliability and security of supplies (Wilson, 2017; Shiquan et al., 2023). For instance, Sino-American frictions have escalated worries over REEs availability, given China's past in leveraging market dominance during international disputes (Kalantzakos, 2017; Chapman, 2018; Fan et al., 2022). Similarly, the dependency on the DRC for cobalt raises concerns about supply chain ethics and transparency (Calvão et al., 2021; Deberdt and Le Billon, 2022). To strengthen supply chain resilience, strategies are being deployed to boost domestic production, broaden supply bases, invest in recycling and alternative materials, and foster international cooperation for developing new mining sites and processing capacities (Vivoda, 2023; Vivoda and Matthews, 2023). These endeavours are crucial for establishing a secure and sustainable supply base for critical minerals. Governments and industries worldwide are increasingly recognising the importance of diversifying supply sources and enhancing the sustainability of critical mineral supply chains to support the transition to clean energy systems. Moving forward, continued investment in technological innovation, recycling, and international collaboration will be vital to meet the rising demand for these essential materials while mitigating the associated environmental and geopolitical risks. 5. Energy security implications of DSM DSM can potentially strengthen global energy security by accessing untapped reserves of essential minerals that are essential for clean energy and energy storage technologies. These undersea resources can support the evolution of modern energy systems and catalyse the adoption of clean energy sources. A thorough understanding of DSM's energy security implications is important for policymakers and industry leaders to navigate the sector's growth thoughtfully, balancing environmental and societal considerations with the opportunities DSM presents for the global energy transition. 5.1. The concept of energy security Energy security, traditionally anchored in the assurance of sufficient, affordable, and uninterrupted energy supplies, has evolved to reflect the exigencies of the modern world. It is no longer merely a question of quantity and cost but a multidimensional challenge that intersects with environmental sustainability and the intricate web of international politics (Sovacool and Brown, 2010). As the world gravitates towards clean energy sources, energy security demands a delicate balance between satisfying immediate energy needs and ensuring the long-term health of the planet and its inhabitants (Cherp and Jewell, 2011). The urgency of climate change, underscored by extreme weather events and dire scientific warnings, has provoked a global reckoning with energy choices. The transition to a low-carbon economy is not just an environmental imperative but a redefinition of what it means to be energy secure. It is a vision that demands that the world moves away from fossil fuels, which have long been the bedrock of energy security but are now the architects of ecological crisis (Chester, 2017). In this expanded framework, energy security is intertwined with the pursuit of clean energy technologies that promise a cleaner, more resilient future. This evolution in the concept of energy security reflects a world in transformation—a world where the effects of climate change transcend borders, and the sources of energy generation are diversifying. It is a world where the stability of supply chains becomes critical, as the materials necessary for clean energy technologies are sourced globally. The geopolitical landscape is shifting in tandem with these changes, as countries rich in traditional energy resources adapt to a future where the sun, wind, and sea could become the new cornerstones of energy dominance (Overland, 2019; Vakulchuk et al., 2020). Against this backdrop, the pursuit of energy security is driving innovation and exploration, leading to a consideration of untapped resources. Specifically, DSM represents a frontier in the quest for energy security, potentially providing access to critical minerals vital for clean energy technologies and electrification. It is essential to navigate these uncharted depths with caution, ensuring that the drive for energy security aligns with the imperatives of environmental stewardship and sustainable development. 5.2. Diversification of supply DSM's ability to diversify the supply of critical minerals, such as cobalt, nickel, copper, and REEs, offers a strategic edge, potentially reducing the world's reliance on a select group of mineral-producing nations (Watzel et al., 2020). This could reinforce global energy security and supply chain robustness and reshape the geopolitical contours of the energy industry. As states, such as Norway and Japan, begin to harness DSM, their geopolitical leverage and strategic significance are likely to shift, fostering new global alliances, investment flows, and competitive dynamics, while also altering the status quo caused by overreliance on traditional terrestrial mineral-rich producers. DSM holds promise in addressing supply security issues that arise due to geopolitical competition, environmental pollution, social unrest, human rights abuses and infrastructural constraints across many important mineral-producing countries (Olivetti et al., 2017). By introducing alternative sources for these critical materials, DSM can contribute to a steadier and more dependable supply for clean energy and EV production. For instance, the REE and cobalt supply, predominantly controlled by a handful of nations, could be augmented by DSM (Sun et al., 2017; Alessia et al., 2021). Norway's decision to pursue DSM in its extended continental shelf, and Japan's active exploration of DSM in its exclusive economic zone (EEZ), could assist the West—under the Minerals Security Partnership (MSP) umbrella—in breaking China's dominance of the REE supply chain, and reducing reliance on the DRC for cobalt. Investments in DSM could spur resource exploration and extraction in diverse locales, including the Arctic, Pacific's CCZ and the Indian Ocean, broadening the geographical scope of available supply sources. This diversification can enhance international collaboration, leading to shared investments in infrastructure, technological innovations, and cohesive regulatory frameworks. Japan's exploration of polymetallic sulphides within its EEZ has provided valuable insights into the technological and environmental challenges of DSM. Preliminary studies have indicated that these resources could significantly bolster Japan's supply of critical minerals, reducing its dependence on imports (Sharma, 2024). However, concerns about environmental impacts, particularly on hydrothermal vent ecosystems, have necessitated the development of advanced monitoring and mitigation strategies (Menini et al., 2023). Similar exploratory efforts in Norway's extended continental shelf have focused on cobalt-rich ferromanganese crusts, highlighting both the economic potential and the need for comprehensive environmental assessments to guide sustainable development (Hannington et al., 2023; Roest et al., 2023). Furthermore, the advent of DSM presents an opportunity to forge supply chain systems imbued with transparency and traceability from the outset (Sovacool et al., 2020). In regions plagued by human rights and environmental issues related to artisanal and small-scale mining (ASM) or conflict minerals, such systems could ensure that only responsibly extracted minerals enter the market, thereby addressing ethical sourcing issues (Deberdt and Le Billon, 2021). Technologies such as blockchain could revolutionize these supply chains, offering secure, immutable records that empower consumers and businesses to make informed decisions, thus incentivizing ethical procurement practices (Esmaeilian et al., 2020). DSM's potential to diversify the sources of critical minerals also offers a buffer against the risks posed by an overdependence on a few suppliers, geopolitical unrest, trade frictions, or regional conflicts, thereby contributing to a more resilient and secure global energy framework in the face of escalating demand for clean energy technologies and energy storage solutions. 5.3. Support for clean energy and electrification

#### DSM is key to rare earths necessary for a green transition – it also increases innovation

Vivoda 24 [Vlado Vivoda, ARC Fellow at Griffith Asia Institute at Griffith University and Editor-in-Chief of Resources Policy with a PhD in International Relations from Flinders University, along with a Bachelor of Arts (Hons) from the National University of Singapore and a Master of Arts in International Relations from the Australian National University, 10-2024, "Uncharted depths: Navigating the energy security potential of deep-sea mining", Journal of Environmental Management, https://www.sciencedirect.com/science/article/pii/S0301479724023296]/Kankee

5.3. Support for clean energy and electrification The role of DSM extends beyond mere extraction; it can play an important role in powering clean energy technologies such as solar panels, wind turbines, and EVs. By providing a steady and diverse supply of necessary materials, DSM can bolster the global move towards low-carbon energy systems (Amon et al., 2022). This shift can yield numerous benefits, including expanded clean energy capacities, accelerated EV uptake, improved energy storage, innovation in clean energy technologies, minimized social and environmental impacts associated with terrestrial mining, and enhanced global cooperation on green energy initiatives. The assurance of a stable supply of crucial minerals from DSM can invigorate the production and dissemination of clean energy technologies (Teske et al., 2016). This, in turn, can diminish greenhouse gas (GHG) emissions and contribute to a more sustainable energy portfolio worldwide. For example, the production of solar panels requires silver, gallium, and indium, while wind turbines rely on REEs, such as neodymium and dysprosium (Moss et al., 2013). Energy storage systems, pivotal for EV batteries, depend on lithium, cobalt, nickel, and other materials (Xu et al., 2020). As clean energy solutions see heightened demand, the need for these critical elements also escalates. Except for lithium, DSM has the potential to provide alternative and plentiful supplies of these resources, mitigating supply pressures and aiding the transition towards low-carbon energy. The outcome could be more stable and competitive prices for critical minerals, rendering EV batteries and other green technologies more economical and widely accessible. Moreover, a secure and varied supply may drive battery technology forward, resulting in enhancements in battery efficacy, efficiency, and service life (Babbitt et al., 2021). Energy storage, particularly grid-scale batteries, is integral to incorporating clean energy sources into electricity systems, counterbalancing the variability of solar and wind energy (Yang et al., 2018). The accessibility of essential minerals via DSM can support the advent of cutting-edge large-scale energy storage systems, thereby improving grid reliability and enabling greater integration of clean energy. A diversified critical mineral supply could also propel innovation within clean energy technologies, paving the way for novel materials, designs, and manufacturing techniques. Such advancements could increase efficiency, drive down costs, and boost the performance of clean energy systems. Technological advancements are also being made in the field of real-time environmental monitoring systems, which are crucial for mitigating the ecological impacts of DSM (Yuan et al., 2023). Project such as the EU's Blue Nodules are pioneering the development of new technologies for harvesting polymetallic nodules with minimal environmental disruption (Trocan, 2023). These efforts underscore the importance of integrating sustainability into all phases of DSM, from exploration to extraction. Moreover, a consistent supply of REEs could support the development of more effective permanent magnets for wind turbines, while a reliable metal supply, including copper, could support research into more efficient solar cell technologies (Grandell et al., 2016; Valero et al., 2018; Ormerod et al., 2023). Additionally, the pursuit of DSM resources may cultivate international collaboration on clean energy as nations join forces to research, extract, and manage deep-sea resources. Such joint efforts can facilitate technological exchanges, knowledge sharing, and the adoption of best practices, all of which underpin the transition to green energy. 5.4. Impact on energy prices The advent of new mineral and metal sources through DSM has the potential to significantly influence global supply and demand dynamics, thereby impacting the pricing of energy-related commodities (Martino and Parson, 2013). By introducing a broader base of suppliers and fostering market competition, DSM could lead to more stable and competitive prices for critical minerals, enhancing the affordability and adoption of clean energy technologies, and propelling the global energy transition. DSM's ability to augment the global reserve of critical minerals could support a competitive market environment, reducing prices and making these materials more cost-effective for clean energy and EV industries. This could result in a reduction in the overall costs of clean energy technologies and energy storage solutions, increasing their market penetration among consumers and businesses. As DSM ventures proliferate and diversify the supply of critical minerals, suppliers might strive to stand out by competing on price, quality, and sustainability. Such competition can spark innovation, foster efficiency, and promote environmentally conscious mining practices, thereby augmenting the value and sustainability of clean energy and the EV sector. Furthermore, DSM's role in diversifying the sources of critical minerals can lead to price stabilization and shield the market from spikes due to supply disruptions or geopolitical tensions (Althaf and Babbitt, 2021). A stable pricing landscape offers a boon to industries dependent on these materials, allowing for more precise planning and confident investment in the advancement and application of clean energy technologies. DSM's contribution to supply diversification also mitigates reliance on volatile regions prone to political instability, social unrest, natural disasters, or regulatory shifts, thus fostering price stability and reducing the susceptibility to abrupt price changes. Stable and competitive pricing of critical minerals can catalyse investments in clean energy technologies, making them economically more viable and competitive with conventional fossil fuel-based energy sources (De Ridder, 2013). As clean energy and storage solutions become more cost-competitive, we can expect an acceleration in the adoption and innovation of clean energy technologies, further driving down prices and enhancing affordability for both consumers and businesses (Kittner et al., 2017; Kalair et al., 2021). Additionally, DSM's effect on supply and demand may incentivize resource efficiency and recycling innovation. With a reliable supply, industries may invest more in technologies and processes that optimize material usage, such as recycling and creating more efficient products (Beaudet et al., 2020). This approach can foster a more sustainable, circular economy, potentially reducing the long-term costs associated with clean energy technologies (Giurco et al., 2014; Karali and Shah, 2022; Ali, 2023). Furthermore, the application of big data analytics and blockchain technology in DSM operations can enhance supply chain transparency and traceability (Hilmi et al., 2023; Zhang and Gui, 2023). This could help ensure ethical sourcing of minerals and provide a secure and verifiable record of transactions, thus fostering trust among stakeholders and consumers. Lastly, advancements in DSM technology could lead to cross-sectoral innovation, with benefits extending to offshore wind and tidal energy, telecommunications, and marine research, among others. For example, breakthroughs in underwater robotics and communications could be repurposed for subsea cable networks, while innovations in extraction and processing might propel advancements in robotics and artificial intelligence, impacting a wide array of sectors including clean energy, manufacturing, logistics, agriculture, and healthcare. 5.5. Environmental trade-offs The advancement of DSM poses a quintessential challenge: balancing the quest for energy security and clean energy against environmental risks and uncertainties. This delicate balance necessitates a deep dive into environmental trade-offs, guided by rigorous scientific inquiry and the precautionary principle, to navigate DSM's path responsibly and sustainably (Ali, 2023; Levin et al., 2020). The pursuit of DSM must be measured against the potential for environmental harm to the largely uncharted deep-sea ecosystems and the broader, yet to be fully understood, long-term environmental impacts (Christiansen et al., 2020). For example, the interactions between DSM and fish populations are complex and unknown (Amon et al., 2023). Moreover, environmental, social, and governance (ESG) considerations specific to DSM remain undefined, complicating the assessment of its full environmental impact (Kung et al., 2021). One potential environmental benefit of DSM is the reduction in terrestrial or land-based mining, which can be associated with deforestation, habitat destruction, pollution, and threats to vulnerable ecosystems (Hein et al., 2013; Hallgren and Hansson, 2021; Luckeneder et al., 2021). For instance, nickel mining in Indonesia's rainforests leads to widespread ecological damage (Giljum et al., 2022). Additionally, gold mining in the Amazon basin contributes significantly to deforestation and mercury pollution (Kahhat et al., 2019). Similarly, coal mining in the Appalachian region of the United States has been linked to severe water contamination and habitat destruction (Zipper and Skousen, 2021). Transitioning some mining activity to the deep-sea might mitigate these impacts, if DSM is managed sustainably and with minimal marine disturbance. It is important to note that a shift of mining activity to DSM could also negatively affect terrestrial mineral suppliers and livelihoods of those who depend on land-based mining operations (Lèbre et al., 2023). DSM can significantly disrupt seafloor habitats, resulting in biodiversity loss and the potential extinction of unique marine species (Levin et al., 2016; Miller et al., 2018). The resilience of deep-sea ecosystems is low, with recovery from mining disturbances expected to take decades, if not centuries (Glover and Smith, 2003; Ramirez-Llodra et al., 2010). Furthermore, DSM activities can create sediment plumes that compromise water quality and disrupt marine life's feeding and reproductive behaviours (Christiansen et al., 2020; Peacock and Ouillon, 2023). Such plumes might also impede the ocean's role in regulating atmospheric carbon dioxide, possibly intensifying climate change impacts (House et al., 2006; Bauer et al., 2013). A study by Levin et al. (2020) highlighted that the extraction of polymetallic nodules could lead to the removal of approximately 50–100 cm of the seabed surface, resulting in long-lasting impacts on benthic communities. The potential sediment plumes generated during DSM operations may extend over tens of kilometres, affecting water quality and marine life far beyond the mining sites (Jones et al., 2018). The nascent state of DSM and the limited understanding of deep-sea ecosystems present significant challenges for policymakers and regulators in evaluating the benefits and risks associated with DSM operations (Smith et al., 2020; Drazen et al., 2020). The indeterminate nature of ESG risks in DSM adds to the complexity, creating uncertainty for investors and stakeholders. Systematically assessing the ecological implications of DSM and establishing a comprehensive ESG framework for DSM is critical for addressing and mitigating potential environmental and social impacts (Kung et al., 2021; Martins et al., 2023). Achieving this requires global cooperation and robust regulatory regimes.

#### The UNCLOS ISA process is key to international cooperation that fosters innovation, environmental protection, and negotiating resource conflicts – unilateral mining can’t solve

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One potential environmental benefit of DSM is the reduction in terrestrial or land-based mining, which can be associated with deforestation, habitat destruction, pollution, and threats to vulnerable ecosystems (Hein et al., 2013; Hallgren and Hansson, 2021; Luckeneder et al., 2021). For instance, nickel mining in Indonesia's rainforests leads to widespread ecological damage (Giljum et al., 2022). Additionally, gold mining in the Amazon basin contributes significantly to deforestation and mercury pollution (Kahhat et al., 2019). Similarly, coal mining in the Appalachian region of the United States has been linked to severe water contamination and habitat destruction (Zipper and Skousen, 2021). Transitioning some mining activity to the deep-sea might mitigate these impacts, if DSM is managed sustainably and with minimal marine disturbance. It is important to note that a shift of mining activity to DSM could also negatively affect terrestrial mineral suppliers and livelihoods of those who depend on land-based mining operations (Lèbre et al., 2023). DSM can significantly disrupt seafloor habitats, resulting in biodiversity loss and the potential extinction of unique marine species (Levin et al., 2016; Miller et al., 2018). The resilience of deep-sea ecosystems is low, with recovery from mining disturbances expected to take decades, if not centuries (Glover and Smith, 2003; Ramirez-Llodra et al., 2010). Furthermore, DSM activities can create sediment plumes that compromise water quality and disrupt marine life's feeding and reproductive behaviours (Christiansen et al., 2020; Peacock and Ouillon, 2023). Such plumes might also impede the ocean's role in regulating atmospheric carbon dioxide, possibly intensifying climate change impacts (House et al., 2006; Bauer et al., 2013). A study by Levin et al. (2020) highlighted that the extraction of polymetallic nodules could lead to the removal of approximately 50–100 cm of the seabed surface, resulting in long-lasting impacts on benthic communities. The potential sediment plumes generated during DSM operations may extend over tens of kilometres, affecting water quality and marine life far beyond the mining sites (Jones et al., 2018). The nascent state of DSM and the limited understanding of deep-sea ecosystems present significant challenges for policymakers and regulators in evaluating the benefits and risks associated with DSM operations (Smith et al., 2020; Drazen et al., 2020). The indeterminate nature of ESG risks in DSM adds to the complexity, creating uncertainty for investors and stakeholders. Systematically assessing the ecological implications of DSM and establishing a comprehensive ESG framework for DSM is critical for addressing and mitigating potential environmental and social impacts (Kung et al., 2021; Martins et al., 2023). Achieving this requires global cooperation and robust regulatory regimes. To navigate the environmental trade-offs and uncertainties of DSM, international collaboration is imperative. Sharing research, best practices, and technologies can lead to enhanced regulatory mechanisms and the sustainable evolution of the DSM sector (Koschinsky et al., 2018; Ali, 2023). Global cooperation is crucial in setting universal standards and responsible mining practices that minimize environmental damage. The adaptive management of DSM, underpinned by ongoing environmental monitoring and informed by the latest scientific insights, is essential for mitigating ecological risks and promoting sustainable practices. Ultimately, investment in sustainable mining technologies and low-impact extraction methods is vital, including real-time monitoring systems and effective mitigation strategies to protect deep-sea ecosystems (Clausen et al., 2022; Clausen and Sörensen, 2022). 6. Policy recommendations and strategies The policy recommendations provided in this paper are designed to align with JEMA's emphasis on sustainable environmental management. By proposing specific regulatory frameworks and management strategies, this paper aims to mitigate the environmental risks associated with DSM while ensuring that its development contributes positively to global sustainability goals. To ensure that DSM contributes to energy security and the global transition to clean energy in a responsible and sustainable manner, policymakers and stakeholders should adopt a comprehensive set of strategies that address the various challenges and trade-offs associated with the industry. By adopting these policy recommendations and strategies, policymakers and stakeholders can ensure that, if DSM goes ahead, it contributes to energy security and the global transition to clean energy, while also minimizing negative environmental and social impacts associated with extractive industries. 6.1. Fostering international cooperation and governance in DSM 6.1. Fostering international cooperation and governance in DSM The critical role of the ISA in shaping the future of DSM underlines the need for robust international governance. After the ISA's setback in establishing comprehensive standards for DSM, it is imperative to forge international agreements and regulatory frameworks that ensure DSM is governed by sustainable and environmentally conscious practices (Stanway et al., 2023). Blanchard et al. (2023) offer an insightful examination of the governance landscape for DSM in international waters, linking the ISA's organizational structure and operational dynamics to its pivotal role in fostering sustainable DSM practices. Their work presents a clear and comprehensive overview of the ISA's organizational structure and operational dynamics. Additionally, they provide essential context on various regulatory, control, and management tools developed by the ISA specifically for overseeing DSM activities (Blanchard et al., 2023). Building on the insights provided by Blanchard et al. (2023), a collaborative international effort is essential for setting industry-wide standards that prioritize responsible development and minimize the potential environmental and societal repercussions. Joint efforts among nations and stakeholders are vital for the exchange of knowledge, resources, and technical expertise in DSM. Such cooperation could pave the way for the collective advancement of infrastructure and technological capabilities, driving innovation and progress within the industry. The development of platforms for dispute resolution and multilateral dialogue is also paramount, as these can mitigate conflicts and foster a spirit of collaboration in the exploration, extraction, and stewardship of deep-sea resources. These initiatives are key to preventing the escalation of tensions, maintaining open communication channels, and establishing a foundation for sharing innovative ideas and best practices. Ultimately, these efforts can lead to a more stable, cooperative, and progressive global DSM industry, benefiting all stakeholders involved. 6.2. Investing in research and development for sustainable DSM technologies

#### Chinese DSM regulation-setting is obliterates ocean biodiversity with lax regulations – ratification solves with American ISA input and legal certainty for US DSM

Trainer 22 [Jocelyn Trainer, researcher and expert for the energy, economics and security program at the Center for a New American Security, 11-3-2022, "The Geopolitics of Deep-Sea Mining and Green Technologies", United States Institute of Peace, https://www.usip.org/publications/2022/11/geopolitics-deep-sea-mining-and-green-technologies]/Kankee

What Is Deep-Sea Mining? Deep-sea mining (DSM) involves retrieving mineral deposits from nodules that dot the ocean floor, typically more than 600 feet below sea level. The most economically viable nodules lie partially under sediment in the north-central Pacific Ocean, the southeastern Pacific Ocean, and the northern Indian Ocean. These valuable nodules contain cobalt, copper, nickel and other minerals required to produce green technologies like electric vehicles, solar panels and wind turbines. However, the regulatory oversight of this practice is a major source of geopolitical tensions. The U.N. Convention on the Law of the Sea (UNCLOS) mandates that states govern deep-sea mining on seabed within their national jurisdiction. But roughly 60 percent of the ocean bottom is located beyond the jurisdiction of individual states. In these waters, deep-sea prospecting (the search for minerals and metals), exploration (assessments of the location, size and quantity), and exploitation (the recovery and delivery of economic amounts of minerals and metals) is regulated by the UNCLOS-created International Seabed Authority (ISA). Some states, including world powers, have differing, competing or incompatible interpretations of UNCLOS or domestic maritime laws. Areas of disagreement include maritime boundaries as well as what nations are entitled to do or disallow both within and outside those boundaries. The ISA has tried to govern DSM issues with the Mining Code. But the code is incomplete, with only exploration regulations finalized and exploitation laws still under review. In 2021, Nauru — an island nation in the Central Pacific — announced its intention to transition from exploration to exploitation, creating even more urgency for the ISA to finalize regulations. The Rise of Geopolitical Competition Demand for exploiting minerals on the seabed is rising. But the hasty development of a DSM regulatory framework could heighten geopolitical competition and environmental degradation. China, in particular, has demonstrated its desire to shape international norms in the maritime domain, as exemplified by Beijing’s aggressive actions in the South China Sea and DSM. Already dominating terrestrial mining, China is now leading the race to the bottom of the sea by building superior capabilities and influencing the regulatory environment. China currently holds five out of the 30 deep-sea mining contracts issued by the ISA — more than any other country. Under the ISA, member states must ensure that actions taken under an exploration license abide by UNCLOS law. And while the Chinese DSM law details environmental obligations under the UNCLOS, the requirements are vague, creating lax regulation. As such, China can influence operational practices and environmental norms. China is also a leader in research and development and has unrivaled mineral processing capabilities. DSM research is expensive, and companies require large amounts of capital to operationalize. But the Chinese government has made funding for deep sea mining research a national security and economic priority. Chinese state-owned enterprises are given preferential access to loans from state banks with lower interest rates, which offer them an advantage over companies operating in the free market. Meanwhile, the United States is not a member state of UNCLOS or the ISA, having signed but not ratified the UNCLOS treaty. This leaves the United States with a limited ability to shape DSM regulatory framework. The UNCLOS also requires that DSM companies be based in a member state, meaning U.S. companies are unable to access ISA deep-sea mining contracts. To get around the issue, the United States has passed its own law on seabed mining that allowed NOAA to issue exploration licenses for international DSM. However, despite receiving licenses, U.S. companies like Lockheed Martin are hesitant to begin DSM operations — citing a lack of international recognition. By creating parallel regulations rather than ratify the UNCLOS, the United States risks weakening the incentive to comply with international law — and sets a dangerous precedent that could empower malign actors. The United States also relies on Chinese terrestrial mining for critical minerals. Without international recognition for DSM activities, U.S. companies will fall further behind, making it unlikely the United States will shift reliance away from China. Enhancing Global Governance to Manage Risks The Biden-Harris National Security Strategy emphasizes identifying opportunities for cooperation and working with U.S. allies and partners to “secure access to critical mineral supply chains” as the United States works to mitigate climate change and bolster energy security. At COP27, the United States can further these goals by elevating the connection between responsible critical mineral extraction, climate change mitigation and the need for internationally recognized DSM exploitation regulation. The conference provides an opportunity to prioritize forming a consensus on updated international DSM regulation, which can reduce geopolitical tensions around critical climate and security issues. While the United States has not ratified the UNCLOS, it can encourage and advise members — such as the EU, Canada and the United Kingdom — that will vote on ISA regulation. Policymakers can also prioritize strengthening and forming new working relationships with governments at COP27, as efforts to protect the environment and mitigate climate change will require global cooperation beyond traditional allies and partners. The United States can also speak with partners about adopting trade policies that promote sustainable DSM practices. For example, policymakers could create regulations that restrict the importation of products that use deep sea materials — with a carveout for companies that meet environmental and enforcement standards. Regulations like this will be particularly effective in incentivizing companies to uphold responsible exploration and exploitation as they prepare for commercialization, with the United States being a large target market. And while U.S.-China competition is intensifying, the two nations should prioritize cooperation on the common threat of climate change. Scientists still do not know the extent to which DSM affects the environment. But mismanaged deep-sea exploration and extraction could degrade biodiversity, water quality and fish stocks as well as change ocean currents. The United States should utilize its bilateral relationships and leadership in multinational organizations, like the United Nations, to promote scientific exploration and the protection of biodiversity as guiding principles of DSM regulation. The United States can lead efforts to bridge climate change mitigation and sustainable extraction — as well as enhance global governance of deep-sea mining within multilateral bodies — to mitigate environmental degradation and incentivize cooperation between nations attempting to secure critical mineral supply chains.

#### Pro-environment ISA regulations are key to sustainable DSM

Pickens et al. 24 [Chris Pickens, The Pew Charitable Trusts, Hannah Lily, independent consultant, Ellycia Harrould-Kolieb, Melbourne Law School and School of Geography, Earth and Atmospheric Sciences, University of Melbourne, and Law School, University of Eastern Finland, Catherine Blanchard, Netherlands Institute for the Law of the Sea (NILOS) and Utrecht Center for Water, Oceans and Sustainability Law (UCWOSL), Utrecht University, Anindita Chakraborty, The Pew Charitable Trusts, 11-2024, "From what-if to what-now: Status of the deep-sea mining regulations and underlying drivers for outstanding issues", Marine Policy, https://www.sciencedirect.com/science/article/pii/S0308597X23005006]/Kankee

\* RRPs: rules, regulations and procedures

Under pressure from mining proponents for having missed the 9 July 2023 deadline to finalize and adopt RRPs, the Council sought to provide predictability through the new aim for adoption in 2025 at its July 2023 meeting. Based on the status of the draft RRPs as analyzed in this paper, we are of the view that this new timeline will almost certainly be missed, and not because of a lack of trying. Should this be the case, this will be the third timeline set and missed by the Council. If the intent of setting a timeline, even non-binding, is to provide predictability to member States, observers, contractors and other stakeholders we recommend that before setting another timeline the Council should first agree to a list of outstanding issues required to be settled before the adoption of RRPs and use that as a basis for planning and prioritizing its future work in a methodical and stepwise fashion. Unlike many other industries that have caused significant environmental and social impacts due to unregulated practices, UNCLOS presents the ISA and its member States both with an obligation and an opportunity to proactively shape the RRPs governing this industry, and ensure they are underpinned by the necessary scientific information before DSM commences. By carefully designing and implementing a robust regulatory framework, the ISA can ensure that the potential negative environmental consequences of DSM are sufficiently understood and that any decision to permit DSM ensures the effective protection of the marine environment, while maximizing the financial and non-financial benefits of humanity as a whole, including for future generations. This forward-thinking approach is critical to ensuring the responsible regulation of DSM and represents a unique moment in human history - it should not be rushed and must not be missed.

#### US non-participation will kill DSM environmental norms because of Chinese DSM deregulation

Yozell 24 [Sally Yozell, Senior Fellow and Director of the Environmental Security program at the Stimson Center, former Senior Advisor to the Secretary of State and former Director of Policy and as Deputy Assistant Secretary for Oceans at NOAA with a Master’s degree in Public Administration from Harvard University’s Kennedy School of Government and a Bachelor’s degree in Political Science from the University of Vermont, 11-19-2024, "Race to the Deep on Seabed Mining", Stimson Center, https://www.stimson.org/2024/race-to-the-deep/]/Kankee

The Problem The global race is on to lead in advanced energy and high technology manufacturing to meet the growing consumer demand around the world – particularly for solar panels, electric vehicles, batteries for energy storage and semiconductor chips – while also safeguarding the needs of our military and aerospace. Accompanying this sprint is the international quest to access rare earth minerals, which are vital to meet technology demands. The winner or winners in this competition will determine who will have the edge in enhanced energy technologies, economics, and military security around the world. Mining has accelerated for critical minerals like manganese, cobalt, lithium, copper, and nickel across mineral rich countries and regions including Africa, Australia, South America, and Southeast Asia. Between 2017 and 2022, demand for lithium tripled, demand for cobalt increased by 70%, and demand for nickel increased by 40%.1 The International Energy Agency estimates this demand is likely to double by 2040. Today, China is poised to lead in the global race to secure the deposits of these minerals. With the new U.S. Administration coming to power, potential China hawks like Senator Marco Rubio and Representative Michael Waltz are likely to pay more attention to this competition for advanced technologies, particularly in the maritime domain. Essential Context Great Power Competition China and the U.S. are already engaged in competition over the development and manufacturing of advanced technologies. Securing the critical minerals necessary to support the development and implementation of these technologies has further escalated tensions, with China making significant progress in both land-based and maritime sectors. China has achieved a domestic advantage for “processing and refining key critical minerals,” leaving the U.S., along with its allies and partners, vulnerable to supply chain disruptions that threaten both economic stability and national security.2 Currently, China accounts for 60% of global production and 85% of processing capacity,3 with recent reporting indicating that China is also set to “dominate the deep sea and its wealth of rare metals.4 China has also demonstrated a willingness to leverage its advantages in rare earth minerals. In 2010, the Chinese government blocked rare earth exports to Japan in response to a dispute over Japan’s detention of a Chinese fishing trawler captain whose vessel collided with Japanese coast guard vessels while fishing in waters claimed by China.5 Although Chinese officials denied the existence of the embargo, two months passed before exports resumed. Last year, China announced a ban on the export of technologies used for the extraction and processing of rare earths.6 A December 2023 report from the U.S. House Select Committee on the Chinese Communist Party also highlighted China’s “willingness to weaponize these dependencies [on rare earths] to coerce the United States and its allies.”7 International Seabed Authority (ISA) To date, most rare earth mineral mining has occurred on land. Now, all eyes are turning to the deep ocean floor as the next frontier for critical mineral extraction. Vast fields of nodules that hold critical rare earth metals are located across the world’s deep seabed. Seabed mining is governed by the International Seabed Authority (ISA), made up of the 168 member states who have ratified the United Nations Convention on the Law of the Sea (UNCLOS).8 The ISA is charged with regulating the conduct of deep-seabed mining activities. The United States has not ratified UNCLOS, and as an observer, does not have a seat at the ISA decision-making table. On the other hand, China has taken full advantage of its membership to shape international rules to its interests.9 Though difficult to access, China has prioritized seabed mining by investing heavily in technologies and furthering exploration. In 2016, China’s President Xi Jinping stated that the nation must get its hands on the hidden treasures of the ocean.10 China holds five seabed mining exploration contracts, the highest number of any ISA member.11 Additionally, a Chinese-based company, the Jinhang Group, has attracted millions in early-stage investments and signed a series of contracts to develop China’s first commercial deep-sea mining robot by 2025. In July of 2024, the ISA continued its years-long negotiations to draft seabed mining exploitation regulations.12 Negotiations concluded with numerous gaps in the mining code, including lack of agreement on environmental data requirements, compliance and enforcement mechanisms, and liability requirements. The authority has also yet to broach important components such as environmental impact assessments, emergency response and contingency planning, and toxic substances. In recent years, China has had an oversized influence in the ISA’s decision-making, including blocking discussions on marine conservation at recent seabed mining exploitation negotiations.13 This influence is underpinned by significant financial and technical contributions to the ISA since its founding. China has provided more monetary support to the ISA’s key funding mechanisms—the Endowment Fund for Marine Scientific Research and the Voluntary Trust fund for members of the Legan and Technical Commission and Finance Committee—than any other nation.14 China’s support for the ISA has also taken the form of technical support. In June of 2024 former Michael Lodge, the current Secretary General of the ISA went on a five-day visit to the ISA-China Joint Training and Research Centre (JTRC). The JTRC explores technologies designed to streamline deep seabed mining exploration and eventual exploitation.15 A New Era at the ISA A new era is about to begin with Brazilian oceanographer Leticia Carvalho elected as the next Secretary General for the ISA. Carvalho’s leadership of the ISA will begin in January 2025. Her leadership has arrived at a key moment, with the global race on to exploit the seafloor for valuable minerals and the need for a strong regime to be put in place to ensure seabed mining is done in a manner supported by sound science and is equitable for the parties involved. As the ISA grapples with key governance decisions on permitting, regulations, equity, and seeks scientific information needed for the protection of critical marine resources, the implications for island and coastal developing states are paramount for their future. The U.S. has a chance to engage in constructive dialogue both at the ISA, and bilaterally with allies and coastal developing countries as well as the commercial mining interests who are considering seabed mining in international waters. Such engagement could help foster a responsible regime moving forward. Seabed Mining Pause

## Negative

### Contention 1: Deep Sea Mining Bad CP/DA (UNCLOS)

#### The United States ought to:

#### Not engage in deep sea mining absent permits from the International Seabed Authority

#### Partially ratify the United Nations Convention on the Law of the Sea, excluding Article XI Section Three regarding the permissions in deep sea mining.

#### Absent treaty acceptance, the United States ought to follow all other articles of the treaty as a matter of customary international law.

#### Deep sea mining destroys the carbon sink, biodiversity, and the food web – all independently cause extinction

Baker 21 [Aryn Baker, senior international climate and environment correspondent at TIME, 09-07-2021, A Climate Solution Lies Deep Under the Ocean—But Accessing It Could Have Huge Environmental Costs,” Time, https://time.com/6094560/deep-sea-mining-environmental-costs-benefits/]/Kankee

Marine biologists say they are part of one of the least-understood environments on earth, holding, if not the secret to life on this planet, at least something equally fundamental to the health of its oceans. Gerard Barron, the Australian CEO of seabed-mining company the Metals Company, calls them something else: “a battery in a rock,” and “the easiest way to solve climate change.” The nodules, which are strewn across the 4.5 million-sq-km (1.7 million-sq-mi.) swath of international ocean between Hawaii and Mexico known as the Clarion-Clipperton Zone (CCZ), contain significant amounts of the metals needed to make the batteries that power our laptops, phones and electric cars. Barron estimates that there is enough cobalt and nickel in those nuggets to power 4.8 billion electric vehicles—more than twice the number of vehicles on the road today, worldwide. Mining them, he says, would be as simple as vacuuming golf balls off a putting green. But conservationists say doing so could unleash a cascade effect worse than the current trajectory of climate change. Oceans are a vital carbon sink, absorbing up to a quarter of global carbon emissions a year. The process of extracting the nodules is unlikely to disrupt that ability on its own, but the very nature of the world’s oceans—largely contiguous, with a system of currents that circumnavigate the globe—means that what happens in one area could have unforeseen impacts on the other side of the planet. “If this goes wrong, it could trigger a series of unintended consequences that messes with ocean stability, ultimately affecting life everywhere on earth,” says Pippa Howard, director of the biodiversity-conservation organization Fauna and Flora International. The nodules are a core part of a biome roughly the size of the Amazon rain forest, she notes. “They’ve got living ecosystems on them. Taking those nodules and then using them to make batteries is like making cement out of coral reefs.” The debate over the ethics of mining the earth’s last untouched frontier is growing in both intensity and consequence. It pits biologist against geologist, conservationist against environmentalist, and manufacturer against supplier in a world grappling with a paradox—one that will define our path to a future free of fossil fuels: sustainable energy that will run cleaner but also require metals and resources whose extraction will both contribute to global warming and impact biodiversity. So as nations commit to lower greenhouse-gas emissions, the conflict is no longer between fossil-fuel firms and clean-energy proponents, but rather over what ecosystems we are willing to sacrifice in the process. History is littered with stories of well-intended environmental interventions that have gone catastrophically wrong; for example, South American cane toads introduced into Australia in the 1930s first failed to control beetles attacking sugarcane, then spread unchecked across the continent, poisoning wildlife and pets. Nevertheless, a radical embrace of electric vehicles will be necessary to limit global warming to less than 1.5°C above preindustrial levels, the goal of the Paris Agreement. But according to a May 2021 report by the International Energy Agency (IEA)—the Paris-based intergovernmental organization that helps shape global energy policies—the world isn’t mining enough of the minerals needed to make the batteries that will power that clean-energy future. Demand for the metals in electric vehicles alone could grow by more than 30 times from 2020 to 2040, say the report’s authors. “If supply chains can’t meet skyrocketing demand, mineral shortages could mean clean-energy shortages,” the report argues. Fears of such shortages have countries and companies racing to secure the supplies needed for the coming energy transition. By most assessments, existing mines on land could supply the needed minerals. But after decades of exploitation, the quality of the ore is going down while the energy required to quarry and refine it is going up. Meanwhile, the efforts to extract cobalt, which is mined almost exclusively in the Democratic Republic of Congo, are dogged by persistent accounts of human-rights and environmental abuses. According to deep-ocean-mining proponents, the seabed nodules could provide most of the minerals the world needs, with minimal impact. “The biggest risk to the ocean right now is global warming,” says Kris Van Nijen, managing director of the Belgium-based deep-sea-mining company Global Sea Mineral Resources (GSR). “And the solution can be found on the seafloor, where there is a single deposit that provides the minerals we need for clean-energy infrastructure.” GSR has already trialed a 12-m-long, 25-ton nodule-sucking robot that zigzags across the ocean floor on caterpillar tracks, kind of like a giant underwater Roomba. They dubbed their prototype “Patania,” after the world’s fastest caterpillar. Commercial mining is not yet permitted in international waters. The International Seabed Authority (ISA), the U.N. body tasked with managing seafloor resources, is still deliberating how, and under what conditions, mining should be allowed to proceed. A few private companies, including GSR and Barron’s Metals Company, have scooped up a couple of dozen metric tons of the nodules on exploratory missions, and are now pressuring the ISA to approve commercial operations. Barron is already telling potential investors that he expects to be harvesting nodules by 2024. GSR says that by the time they are up and running, they will be able to collect up to 3 million tons a year with just two of their mining robots. Not everyone is on board. Scientists, conservationists, the European Parliament and some national governments are calling for a moratorium on deep-sea mining until its ecological consequences can be better understood. The ocean environment is already under threat from climate change, overfishing, industrial pollution and plastic debris, they argue; added stresses from heavy machinery and habitat destruction could tip it over the edge. Three miles below the ocean’s surface, the deep seafloor boasts some of the most biologically diverse ecosystems on the planet; the perpetual darkness, intense cold and strong pressures foster unique life-forms rarely seen elsewhere, such as a newly discovered ghostly white octopus dubbed “Casper” and an armored snail that researchers believe doesn’t need to eat to survive. The region may look lifeless, but it is home to thousands of species of tiny invertebrates fundamental to the ocean food web, says deep-ocean marine biologist Diva Amon, whose work is focused on the CCZ. The nodules themselves host microbial life forms that scientists are just starting to investigate—they play an important but poorly understood role in the nodules’ formation that may be vital for a wider comprehension of how ocean processes work. Removing them would be akin to yanking a couple of wires out of the back of your computer just because you don’t know what they’re for. “A lot of the life in the CCZ is very small, but that doesn’t mean it’s unimportant,” says Amon. “Think about our world without insects. It would collapse.” The little data available suggests that deep-sea mining could have long-term and potentially devastating impacts on marine life. For example, in 1989, scientists simulated deep-sea mining in an area similar to the CCZ, and in those simulations, marine life never recovered, according to a recent study published in the journal Scientific Reports. Plough tracks remain etched on the seafloor 30 years later, while populations of sponges, soft corals and sea anemones have yet to return. If the results of the experiment were extrapolated to the CCZ, the authors concluded, “the impacts of polymetallic-nodule mining there may be greater than expected and could potentially lead to an irreversible loss of some ecosystem functions, especially in directly disturbed areas.” That said, it’s a hard call, says Amon. “We want to transition to a green economy. But should that mean destroying a potentially huge part of the ocean? I don’t know.” In June, more than 400 marine scientists and policy experts from 44 countries signed a petition stating that the ISA should not make any decisions about deep-sea mining until scientists have a better understanding of what is at stake and all possible risks are understood. The ISA requires permit holders to undertake three years of environmental-impact assessments before it will grant a commercial license, but given the slow-moving nature of the deep sea, scientists say it would be impossible to understand the impacts in such a short time. Nor is it clear on what grounds, exactly, the ISA will evaluate the results of such studies. A few days later, the debate grew even more heated as the tiny Pacific island nation of Nauru, the ISA member sponsoring Barron’s company in a mining application, announced it wanted to start mining efforts, triggering the ISA’s “two-year rule,” a clause that allows member states to notify the organization of their intention to start deep-sea mining, even if the regulations governing mining have not yet been formalized. It also triggered international uproar. “Deep-sea-mining companies are peddling a fantasy of untold profits and minimal risks,” says Louisa Casson of Greenpeace’s Protect the Oceans campaign. “Governments who claim to want to protect the oceans simply cannot allow these reckless companies to rush headlong into a race to the bottom, where little-known ecosystems will be ploughed up for profit and the risks and liabilities will be pushed onto small island nations.” Barron, who has invested millions of dollars in preliminary environmental-impact assessments, describes the abyssal plain where the nodules are located as a “lifeless desert” where the impact of mining is likely to be minimal, if felt at all. “I think we are overthinking this. There is a reason why they are full of battery metals. It’s so we can make batteries,” he says. If you were to discover a cobalt seam in your backyard, the revenue would, in most cases, belong to you or your government. But much of the world’s known deep-sea metal deposits lies under international waters, which means it belongs to the world. First discovered in the Arctic Ocean in 1868, polymetallic nodules can be found in almost all oceans, but are concentrated in the CCZ. They were widely regarded as geologic curiosities until the 1960s and ’70s, when several multinational mining consortiums started exploring the potential of the CCZ, with mixed results. Despite an estimated yield of 21 billion tons of nodules, commercial interest in mining the CCZ waned, largely because of high extraction costs and the relative abundance of existing sources of the same metals—particularly nickel—on land. Recognizing that the nodules, along with other potentially lucrative seabed mineral deposits in international waters, should be treated as a “common heritage of mankind,” the U.N. established the ISA in 1994, under the U.N. Convention on the Law of the Sea (UNCLOS). The 168-member-country bureaucracy was tasked with organizing, regulating and controlling all mineral-related activities in the international seabed area “for the benefit of mankind as a whole,” with proceeds shared among those who developed the resources and the rest of the international community. The treaty gives the ISA two almost mutually exclusive mandates, says Aline Jaeckel, a specialist on international seabed-mining law at Potsdam University’s Institute for Advanced Sustainability Studies (IASS) in Germany: one to administer the mineral resources for the good of mankind, and the other to protect the marine environment from any harm from mining. “They are almost impossible to comply with because any mining will have environmental consequences. There is no way around that. So the question then becomes, How much harm is acceptable?” Those conflicting mandates may explain why the ISA has yet to issue a single commercial mining permit—and why, in its nearly three decades of existence, it hasn’t even agreed on mining regulations, let alone how revenue from the globally owned resource should be distributed. So far, the ISA has awarded 18 exploration contracts in the CCZ to contractors representing China, Russia and the U.K., along with several other European, Asian and island nation-states. The U.S., which has not yet ratified UNCLOS, tacitly abides by it but has not sought any mining contracts. Once the mining regulations are formally established, exploration-contract holders can apply for commercial-mining permits. According to the ISA’s mandate, mining revenue from those concessions should be equitably shared among members. Yet industry watchers expect that the organization will establish a royalty fee somewhere from 2% to 6% when it next meets in Kingston, Jamaica. A meeting scheduled to take place in July was postponed indefinitely because of the pandemic. In 2019, a group of 47 ISA members from Africa calculated that the proposed payment regime could lead to a return to member nations of less than $100,000 a year per country, hardly enough to “foster healthy development of the world economy,” as stipulated by the UNCLOS directive to the ISA. The final amounts could be even less, especially if the ISA establishes more stringent environmental protections, which would require consistent monitoring, an expensive undertaking when it has to happen thousands of miles from port and three miles deep. “The more money put into monitoring, the less gets distributed to the developing states,” says Pradeep Singh, a research associate at IASS in Germany who focuses on seabed-mining issues, and who frequently attends ISA meetings as a consultant for member nations. Apart from a small number of private contractors and supporting states who could potentially receive a windfall, he says, few others would benefit. Any member nation can sponsor a contract application, but developing nations are given preferential access to concessions with proven deposits, a practice meant to level the playing field. Most sponsoring countries work with their own government-run mining contractors. Nauru partnered with the Metals Company, giving the Canada-based startup preferential access to a 75,000-sq-km area rich in nodules. The details of the Metals Company’s agreement with the government of Nauru are not public, but according to the company’s regulatory filing with the SEC in advance of its pending public listing, the startup estimates that it will earn $95 billion over 23 years of production, of which it will pay 7.6% in royalties to Nauru and the ISA. The rest, presumably, goes to the investors that Barron is now courting. Singh suspects that Nauru’s recent triggering of the two-year countdown to mining activity was directly linked to the Metals Company’s desire to create investor hype ahead of the listing. Either way, Barron has managed to crown what is at its core an expensive, untested and risky underwater-mining operation with a green halo, promising a surefire—and lucrative, at least for investors—shortcut for saving the planet. A self-styled maverick with the requisite long hair, beard and leather jacket, Barron professes to be shocked that conservation groups have not wholeheartedly embraced his plan to mine the ocean for the battery metals that will help replace fossil fuels. The alternative, he says, is to keep plundering terrestrial mines with all their devastating environmental and social consequences: biodiversity loss, habitat destruction, contaminated waterways, displaced Indigenous groups and labor exploitation. “If we started mining over again, knowing what we know now, surely we would carry out extractive industries in parts of the planet where there was least life,” he tells TIME via video call. “We wouldn’t go to the rain forest. We would go to the deserts. That’s what we have here in the CCZ: the most desert-like place on the planet. It just happens to be covered by 4,000 m of water.” Even if seabed mining were able to provide metals in sufficient quantities to feed growing demand for electric vehicles, it’s unlikely that terrestrial mining would come to an end. If anything, demand for the metals would increase, as manufacturers engineer based on the availability of more plentiful supplies. Nor would ocean mining necessarily be immune from the oversight problems that plague land extraction. Fishing on the high seas, for example, is highly regulated on paper, but enforcement is weak because of the difficulty and high costs of policing nearly 100 million square nautical miles of open ocean, leading to rampant abuse. Nor is it certain that cobalt mining will even be all that important in car-battery technology going forward. To start, there are efforts among many battery manufacturers, Tesla among them, to recycle cobalt (among other elements) from spent batteries. More long-term, manufacturers have already started the shift to alternatives. Lithium-iron-phosphate options—which are jokingly referred to as rust-and-fertilizer batteries in the industry for the everyday ubiquity of their core ingredients—may have a lower energy density than cobalt versions, but engineers are willing to work around those limitations in order to reduce their dependence on imports, says Gavin Harper, a battery metals Ph.D. and research fellow at Birmingham University’s Energy Institute. “They won’t give you the extreme performance [of cobalt battery formulations], but they will give you a more than adequate performance that will meet a lot of people’s needs, without the baggage that comes with [cobalt] chemistries.” Many Chinese EV manufacturers have already made the switch, and Tesla announced in September 2020 that the batteries in its Model S will soon be cobalt-free. Even the IEA in its report noted that EV-battery manufacturers are shifting away from cobalt-rich chemistries in favor of those using cheaper, more readily available materials. “My concern is that we start mining the ocean for cobalt because it is profitable now, but once we move to next-gen batteries and more efficient recycling, we will have done irreversible damage for just a few years of profit,” says Harper. The polymetallic nodules do contain other valuable minerals, such as nickel and trace amounts of rare earth, that could make mining them worthwhile, says Frances Wall, the principal investigator for the U.K.’s Research and Innovation Interdisciplinary Circular Economy Centre for Technology Metals. But if the nodules aren’t needed for power storage, “it just takes away that magic headline that you are mining the ocean for batteries. And without that, companies might find it harder to raise investment.” Without its green halo, the Metals Company becomes just another mining company hawking unproven riches at considerable risk. Nor is mining in the deep sea exclusively about minerals. It’s also about access and market share. China, which holds three exploration permits in the CCZ (Russia and the U.K. each have two; every other nation that has any has one), invested early in developing deep-sea-mining machinery and is considered to be a world leader in submersible technology. After a tour of a Chinese submersible-mining-tech factory in 2017, Singh, the deep-sea-mining law expert from IASS, was convinced that the country would be the first to dive in. Instead, it seems to be holding back, he says, because leaders there appear unconvinced that nodule mining is commercially viable. As the world’s top manufacturer of solar panels, turbine parts, EV batteries and all manner of electronics, China is also unsurprisingly the world’s top importer of cobalt, buying some 95,000 metric tons annually, mainly from Congo. As long as supplies remain stable, China will have less interest in aggressively exploring seabed mining. Unless, of course, opening up a new seabed source threatens its dominance in the cobalt-refining business. “If someone is going to be at the front of the line with a cobalt supply that could compete, or threaten their position, then China is going to come quickly, and maybe even cut the line,” says Singh. Meanwhile, China has focused investment on mining in the technologically challenging—and highly controversial—hydrothermal vent deposits of the deep sea, where it holds two additional exploration permits with the ISA. “China wants to do the stuff that nobody else has got access to yet,” says Jessica Aldred, editor of the Oceans special project at China Dialogue Trust, an independent nonprofit organization promoting environmental awareness in China. Amon, the deep-sea marine biologist, has been going to the CCZ since 2013. Each time she returns from a research expedition, it is with a deeper understanding of the complex interactions between the creatures that live at inhospitable depths and the environment that supports them. Her research has shown that those relationships affect neighboring ecosystems as well, impacting biodiversity, feeding patterns and carbon sequestration in ways that scientists have yet to grasp. It has also shown her how much more there is to learn. Barron speaks of “plucking” nodules off the seafloor, but the mining robots work more like vacuums, sucking the nodules up along with a layer of sediment approximately 4 in. deep. Amon describes it as not just clear-cutting a forest but digging up the top 10 ft. of soil as well. She also worries that plumes of disturbed sediment could drift with ocean currents, smothering habitats miles away with unknown consequences. Barron, who has already spent $3 million and committed a further $72 million to deep-sea research, says that preliminary findings show no such impacts. Amon argues that there hasn’t been enough time to know for sure. “No one is saying never,” she says about mining in the deep sea. “Just not yet. By rushing in, we risk losing parts of the planet and species before we know them, and not just before we know them but before we understand them and before we value them.” Companies are starting to heed scientists’ call for a moratorium on exploration activities. In March, BMW and Volvo joined other businesses in a joint statement to say that they would not buy any metals produced from deep-sea mining before the environmental risks are “comprehensively understood.” Even the World Bank warned of the risk of “irreversible damage to the environment and harm to the public” from seabed mining, and urged caution. The mining companies argue that the ISA’s existing research requirements are sufficient. “No commercial licences will be granted by the ISA without a full environmental-impact assessment. If the science shows the deep seabed has no advantages over the alternatives, there will be no seabed-minerals industry,” says Van Nijen, of GSR. He points out that putting a stop to exploration could even be counterproductive. Both GSR and the Metals Company have already invested tens of millions in deep-seabed research. “A moratorium would put a halt to all that,” says Van Nijen. “[Stopping] exploration takes whatever certainty there is for the industry away, which means investment will disappear, which means that research isn’t funded, which means in 10 years’ time, we are in a similar boat as we are today, without a significant advance in knowledge.” Barron may dismiss the bottom of the CCZ as a barren wasteland, but his scientists think differently. When the Maersk Launcher pulled into San Diego’s port on June 8, after a six-week research expedition to the CCZ sponsored by the Metals Company, the top deck was bustling with 21 marine scientists from eight universities packing up seafloor samples to take back to their labs for further analysis. Onboard technical lead Claire Dalgleish, a marine biologist working with the Seattle-based marine-consulting service Gravity Marine, peered into a box containing a 20-sq.-in. section of nodule-studded sediment that had been stamped out of the seabed with the underwater equivalent of a giant cookie cutter. Pointing with her finger, she identified several species of sea life all but invisible to the naked eye: chitons, algae, xenophyophores, miniscule sponges and a delicate fanlike creature called a bryozoan. “Initially you might look at this and think there’s nothing there,” Dalgleish says, “but there’s actually a fair amount of life. It’s just a really small scale.” None of the scientists on board are ready to say what kind of impact, if any, mining will have. An assessment like that will take years of research, says principal investigator Andrew Sweetman, a marine scientist at Edinburgh’s Heriot-Watt University. This is his eighth trip to the CCZ in the past decade, and on each expedition he has discovered something new: “It’s kind of like being the only person on a planet for the first time. It comes with an enormous amount of responsibility to work out exactly what’s going on. But that’s why we’re out here.” Sweetman doesn’t want to get sucked into the controversies over deep-sea mining, but he does agree that without mining interest, research like his wouldn’t be happening much at all. “With all the investment that the mining companies are putting into the Clarion-Clipperton Zone, it’s probably going to be one of the most well-studied areas on the planet by the time we’re finished,” he says.

#### Nodules disturbed by deep sea mining are key to biodiversity

Rasper 24 [Anke Rasper, climate journalist, 8-2-2024, "Deep-sea metals: Vital resource or environmental disaster?", DW, https://www.dw.com/en/raw-materials-does-deep-sea-mining-makes-sense-do-we-need-them-for-batteries-profit-business/a-69840730]/Kankee

How could deep-sea mining harm marine ecosystems? Manganese nodules and mineral crusts aren't dead rocks — they're an important habitat for many sea creatures. According to marine scientists, more than 5,000 different species, some of which have barely been researched, make these unhospitable areas their home. At this depth, conditions are extreme: food is scare, sunlight is nonexistent, and the water pressure is 100 times higher than at sea level. For that reason, the seabed ecosystem — and species that have adapted to living in these conditions — are extremely fragile. Mining robots, which vacuum up huge expanses in their search for manganese nodules, would destroy the ocean floor and suck up countless sea creatures. Even marine life found kilometers away from these mining areas would be disturbed by light and noise pollution as well as the far-reaching, swirling clouds of sediment. Fishing activity above the mining areas could be permanently disrupted. To date, researchers have explored only around 1% of the deep sea area and its potential. A study released in July, for example, showed that the minerals present in manganese nodules are able to produce oxygen through electrolysis, in the complete absence of sunlight. Until now, scientists assumed that this only happened in nature through photosynthesis. Research is ongoing. Marine scientists have warned that beginning deep-sea mining without sufficient knowledge of the potential consequences could be catastrophic for biodiversity and the as-yet little-known sea ecosystems. The necessary research could still take another 10 to 15 years, in part because the area is so difficult to reach. Is deep-sea mining even worth it?

#### Deep sea mining eviscerates the biosphere

Watson 24 [Paul Watson, environmental writer, 3-6-2024, "The Looming Environmental Apocalypse: Deep Sea Mining", InDEPTH, https://indepthmag.com/environmental-apocalypse-deep-sea-mining/

Technology has also advanced considerably since 1977, and the price of these metals has risen sharply providing both financial motivation and ease of access. The mining industry sees a vast area with trillions of “rocks,” easy for the picking. What the industry fails to see (or refuses to see) is that this is a vast, living, finite ecosystem that has evolved over hundreds of millions of years. These nodules are non-renewable, mining will eradicate exceedingly large ecosystems, the machinery will produce high decibel sound waves that will have a devastating impact on living organisms, and the silt will smother the life that survives. That aquatic life will never recover, at least not for another few hundred million years. In addition, while sucking up the rocks, the industry is looking into scraping the sides of undersea volcanoes to extract their cobalt crust and digging deep into the benthic mud to extract massive sulfide deposits around hydrothermal vents. Deepsea mining will cause more destruction on the planet than the cutting down of the Amazonian and Indonesian rainforests. But it will be done with no visible scars; the impacted ecosystems will remain hidden from view and will become huge, extensive, invisible dead zones. The impact on the planet’s atmosphere and ocean ecology will be apocalyptic. How will it impact the already diminished populations of phytoplankton which provide up to 70% of the oxygen in the atmosphere? How will it impact the already diminished populations of krill, the foundation of the food pyramid in the sea? How will deep sea mining influence the climate, the movement of currents, and the migration and viability of sea life? The industry has not answered these questions because there is no answer that they will acknowledge—because such answers will expose them as harbingers of global destruction. At present, there simply is no regulatory framework for mining inside or outside of economic exclusion zones. Already, territorial disputes are emerging. Norway and Russia both want to exploit the seabed of the Arctic Ocean. China is eagerly exploring ways to exploit the South China Sea, which will cause problems for the Philippines, Vietnam, and Japan. And all this jockeying for control contributes to existing unresolved maritime disputes (of which there are hundreds). And thus, we can now see a new threat to the stability of the life support system we call the sea, where acidification, species diminishment, plastic, noise, and chemical pollution are already seriously straining the biological processes that keep the ocean healthy. It appears that full scale deep-sea mining could begin by 2026, and if it is allowed to do so, the global consequences could be cataclysmic.

#### Deep sea mining causes inevitable environmental damage

McKie 23 [Robin McKie, science and environment editor for the Observer, 3-26-2023, "Deep-sea mining for rare metals will destroy ecosystems, say scientists", Guardian, https://www.theguardian.com/environment/2023/mar/26/deep-sea-mining-for-rare-metals-will-destroy-ecosystems-say-scientists]/Kankee

The report, to be published on Monday by the international wildlife charity Fauna & Flora, adds to the growing controversy that surrounds proposals to sweep the ocean floor of rare minerals that include cobalt, manganese and nickel. Mining companies want to exploit these deposits – which are crucial to the alternative energy sector – because land supplies are running low, they say. However, oceanographers, biologists and other researchers have warned that these plans would cause widespread pollution, destroy global fish stocks and obliterate marine ecosystems. “The ocean plays a critical role in the basic functioning of our planet, and protecting its delicate ecosystem is not just critical for marine biodiversity but for all life on Earth,” said Sophie Benbow, the organisation’s marine director. Fauna & Flora first raised concerns about ocean mining in a 2020 report. Since then, scientists have intensified their study of deep-sea zones and highlighted further dangers posed by mining there. These form the focus of the organisation’s report. “It has become increasingly clear in the last couple of years that, apart from other dangers, deep-sea mining poses a particular threat to the climate,” said Catherine Weller, Fauna & Flora’s director of global policy. “The deep sea holds vast reservoirs of carbon which could be completely disrupted by mining on the scale being proposed and exacerbate the global crisis we are experiencing through rising greenhouse gas levels.” Recent research has also emphasised that our knowledge and understanding of biodiversity is woefully incomplete. “Each time an expedition is launched to collect species, we find that between 70% and 90% of them are new to science,” said Benbow. “It is not just new species, but whole genera of plants and creatures about which we had previously known nothing.” This view is supported by David Attenborough, who has called for a moratorium on all deep-sea mining plans. “Mining means destruction, and in this case it means the destruction of an ecosystem about which we know pathetically little,” he said. Delicate, long-living denizens of the deep – polychaete worms, sea cucumbers, corals and squid – would be obliterated by dredging, researchers have warned. Nor would there be any chance of a quick recovery. At depths of several kilometres, food and energy are limited, and life proceeds at an extraordinarily slow rate. “Once lost, biodiversity will be impossible to restore,” says the report. The battle over our planet’s deep-sea resources focuses primarily on the trillions of nodules of manganese, nickel and cobalt that litter the ocean floor. These metals are critical to the manufacture of electric cars, wind turbines and other devices that will be needed to replace carbon-emitting lorries, power plants and factories. As a result, mining companies are now jostling to dredge them up in vast quantities using robot rovers – attached by pipelines to surface ships – that would trundle over the ocean floor, sucking up nodules and pumping them to their mother craft. But operations like these would devastate our already stressed oceans, destroy their delicate ecosystems and send plumes of sediments, laced with toxic metals, spiralling upwards to poison marine food-chains, say marine biologists. For their part, mining companies have defended their plans by pointing out that drilling for mineral reserves on land is even more damaging to the planet’s stressed ecosystems. If we focus all our efforts to dig up cobalt, nickel and manganese there, we will degrade the environment ever further. Better turn to the ocean depths instead, it is argued. The claim is dismissed by Weller. “These companies are presenting deep-sea mining as a new frontier but they really mean it to be an additional frontier – for none of these companies is suggesting that if we started mining the deep seabed then they would stop mining on land. We would just be adding to our woes.” Ocean experts are concerned about the prospects of deep-sea mining operations beginning in the near future, following the decision of the Pacific Island state of Nauru to accelerate exploitation of the sea bed. In June 2021, it notified the International Seabed Authority (ISA) – responsible for regulating mining in areas beyond national jurisdiction – of its intention to sponsor an exploitation application for nodule mining in the Pacific.

#### Royalties from deep sea mining support terrorism and corrupt states

Groves 11 [Steven Groves, Bernard and Barbara Lomas Fellow in the Margaret Thatcher Center for Freedom with a master of laws (with distinction) from Georgetown University Law Center, a juris doctorate from Ohio Northern University's College of Law, and a bachelor of arts in history from Florida State University, 6-7-2011, "U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf", Heritage Foundation, https://www.heritage.org/report/un-convention-the-law-the-sea-erodes-us-sovereignty-over-us-extended-continental-shelf

Royalties and Revenue Exploitation of resources from the U.S. ECS is expected to generate royalties in the near future, and the United States will forgo some of those royalties if it joins UNCLOS. The potential financial impact of joining UNCLOS is evident from a brief review of how revenue is generated from activities currently taking place on the U.S. outer continental shelf within the 200 nm line. A wealth of mineral resources (e.g., oil and natural gas) lies below the surface of the U.S. OCS.[28] Alaska’s OCS alone may contain almost 10 billion barrels of oil and 15 trillion cubic feet of natural gas.[29] Massive known reserves of oil and natural gas also lie beneath the OCS in the Gulf of Mexico. The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE)[30] in the U.S. Department of the Interior manages the nation’s oil, natural gas, and other mineral resources on the OCS.[31] One of BOEMRE’s primary activities is managing sales of offshore oil and gas leases. Through BOEMRE, the United States leases OCS tracts to companies for exploration and exploitation. The companies bid competitively for leases, and the winning company is required to make certain payments to the Secretary of the Interior for deposit into the U.S. Treasury. First, the company that makes the highest bid pays a “bonus bid,” an up-front payment to secure the lease. Second, until production begins at the site, the company makes annual “rent” payments of $5 to $11 per acre, depending on the water depth at the site. Finally, once production begins, the company pays an annual royalty on the value of production at the site. The OCSLA sets a minimum annual royalty rate of 12.5 percent, but that rate has increased over the years and often fluctuates between 12.5 percent and 16 percent, depending on the depth of the water at the site of production. The typical royalty rate on the Alaskan OCS is 12.5 percent.[32] However, new leases have a royalty rate of 18.75 percent, which will likely be the rate for future leases.[33] All royalties, rents, and bonus bids generated from lease sales and production on the Alaskan OCS are transferred to the U.S. Treasury general fund. Bonus bids, rent payments, and royalty payments are distributed differently in the Gulf region. The Gulf of Mexico Energy Security Act of 2006 (GOMESA) governs the distribution of revenue from mineral exploitation in the Gulf of Mexico.[34] GOMESA splits the revenue between the U.S. Treasury and certain U.S. states that border the Gulf.[35] The U.S. Treasury general fund receives 50 percent of the revenue from Gulf OCS leases, and the remaining 50 percent is divided between the Gulf States (37.5 percent) and the Land and Water Conservation Fund (12.5 percent).[36] Both the Alaskan OCS and Gulf OCS will continue to generate revenue for the United States for many years to come. According to Interior Department estimates, the U.S. OCS contains 8.5 billion barrels of oil and 29.3 trillion cubic feet of natural gas in proved and unproved reserves and another 86 billion barrels of oil and 420 trillion cubic feet of natural gas in as yet undiscovered resources.[37] Such vast resources will continue to generate billions of dollars in royalty revenue for the United States. A recent report by the Institute for Social and Economic Research at the University of Alaska evaluated further development of the Alaskan OCS,[38] focusing on the Beaufort Sea OCS and the Chukchi Sea OCS, the two OCS areas off the northern shore of Alaska. Assuming a minimum royalty rate of 12.5 percent, mineral exploitation in these two areas would generate almost $92 billion in royalty revenue over the next 50 years.[39] “Sharing” U.S. Royalties As noted, the Truman Proclamation, the OCSLA, the Convention on the Continental Shelf, and the DSHMRA represent the status quo regarding the definition of the U.S. continental shelf and the disposition of its resources. That is to say that the entire continental shelf, from the shoreline to the end of the ECS where the deep seabed begins, is sovereign territory of the United States, subject to its complete jurisdiction and control. U.S. accession to UNCLOS would significantly alter the status quo. If the United States became an UNCLOS member, it would be required to transfer a substantial portion of the royalties generated on the U.S. ECS to the International Seabed Authority.[40] UNCLOS requires member states to “share” a portion of their royalty revenue for all oil, gas, or other mineral resources extracted from the continental shelf beyond 200 nm.[41] This would include, if the U.S. were a member, the extended continental shelf.[42] Article 82 of UNCLOS states: The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[43] These payments are to be made to the Authority on an annual basis. Like the royalties paid by companies that enter leases under the OCSLA, the amount of the royalty is based on the value of production at the particular site—in most cases, an offshore drilling platform extracting oil or natural gas from the seabed. According to a recent study conducted for the Authority, such payments are considered “international royalties.”[44] Member states begin to pay these “international royalties” during the sixth year of production at the site, apparently to allow the company a grace period of five years to recoup the costs of exploration. Starting with the sixth year of production, UNCLOS members must pay 1 percent of the total production at that site to the Authority. Thereafter, the royalty rate increases in increments of 1 percentage point per year until the twelfth year of production, when it reaches 7 percent. The annual royalty rate remains at 7 percent until production ceases at the site.[45] If the United States became an UNCLOS member, it would effectively be agreeing to transfer to the International Seabed Authority a considerable portion of the royalties generated on the U.S. ECS that would otherwise be deposited in the U.S. Treasury for the benefit of the American people.[46] Assuming that the royalty rate on the U.S. ECS is set at 12.5 percent, the U.S. would be required to transfer more than half of its royalty revenue to the Authority beginning in the twelfth year of production until production ends.[47] Given that ECS resources “may be worth many billions if not trillions of dollars,”[48] the U.S. would be obligated to pay substantial international royalties to the Authority. The United States will likely soon begin to exploit the oil and natural gas resources on its ECS. The BOEMRE has already issued exploration leases for areas located, at least in part, on the U.S. ECS. Indeed, during the bidding process, the BOEMRE has given notice to companies bidding on offshore leases about UNCLOS Article 82. Since at least 2001 and as recently as 2008, BOEMRE has advised companies that the Article 82 royalty payment provisions would apply if the United States joins the convention.[49] The BOEMRE is not alone in its opinion that activities on the ECS will commence sooner rather than later. The report commissioned by the Authority predicts that, while Article 82 “has been dormant since the adoption of the Convention,” it “will soon awaken,” and royalties from that provision may come due to the Authority as early as 2015.[50] In sum, under current U.S. law and policy, all royalties and other revenue generated from exploitation of the U.S. ECS and owed to the United States would be deposited in the U.S. Treasury to be dispensed in the best interest of the United States and the American people. However, if the United States accedes to UNCLOS, potentially billions of dollars in royalties would instead be transferred to the Authority pursuant to Article 82. How the Authority would dispense those “internationalized” royalties is less clear. The Authority’s Distribution of ECS Royalties UNCLOS authorizes the Authority to distribute royalty funds to despotic regimes, corrupt nations, and even state sponsors of terrorism, arguably without the final consent of the United States or any other country that might pay international royalties pursuant to Article 82. UNCLOS provisions direct that international royalties generated by resource exploitation of the ECS be distributed to certain recipients to the exclusion of others. The Authority is required to distribute the revenue only to UNCLOS members and to preference developing countries, particularly those that are landlocked or the “least developed,” and to “peoples who have not attained full independence or other self-governing status.”[51] If the United States joined UNCLOS, it would be one of more than 160 nations that are party to the convention and would have limited control over the disposition of Article 82 revenue. All final decisions on the “equitable sharing of…payments and contributions made pursuant to article 82” are made by the Assembly, the “supreme organ” of the Authority. The Assembly consists of all nations that are party to UNCLOS.[52] The United States would have only one vote in any Assembly decision, whether it dealt with Article 82 revenue or some other matter.[53] Some UNCLOS proponents maintain that the United States, if it joined the convention, would have a “veto” over such decisions because the U.S. would hold a permanent seat on the 36-member Council, which is the executive organ of the Authority.[54] In fact, UNCLOS empowers the Council only to make recommendations to the Assembly on the disposition of Article 82 revenue, which the Assembly may approve or disapprove.[55] Any Council recommendation that is disapproved by the Assembly is returned to the Council “for reconsideration in the light of the views expressed by the Assembly.”[56] Therefore, in function and form, the Assembly makes final determinations regarding the disposition of Article 82 revenue. Thus, it is unlikely that the United States would be able to prevent the Authority from distributing Article 82 revenue to Cuba and Sudan, UNCLOS members that the U.S. State Department has designated as state sponsors of terrorism.[57] It would also be difficult for the United States to block the Authority from sending funds to the undemocratic, despotic, and/or brutal regimes in Belarus, Burma, China, Somalia, and Zimbabwe.[58] Finally, the United States would have limited ability to stop the transfer of Article 82 revenue to corrupt regimes, especially given that 13 of the 20 most corrupt nations in the world are UNCLOS members.[59] By virtue of its seat on the Council, the United States might be able to hinder decisions to distribute Article 82 revenue for purposes to which it objects. Whether the United States would be steadfast in its objections to such distributions and whether the Assembly would make any such distributions without the consent of the Council are open questions.[60] UNCLOS is silent on how UNCLOS nations that receive Article 82 royalty revenue should spend it. UNCLOS does not require recipient nations to spend the revenue on anything related to the oceans or the maritime environment. Nor does it require them to spend the revenue on humanitarian or development projects, even though most, if not all, of the eligible recipients are supposed to be poor, developing countries. Recipients are apparently free to spend the funds on military expenditures or simply deposit them into the personal bank accounts of national leaders. Finally, UNCLOS does not require that Article 82 revenue be spent in a transparent or accountable manner. Apparently, the Authority simply hands over substantial amounts of money to the recipient nation to be spent however that nation sees fit, no matter how corrupt or inept that nation’s leadership is. What the United States Should Do

#### Decade long deep-sea mining experiments prove they’re catastrophic

Duncombe 22 [Jenessa Duncombe, science writer with a MS in physical oceanography from Oregon State University, 1-24-2022, "The 2-Year Countdown to Deep-Sea Mining", Eos, https://eos.org/features/the-2-year-countdown-to-deep-sea-mining]/Kankee

The Possible Toll of Mining Opponents of deep-sea mining say that without a better understanding of its consequences, the risk of environmental damage it poses to the seafloor could be too great. Although research into the effects of mining on deep-sea ecosystems is scarce, one significant attempt to simulate the long-term effects uncovered some damning clues. In 1989, German scientist Hjalmar Thiel led a test of deep-sea mining off the coast of Peru. The expedition, funded by West Germany’s Ministry of Science and Technology, towed an 8-meter-wide plow harrow on 78 passes through an 11-square-kilometer section of seafloor. The plow disturbed the sediment enough to bury most of the nodules—simulating their removal by mining. Twenty-six years later, scientists on the R/V Sonne visited the site for the first time in decades and found long-lasting damage, said ecologist Erik Simon-Lledó from the National Oceanography Centre in the United Kingdom. The nodules still sat under a blanket of sediment, and the critters that usually live among the nodules hadn’t returned. “Nodules act like trees in a forest,” said Simon-Lledó. “If there are no trees, there are no squirrels.” In other research, a group in the Netherlands and Germany simulated the deep-sea food web and showed that removing the nodules resulted in a 31% loss of links in the ecosystem’s food chains. The deep ocean is so poorly understood that in a 30- x 30-kilometer area on the seafloor, a typical research survey might identify hundreds of species living on the nodules themselves—and likely between 70% and 90% would be new to science, Amon said. That doesn’t include the multitudes of single-celled organisms living there. Deep-sea mining could potentially kill microbes in the seabed that sequester carbon dioxide and trigger the release of carbon dioxide stored in deep-sea sediments. Moreover, many marine animals use sound to avoid predators or find prey, and loud noises from deep-sea mining could impair them, said oceanographer Craig R. Smith from the University of Hawai‘i. “Just like you and I get on with our jobs every day, every species in the deep ocean has this role that it plays,” Amon said. These jobs are “all linked to services that you and I rely on,” like drawing carbon out of the atmosphere, storing heat, and supporting fisheries. To safeguard vulnerable ecosystems, ISA excluded 1.6 million square kilometers of the CCZ from mining, singling out areas for their biodiversity and the presence of seafloor features like seamounts. Simon-Lledó believes that the biggest open question about deep-sea mining relates to the effects of sediment kicked up during the extraction process. Mining vehicles will muck up bottom waters with fine particles as they roam around sucking up nodules, and operators will discharge sediment carried up in pipes back into the ocean. Muddy water could clog delicate mucus filters of animals like the giant anemone Relicanthus sp. or obscure light that species like the vampire squid Vampyroteuthis infernalis and the barbeled dragon fish Idiacanthus antrostomus use to mate and hunt. The bottom waters of the CCZ are some of the clearest in the world; sediment collects on the seafloor at only a few millimeters per millennium. In one modeling study, researchers calculated that a cloud of sediment could travel a maximum of 4–9 kilometers from a study site depending on deep-sea currents. Data from the GSR test with Patania II could provide much-needed field observations. “There could be very grave consequences for these activities,” said Amon, who signed the petition for a moratorium on deep-sea mining. Amon worked on baseline surveys for UK Seabed Resources between 2013 and 2016. “I think we as scientists have a responsibility to connect the dots between our research and informing policymakers, decisionmakers, and, ultimately, humankind,” she said. “I have mixed feelings about the moratorium,” said Smith, who has also worked with UK Seabed Resources in the past. Smith has not signed the petition and worries that the moratorium doesn’t detail specific research goals for tackling mining impacts or the resources needed to achieve those goals. Because research into the deep sea and mining effects is often funded by private companies and governments keen on mining, he believes research could plummet if a moratorium is enacted.

#### Deep sea mining is not needed for rare earths – mining waste refinement, recycling, and innovation solve

Jerome 24 [Aaron Jerome, graduate with an MPhil in International Relations from the University of Oxford, 8-27-2024, "The Impact of China's Rare Earth Supply Chain Monopoly on National Security » Karve", Karve International, https://www.karveinternational.com/insights/the-impact-of-chinas-rare-earth-supply-chain-monopoly-on-national-security

Boosting Supply: The processing bottleneck Boosting RE raw material supply has attracted both good and bad ideas. While opening more mines will be important, calls to loosen pollution standards, open deep-sea mining, or bypass permitting processes and concerns of local communities surrounding mines can and should be resisted. Fixing the Rare Earth issue doesn’t require sacrificing environmental protections to open new raw material sources because there are abundant supplies of RE in mine tailings, coal fly ash, and e-waste. The barrier to accessing these supplies is a lack of effective, clean, and economical refining and separation technologies. Disruptive technological solutions should be emphasized, and several already show promise. REs are often found in concentrated levels in waste of other mineral refining processes, which could be refined to separate the desirable REs into commercially useful forms. One example is coal fly ash, which the US produces over 100 million tons per year of, often containing REs which can be processed.12 Another major untapped RE source is e-waste. The US is a prodigious e-waste producer: millions of tons of air pods, old laptops, and phones are disposed of annually. Yet little of this is captured and recycled to preserve the Res – and other critical minerals – contained within. Much e-waste is simply wasted, even as research demonstrates the feasibility of recycling critical minerals.13 A lack of effective methods for reclaiming critical minerals from e-waste contributes to both a worrying dependence on China and environmental degradation. It is up to western governments to solve today’s chicken-and-egg problem: if new RE processing technology is possible, but currently expensive and untested at scale, government support can provide a guaranteed demand for clean, de-risked REs while the industry finds its footing. The Departments of Energy and Defense are already targeting funding at novel processing technologies to process coal ash and recycle e-waste, including with genetically modified bacteria which can be programmed to desirable elements.14 The next step is for the US government to subsidize costs or ensure demand for these products which will, at first, be more expensive than Chinese RE produced with proven but highly pollutive processes. Reducing Reliance Through Innovation While there are multiple options to improve RE supply discussed above, for some RE applications, there is also the possibility of reducing demand. Toyota has worked developed new magnet technologies to reduce the need for terbium, one of the most expensive REs, by 80% in their EV motors. Scientists at Cambridge have also discovered a novel method to produce a RE-free permanent magnet which exhibits similar properties to advanced RE magnets.15 As these examples show, an exclusive focus on increasing production could come at the cost of circumventing the problem via clever disruptive technologies. Conclusion Human civilization’s technological progress has often been periodized by the materials we use, from the stone age to the significance of coal and steel for the industrial revolution. Rare earths are among the most important elements powering modern civilian and defense technologies. It is therefore essential to ensure a steady, stable supply of these vital elements. Solving the issue of rare earth on Chinese processing will require concerted effort from industry, capital, and government. New technologies can help reduce the environmental destruction and pollution associated with the rare earth processing technologies of today, but governments must act to foster innovation, tap into creative supply sources, and support the next-generation of rare earth industry.

#### DSM destroys and poisons global fishery stocks

Vincent 24 [Camber Vincent, teaching assistant at Georgetown with a Bachelor of Science in Foreign Service, Science, Technology, and International Affairs from Georgetown University, 7-30-2024, "High-Seas Fishery Managers Should Oppose Deep-Sea Mining", Common Home, https://commonhome.georgetown.edu/issues/spring-2024/high-seas-fishery-managers-should-oppose-deep-sea-mining/]/Kankee

Many member states of the ISA expressed concerns with deep-sea mining, feeling unsettled by a lack of knowledge regarding the impacts of the process on marine life and ecosystems. We know deep-sea mining will have a number of impacts on the marine ecosystem, including noise pollution, the removal of ambient water, the destruction of sea-floor substrate, the alteration of habitat and sediment plumes. Sediment plumes are not well understood, but from small-scale field experiments, have been found to potentially smother organisms, release toxins, acidify the water, deplete oxygen and disperse pathogenic material, while also increasing turbidity — the clarity of water — which can affect water chemistry and microbiology. We don’t know just how drastic these impacts will be, how far away from mining sites they will be felt and how long it will take for marine ecosystems to return to equilibrium should deep-sea mining be permitted. One such high-seas study published in “Marine Policy” in late July 2021 displayed an overlap between high-seas fisheries and deep-sea mining zones. Previously considered unrelated industries, the article led the charge to bring high-seas fishery managers into the conversation on deep-sea mining. The study found that the five zones of which interest for deep-sea mining exploitation is highest overlapped with high-seas fishing grounds managed by regional fishery management organizations (RFMOs). Furthermore, the study estimated that there would be impacts on fisheries regardless if plumes only disrupted 50 kilometers (km) around the site (as is in order with lower estimates) or up to 200 km around the site (in accordance with higher estimates). At 200 km, deep-sea mining operations would overlap with a region outputting roughly 80,000 tons of annual catch in the Clarion-Clipperton Zone. The operations would overlap with an additional 70,000 tons of catch across four other primary fishing regions. Regardless of exact quantification, the study clearly demonstrates that fishery stakeholders should be aware of spatial overlap with deep-sea mining operations and must contribute to conversations on mining regulations as a stakeholder in the blue economy. The spatial overlap of the two operations will interfere with fisheries’ abilities to pull in healthy stock for sale on the market. Competing technological equipment may affect each’s operations, and fish stock living patterns may rapidly shift in response to mining operations. More importantly, mining operations could increase concentrations of toxic metals in the water column, killing marine life directly or remaining present in fatty tissues through bioaccumulation. This accumulation of toxic metals can then biomagnify up the food chain, and the final catch destined for the market is delivered to consumers with heavy doses of toxic metals. Beyond the direct impacts of mining operations, high-seas fishery managers must be aware of the indirect impacts of deep-sea mining on marine species. Marine ecosystems already face immense stress from a combination of factors, including “climate change, acidification, deoxygenation, pollution and over-exploitation of living marine resources,” and another stressor — mining operations — may cause an ecosystem crash. In addition, mining locations often coincide with important ecosystems, like seamounts, which provide vital habitats for marine species to feed, breed and nurse their young. When disrupted, these ecosystems may never recover on a human time scale. Furthermore, midwater ecosystems have been heeded little attention, with the focus dedicated to mining impacts on seafloor environments. These midwater ecosystems represent a huge amount of the marine biosphere and play key roles in carbon export, nutrient regeneration and provisioning of healthy fish stocks — all of which are at threat from deep-sea mining impacts. The turbidity and noise impacts from a single mining site can travel hundreds of kilometers, with known negative impacts on organisms’ behavior, physiology and survival rates. Given the widely understudied and unknown interconnections of high-seas ecosystems, we cannot provide an accurate model or estimate of how deep-sea mining will devastate marine ecosystems, but we know it has the potential to. High-seas fishery managers must urge for the application of the precautionary principle — calling for caution, pausing, and review before implementing a new technology — in approaching the debate on allowing for deep-sea mining operations to commence. High-seas fishery managers are uniquely positioned industry stakeholders with significant connections to other actors in the marine regulation sphere, and they have an opportunity to leverage their strong networks in opposition to deep-sea mining. Of course, we must also recognize that high-seas fisheries are not a beneficial industry to marine ecosystems. High-seas fishing is often listed as a primary threat to sea life due to stock overexploitation, damages from bycatch, noise pollution, interference in open ocean and deep-sea ecosystems and environmental degradation. High-seas fishing would also largely be unprofitable without the government subsidies currently offered. Nonetheless, high-seas fishing continues due to the outsized influence industry leaders have in governance decision-making. If they already have the influence, why not put it to good use? Deep-sea mining is likely to be far more invasive and damaging than high-seas fishing, and we know a lot more about fishing and its impacts than we do about deep-sea mining. Bringing high-seas fishery managers into a diverse coalition of actors opposed to deep-sea mining will likely bolster the chances of regulatory success and could also form an unlikely partnership for cooperation on other threats to the high-seas like those from high-seas fishing. As the ISA Council and Assembly prepares to reconvene for their next sessions from July 10 to 28 — when the two-year time bomb goes off — officials must be urged and prepared to consider the legal option to adopt a precautionary pause or moratorium on deep-sea mining. Once deep-sea mining begins, it is unlikely to stop, and once marine ecosystems are disrupted, they will be impossible to restore. Given the dire, ecosystemic threat from deep-sea mining and the rapidly closing window for opposition to form, high-seas fishery managers must wholeheartedly oppose deep-sea mining and work to see the imposition of a moratorium in due time.

### Contention 2: Colonialism/Imperialism (ICC)

#### The ICC is a tool for “white saviorism” colonial subjugation by the West, “civilizing savages” with Western law

Iyi 23 [John-Mark Iyi, educator at the African Centre for Transnational Criminal Justice Faculty of Law, for the University of the Western Cape, 2023, “Is International Criminal Justice the Handmaiden of the Contemporary Imperial Project? A TWAIL Perspective on Some Arenas of Contestations,” Springer, https://link.springer.com/chapter/10.1007/978-94-6265-551-5\_2]/Kankee

In the same vein, at the time institutions of international law like the International Law Commission was purportedly developing universal norms of international criminal law and justice at its different sessions eventually leading up to the establishment of the ICTY, ICTR and the ICC, there was no reference to the colonial atrocities committed against the peoples of the Third World in the colonies—their voices marginalised and their sufferings effectively erased. It is no surprise therefore, that developments in different branches of international law—human rights, international humanitarian and international criminal law—and the protections purported introduced by these normative evolutions for the universal good were not extended to colonial peoples especially Africans.61 By burying colonial atrocities without reckoning, the post-war UN system validated colonial practices and entrenched the subjugation of the Third World peoples in the new UN Charter-based Post-War World Order supposedly built on claims of ‘never again’. We also see similar continuities when we examine the UN Security Council and what has been described as the phenomenon of ‘Hague Justice’. One important element of the new system is the international concern with human rights and the powers of the UN Security Council in the maintenance of international peace and security. Both of these developments were to become veritable tools in advancing the imperial project from where colonisation left off. The same logic of international criminal justice that underpinned the establishment of the IMT by what one may call the ‘P4’ was carried forward and is now firmly institutionalised in the role of the P5 in the UN Security Council and its powers in terms of Article 13(b) and 16 of the ICC Statute. Thus, the current ICC framework of international criminal justice mirrors the current global power structures of legalised hegemony whereby 5 permanent members of the UN Security Council (pretty much the same as the Allied Powers that set up the IMT in 1945) determines who gets referred to the ICC—including non-state parties to the ICC Statute. I have explored the legal problems posed by these contradictions and inconsistencies of international criminal law elsewhere but it suffices to say that this anomaly is not a coincidence but shows the ways in which international criminal justice effectively serves as a tool in the repertoire of international law for the imperial project.62 What Article 13(b) and Article 16 of the ICC Statute does is to legitimise and cement in the international criminal justice realm, the racialized hierarchies of States in the global world order constructed on the UN system in 1945 where Africa is not represented on the UN Security Council on a permanent basis. This has become another site for TWAIL critique of international criminal law and as Makau Mutua puts it, ‘TWAIL opposes Western hegemony, which the UN legitimizes through the cloak of universality. […] A critical perspective reveals how the selective use of UN organs to advance Western foreign policy, stand in direct contradiction to its highsounding morals.’63 This view challenges the assumption that the ICC is a purveyor of international criminal justice rather than a new legitimizing authority for Western hegemony. This argument has even been extended to the rationale behind the location of institutions of international criminal justice and its enforcement mechanisms mainly in major capitals in the global north from where justice is to be dispensed and exported to the ‘dark corners of the world’ however farremoved from the sites of the commission of those atrocities whether geographically or in terms of proximity to the victim communities most affected by those atrocities. This is arguably another form in which contemporary international criminal justice reproduces colonial continuities and carries forward the ‘civilizing mission’ of the imperial project. 2.3.2 Alleged Selectivity The post-World War II international criminal law regime and its institutions—IMT, the International Tribunal for the Far East, ICTY, ICTR and the ICC have been criticised for their selectivity and to some extent, critics and defenders seem to agree on this but tend to differ on the justifications for this selectivity. Both sides have often relied on similar methodological approaches and more on political rather than legal arguments.64 This selectivity is historically entrenched in the colonial origins of international criminal justice.65 We have already pointed out above that at the same time international criminal justice was invoked at Nuremberg to hold the Nazis accountable for the Holocaust, Britain, France and the United States carried on official policies of no less egregious crimes and systematic violence against Africans and African Americans in their jurisdictions without reproach from international criminal justice. The only difference was in name and this perception of double standards and selectivity have influenced how many in Africa for example perceive international criminal justice.66 Today, the number of cases from Africa at the ICC and the selective application of universal jurisdiction by individual European states indicate that there is one standard of justice for the West and another for the Third World. Until very recently, the ICC has dragged its feet to open investigations anywhere else other than Africa particularly where the high and mighty are involved.67 This selectivity and what often underlies it—a racially and geographically biased regime against citizens of the Third World—and how this fit into the larger scheme of things in the international legal order is part of what TWAIL seeks to uncover.68 One could point to one example in the post-Nuremberg International Criminal Law era and the ICC era. In the aftermath of the Balkan wars, the UN Security Council established the ICTY to investigate and prosecute perpetrators of atrocities during the conflict in the Federal Republic of Yugoslavia. There were persuasive evidence of alleged crimes committed by NATO forces during the conflict but this was not investigated further by the ICTY.69 This pattern continued in 2011 when the UN Security Council authorised intervention during the Libya uprising.70 Once again, there were allegations of international crimes committed by NATO forces in Libya which were not referred to the ICC for further investigation.71 Afghanistan is the latest episode in this list. It is possible that we may yet see some form of accountability for victims in Afghanistan without creating categories of acceptable and unacceptable perpetrators—US/NATO forces or the Taliban/IS. However, the recent pronouncement by the Prosecutor of the ICC to only prioritise investigations of the crimes committed by the Taliban and ISIS-K and not those of other perpetrators confirms concerns long raised by TWAIL scholars but also by anyone who takes international criminal justice seriously.72 In fact, the latest declaration by the ICC prosecutor re-echoes the low ebb of Moreno Ocampo, the first Prosecutor of the ICC, and reminds us of how the ICC and its officials as an institution perpetually operates in the shadows of Western powers and how their officials instrumentalise their office at the behest and to do the bidding of hegemons in the name of international law and international criminal justice.73 This has led some observers to conclude that the ICC is a political animal and as Tor notes, ‘the International Criminal Court does not, and cannot, exist outside politics and its activities reflect that.’74 A synergic approach to the Third World has now emerged whereby the alliance of imperial forces launch military interventions and thereafter the ICC moves in a sort of military-juridical two-pronged approach to intervention whose purpose masquerades as the protection of civilians and international criminal justice.75 Yet, any criticism of the ICC and the dangerous instrument of post-colonial domination it is fast becoming is often met with the retort ‘what about justice for the victims of atrocities’.76 This enterprise championed by NGOs in the Global North and their hand-picked local subsidiaries in the South conveniently turn a blind eye to centuries of atrocities during colonialism, apartheid, the sub-human conditions and other abuses suffered by minority groups in the Global North, and other forms of structural violence perpetrated by multinational corporations.77 Finally, international criminal justice regime does not address structural violence and socio-economic crimes committed by international financial institutions and the socio-economic conditions they produce in the Global South. This selectivity has sometimes been extended to Global South political elites who have successfully aligned with the dominant global power structure. Thus, TWAIL scholars conclude that international criminal justice suffers from the same disease that besets international law more broadly. International criminal justice is therefore, just an additional tool in the repertoire of the modern civilizing mission whose purpose is to humanise the peoples of the Third World and deliver ‘justice’ to the savages by replacing a system inherently incapable of delivery justice to the many victims in the Third World.78 Framed in the language of universal human rights, democracy and the rule of law, the post-colonial state in the Third World is projected has having failed thus, necessitating external military or judicial interventions or both. This then lays the foundation for what follows in the subtle erosion or unmaking of the sovereignties of the Third World—a process to which the international criminal justice has become central. TWAIL is therefore relevant to the ensuing discourse and articulating the concerns of the Global South with international criminal justice and its proximity to hegemonic power relations that forms the focus of this volume. The next of these concerns is the claim to universality of international criminal justice norms and the underlying values. 2.3.3 The Supposed Universality of Legal Norms Another area of concern to the Third World is how the supposed ‘universal’ standards and values are arrived at with little regard for non-Western conceptions of justice. What qualifies as fair trial is measured against the standards contained in the ICC Statute. For example, at the mention of ‘fair trial’, the legal imagination of international criminal justice enthusiasts conjures the picture of a courtroom packed with defence lawyers, prosecutors, judges etc. So, to qualify as fair trial, an international criminal justice process must have these elements and meet this threshold.79 This standard apparent western paradigm held up as ‘universal’ standard does not countenance a process without the presence of a lawyer. In other words, it is the gold standard of what qualifies as ‘fair trial’ in accordance with the ICC Statute. It is true that this is now a part of the criminal justice system in most jurisdictions across the Third World. Hence, this relic of the civilising mission of a colonial heritage is often held up as validating its claim to universality while ignoring the resilient albeit marginalised voices of juridical resistance of African customary law. In this way, international law confers the imprimatur of general principle of law recognised by civilised nations thus making it a valid source of a universal norm of international criminal law. In this way international criminal justice symbolised by the ICC and its founding ICC Statute serve as a mechanism for the continuation of the supplanting and emasculation of indigenous legal systems started during colonisation, this time, in the international criminal justice arena. Both as a source of principles drawn from international law that has historically served and been used for the subjugation of Third World peoples international criminal justice becomes complicit in this imperial project. One can draw some tentative conclusions from the above arguments: first, that much like international law generally, international criminal justice privileges western legal norms as universal standards. To be considered as valid, non-Western notion of justice have to approximate to Western standards and this is a concern for TWAIL. As Anghie and Chimni argue, the growing regimes of international law ‘directed at bringing about a particular way of being is therefore closely connected to the kind of universality that resides at the core of the international legal project.’80 This is not to reject the universality of certain values but it is to resist the universality of every value whose sole claim to universality is its basis in colonial international law—it is to be alert to what type of universality to embrace and the type to resist.81 Another area in which we see the manifestation of this in the ICC paradigm of international criminal justice is the principle of complementarity which supposedly underpins the ICC system. If a State party that has jurisdiction is ‘unwilling or unable’ to investigate and prosecute the alleged crimes, the ICC can assume jurisdiction.82 The ‘unwilling or unable’ doctrine adopted here represents the continuities of the ‘civilised-uncivilized’ yardsticks that have defined how international law has historically been applied to the Third World.83 It is therefore arguable that the meaning of ‘unwilling or unable’ as contemplated by the ICC Statute implies where the judicial system of a particular State party does not approximate to ICC standards which in this case, suggests a judicial system that does not resemble the Western system which is what is regarded as the universal standard by the ICC Statute. Closely connected to this is the idea that equates ‘justice’ with retributive justice—a standard against which all others must be judged. The problem with the notion of the universality of retributive justice in this sense is that its claim to universality arises from representing the values of certain societies different to its own set of values as particular or relative while asserting itself as the universal.84 Underlying this and similar normative standards in the ICC Statute framework is the assumption that these values are hierarchically superior and universal and non-Western notions of justice that are different do not qualify as ‘justice’ in terms of the ICC Statute. It is this privileging of certain values of certain societies that ignores the reality that some societies do not subscribe to ICC-style retributive justice as an appropriate or adequate response to address mass atrocities.85 To the extent that the ICC framework of international criminal justice does not recognise the plurality of values, it is complicit in entrenching hegemonic international law and promoting the imperial project. For this reason, TWAIL ‘insists on the recognition of cultural and civilizational plurality and diversity’ and TWAIL scholars unmask this and other modes of colonial continuities as arenas for contestations and resistance.86 A final example of these cultural biases and its operations within the ICC framework of retributive justice can be seen in the case of The Prosecutor v. Dominic Ongwen where the Trial Chamber of the ICC rejected the possible impact of the defendant’s cultural beliefs on his criminal conduct.87 In the Court’s attempt to evaluate evidence to arrive at a notion of ‘justice’ determined by alleged universal standards contained in the ICC Statute—retributive justice—the Court had to grapple with the cultural context of the society within which the alleged conduct took place. Space will not permit a detailed critique of this case here but it suffices to state that in the Court’s construction of ‘justice’ it was unable to envision an alternative notion of what constitutes ‘justice’ in a variety of socio-cultural contexts. In the context of the campaign to end impunity, justice for the victims of atrocities is linear and viewed through one dimensional prism—retributive justice culminating in investigation, prosecution, conviction and imprisonment. Societies undergoing transition from violent conflict are faced with a hierarchy of norms with international criminal prosecution and the ICC sitting right at the top. TWAIL contests such hierarchical ordering ‘driven by complexes of superiority.’88 It is no surprise that this ICC style retributive justice has arguably yielded little fruits for transitional justice societies in Africa. For example, the search for justice in Uganda. On the one hand, the selective prosecution of rebel leaders of the Lord’s Resistance Army have been hailed as a victory for the victims and their quest for justice. However, on the ground, if one leaves aside for the moment the NGO-driven media perspective of justice as retribution, the story seems different. The Acholi community and their conception of justice as the restoration of social harmony through participation in propitiatory rituals aimed at reconciliation represents this opposition and marginalised voices in international criminal justice discourse.89 It is viewed as the ‘other’, that in some way suggests it is inferior to the ICC retributive justice. This characterisation not only deprives these victims and their community agency but ensures that they remain the marginalised voices in international criminal justice discourse. The defendant may very well have still been convicted but beyond the obvious fact that this demonstrates the intolerance of the current ICC framework of international criminal justice towards legal pluralism and diversity in international criminal justice, it also shows the ways in which contemporary international criminal justice perpetuates the colonial civilising mission. The language of human rights is often appropriated by the ICC for this purpose. Invariably, the normative claims of universality of human rights, the cultural assumptions that underpin the human rights language by which international criminal justice and the ICC in particular have now been operationalised exposes this new ‘civilizing mission’ behind the international criminal justice project as a mechanism to export civilisation to others.90 This is not to say that human rights is not worth defending, but it is to say that the way concepts, principles, norms, and doctrines of international law have historically been produced and understood have been shaped by power imbalance since the colonial era. Contestations of these issues is TWAIL’s contribution to justice in the international legal order.91 2.3.4 Categories of International Crimes

#### ICC foundational laws inherently favor the West and denigrates non-Western thought

Manley et al. 23 [Stewart Manley, PhD candidate at the Faculty of Law at the Universiti Malaya , Pardis Moslemzadeh Tehrani, Associate Head at the School of Law at the Faculty of Business Law and Tourism at the University of Sunderland, and Rajah Rasiah, Distinguished Professor of Economics at the Asia Europe Institute at the Universiti Malaya, 2023, “The (Non-)Use of African Law by the International Criminal Court,” Oxford University Press, https://unlv-primo.hosted.exlibrisgroup.com/permalink/f/6tvje6/TN\_cdi\_oup\_primary\_10\_1093\_ejil\_chad035]/Kankee

In a record related to the Situation in Darfur, Sudan, the Office of Public Counsel for the Defence (OPCD) had made several requests for documents related to applications filed by victims to participate in the proceedings.29 In response, Pre-Trial Chamber I ruled that the mere fact that some people may be entitled to the procedural status of a victim is not per se prejudicial to the defence, citing the statutes of five countries – Brazil, Italy, Spain, France and Belgium – that provide procedural status to victims. As with the other cases, there was no evidence that the Court examined the laws of Sudan to determine whether they provide for the procedural status of victims. African regional authorities were also used by the Court to support legal interpretation. The Appeals Chamber in Ngudjolo Chui, for instance, cited the African Charter on Human Rights to support the proposition that the right to apply for asylum, the principle of non-refoulement and the right to an effective remedy are internationally recognized human rights.30 Pre-Trial Chamber I cited the Constitutive Act of the Union of Africa to support its interpretive finding that the African Union is a regional agency within the meaning of Article 52 of the UN Charter.31 Some citations to national cases and statutes were coded in the database as ‘mentioned’, meaning that they were only tangentially related to the actual interpretation of law. For instance, in a record related to the Situation in Darfur, Sudan, 32 Pre-Trial Chamber I obliquely cited the American Serviceman Protection Act.33 The context of this citation is difficult to discern because the underlying OPCD filing to which the decision was responding is not publicly available. The citation, which observes that entities in the USA were prohibited from cooperating with the ICC, appears nevertheless to suggest that the OPCD would be unable to obtain information it needed about the potential victims as a result of the American Service-Members’ Protection Act. In another example of ‘mentioned’ citations, the Appeals Chamber in the DRC case of Ngudjolo Chui cited ongoing Netherlands cases to support its assertion that it lacked jurisdiction over witness asylum claims.34 If one reads the records in isolation, the citations seem unremarkable. Courts have to identify authorities that address the legal issues before them, and these were the authorities that the ICC found. Looking at the citations in toto as depicted on the graphs, however, reveals certain proclivities. Every citation, after all, is simultaneously a decision to cite one authority and not cite another one. The empirical data point to a significant problem for the ICC because, even if the citations are appropriate, the favouring of Western laws is impossible to ignore. The next section suggests that the problem can be traced at least in part to the marginalization of global South legal systems from international law. 3 TWAIL and the Sources of Law Doctrine TWAIL scholarship has a rich history of connecting Third World concerns, especially the impact of colonization, to the skewed nature of the sources-of-law doctrine.35 This doctrine, not only embodied in Article 38 of the Statute of the International Court of Justice (ICJ Statute) but also partially reflected in Article 21 of the Rome Statute and Article 31 of the Vienna Convention on the Law of Treaties (VCLT), is of particular interest to TWAIL scholars because of the way in which it renders some communities ‘distant and obscure’.36 International law, according to Article 38(1) of the ICJ Statute, is the law to which states consent to be bound.37 This concept is problematic from a TWAIL perspective because colonization rendered colonized peoples stateless or made them mere vassals of their colonizers. Much of Africa and other colonized regions, therefore, were not considered states and, as a result, were seldom involved in the development of international law.38 The other ‘meta-source’ in Article 38(1), which is also problematic, is the reference to ‘the teachings of the most highly qualified publicists of the various nations’ as ‘subsidiary means for the determination of rules of law’. These teachings came to be, and, to an extent, continue to be, identified with the ‘treatises of the “fathers of international law” – men such as Vitoria, Suárez, Gentili, Grotius, Vattel, and Pufendorf ’.39 It is no accident that these are all European men. Because it was constructed in this way, the orthodox sources-of-law doctrine leaves ‘non-state forms of political collectivity invisible’ and makes it exceedingly difficult to locate and recognize relevant and applicable national laws from peripheral states.40 TWAIL scholars argue, therefore, that Eurocentricity is an inherent part of the doctrine. In a modern manifestation of this character, international criminal justice can be said likewise to rest on an ‘assumption that the relevant legal sources … are found largely in the American zonal trials after Nuremberg, but not in Islamic or Chinese law’.41 This article suggests that the lack of citations to the laws of global South states as reflected in the results of the citation study are in part a consequence of this distorted centrality of Western sources of law. B.S. Chimni’s seminal critique of one of these sources of law – customary international law (CIL) – is an instructive example of how TWAIL connects colonialism and capitalism with the sources-of-law doctrine. Chimni describes how, in the 19th century, Europe was considered the theoretical centre of the emergence of international law. The 1856 Treaty of Paris42 shifted the makeup of the international community from Europe to civilized nations, thus leaving out the practices of ‘uncivilized’ non-European states.43 In this way, he traces the origin of CIL to ‘the emergence of Europe as a legal community, common European values, the positivist method, and the needs of nineteenth century imperialism’.44 Chimni argues that the lack of available evidence of the state practice of developing countries leaves it dominated by developed countries, and even if these peripheral practices were available, the doctrines of specially affected states and persistent objectors would diminish their significance.45 Even the attempt to distinguish between material and formal sources of CIL, devised as a way to cut CIL from its historical roots and distributional consequences, has the result of ignoring the culture and history underpinning material sources that are steeped in racist and parochial European and colonial traditions. Taking a more empirical approach in Is International Law International?, Anthea Roberts explores how international lawyers around the world are influenced and exert influence, concluding that ‘the meaning and application of international legal doctrines, principles, concepts, and treaty provisions are dependent on interpretative priorities and presumptions that reflect larger – but specific and often contested – views and assumptions about the nature and objectives of international law’.46 Though, ideally, international law would be constructed equally across national and regional traditions, Roberts notes that, in fact, its construction is largely Western. For instance, the national laws cited in international courts and in international law textbooks are dominated by Western laws, particularly British and American.47 What these and other studies demonstrate is that deeply entrenched biases are intrinsic to the sources of-law doctrine. It should come as no surprise then that the source-of-law choices made by modern international courts such as the ICC reflect those biases. Given this context, this article suggests that the lack of citations to African legal authorities reflects not only a failure of the ICC judges to give the same weight to the laws of Africa as they do to those of Europe or North America but also how the system is stacked against the global South and the rest of the periphery and that this bias is woven into the very fabric of the historical development of law. The use of English law to discuss the stay of proceedings, or the use of the laws of France, Germany, Italy, Mexico, the Slovak Republic and Switzerland to help determine that false testimony includes omitting the truth, arguably reflects that most of these countries, rather than others, are at the centre rather than the periphery and will remain there (notably, Mexico is a global South country).48 The disregard for African national laws is complicated by the fact that almost all African countries (except Liberia and Ethiopia) were colonized and, without exception, adopted the colonizer’s civil or common law legal systems upon independence. The continued use of the metropole’s laws was a result of a ‘lock-in’ that favoured following the institutional system that was known at that time. In Nigeria and Kenya, the courts and legal systems counter-intuitively resembled the English common law even more after independence than before.49 This retention of colonial legal systems, however, does not mean that the ICC can simply look to the colonizer’s laws as a proxy for African laws. African nations have their own laws – both pre- and post-colonial; both formal and informal – apart from those that mirror the metropole’s. The structural bias against laws from the periphery goes deeper yet. There are mundane practical considerations that also place global South countries at a disadvantage. When examining the state practice needed to create CIL, Chimni observes that Third World nations do not always systematically assemble and publish their practices due to, for instance, a lack of human or financial resources or because documentation may not be an important part of their culture.50 Also, the views of highly regarded scholars can serve as a subsidiary means of identifying principles of international law, yet Third World scholars with fewer resources produce less, placing the law of these nations at a disadvantage.51 Cases and statutes from African and other global South countries are often not as easy to find online as those of global North countries. Sometimes, language differences will also create hurdles to accessing these laws. These challenges make it less likely that judges will look for these laws and, when they do, that they will actually find them or be able to understand them. And even when they do look and can find and understand them, the impact of colonialism may nonetheless indicate that the local laws are consistent with those of the imperial powers. 4 Statutory Support for Examining African Laws

#### ICC spectacularized “savage” crime focus obfuscates structural colonial violence while legalizing and authorizing Western violence

Kotova 23 [Anastasiya Kotova, educator at Lund University, 2023, “Violence in International Criminal Law and Beyond,” Springer, https://link.springer.com/chapter/10.1007/978-94-6265-551-5\_3]/Kankee

3.4.2 Violence Invisible to, and Made Invisible by, International Criminal Law Some of the observations made by Galtung are applicable and significant to my analysis of the notion of violence in international criminal law, as discussed above. The attention towards ‘violence that shows’, which has a perpetrator and which is intentional, reproduces the biases Galtung emphasises. As international criminal law is honed to see primarily personal, intentional, and barbarously spectacular violence, it seems to focus on an almost ‘pure’ case of violence, but as Galtung suggests ‘pure cases are only pure as long as the pre-history of the case or even the structural context are conveniently forgotten’.101 Galtung notes that it is primarily the intentional violence that is acknowledged by the dominant ethical and legal systems, and I contend that this is also the case for personal violence versus structural violence. One might observe that it is rather unsurprising that international criminal law has inherited the biases present in much thinking about violence. It is important, however, to be acutely aware of the consequences of the frames of recognition of violence being reproduced.102 To be addressed, violence first needs to be recognised as such, but only violence that passes through certain pre-existing frames of recognition can be seen and acted upon: in other words, it has to be recognisable as violence. ‘[R]ecognizability’, Judith Butler argues, ‘describes those general conditions on the basis of which recognition can and does take place’,103 the conditions that are ‘historically articulated and enforced’.104 Phenomena that are instances of structural violence—poverty and destitution, marginalisation, racism, and discrimination are not recognised as violence, because they do not fit in the existing frames of recognition, frames that are structured in a way that makes these phenomena appear both natural and inevitable, insofar as they randomly occur. Marks explores the consequences of such lack of recognition, discussing the ‘root causes’ turn in human rights discourse: The systemic context of abuses and vulnerabilities is largely removed from view. Despite or rather, because of attempts to explain them, human rights violations are made to seem random, accidental or arbitrary. And if human rights violations are random, accidental or arbitrary, then the prospects of putting them to an end become as remote as though they belonged to the order of nature. They come to appear necessary, not just in the (false contingency) sense of historical necessity, but in the (false necessity) sense of ‘natural’ necessity.105 Since international criminal law does not see structural violence, it regards the violence visible to it as a ‘pure case’, and that is also how it presents the violence it sees to the world. International criminal law makes structural violence, causing and amplifying violent conflict or repressive state rule, obscure and unrecognisable:106 it further embeds the existing frames of recognition by throwing the weight of its hegemonic potential behind the existing frame. As Gerry Simpson suggests, [b]y emphasizing individual agency, courts reproduce a dominant account of the international system in which its crimes (hundreds of thousands of preventable deaths every month) are understood as accidents or by-products of international political economy or sovereignty or the free trade in machetes, while its accidents (the system occasionally results in periods of madness (Taylor in Liberia)) or singular political acts (the Hariri assassination in Lebanon)) are understood as ‘crimes’.107 Importantly, I do not claim that the solution to the invisibility of structural violence in international criminal law is its criminalization—this would be both implausible and ineffective.108 Instead, I suggest that it is important to regard the invisibility of structural violence in international criminal law within the broader context of international criminal law’s hegemonic operation. Claiming its indispensability to global justice and to lasting peace, International criminal law simultaneously promotes a particular vision of such global justice—a vision, from which social justice, i.e., the absence of structural violence in Galtung’s terms, is absent. That structural violence remains unrecognisable to international criminal law is not, perhaps, the most serious problem: this can be remedied, if there are other frames of recognition where structural violence can fit. A more problematic aspect of international criminal law’s hegemonic operation is precisely its ability to obscure such other frames,109 as it claims to deliver global justice by countering the most serious crimes of concern to humanity. As Tor Krever suggests, ‘[a]t the same time that it establishes criminal responsibility for some forms of violence, the law seems implicitly to sanction other forms’.110 The authoritative character of a legal pronouncement of what is violent (and unacceptable in a given social order) relies on a special faith vested in a legal process.111 Legal proceedings, with their declared impartiality, due process guarantees and respect for the rights of the accused, legitimise the existing social order and structural violence underlying it.112 The legal here is put in opposition to the political, with the former representing order, peace and impartiality, while the latter is imagined as the arena of perpetual—and often violent—conflict of interests, partial in nature and dominated by power.113 An international criminal trial is a productive endeavour: its inevitable by-product, in adjudicating the guilt or innocence of the accused, is a history, or a narrative, of the atrocity.114 Similarly inevitable is the simplification of the complexities of the atrocity in international criminal law’s narrative, the erasure of the context and the history surrounding the mass crimes.115 After all, the purpose of the trial is to adjudicate on individual responsibility,116 hence it zooms in on the individual conduct and contribution, on knowledge and intent, in adherence to liberal legalism. As a result of such simplification, the responsibility for atrocity is placed on selected individuals, and dominant emphasis on intended violence, also noted by Galtung,117 is further cemented in the accounts, produced by international criminal justice, while unintended and structural violence is sidelined. As Esenin elegantly put it, ‘When face to face, / we cannot see the face. / We should step back for better observation’.118 The distraction from forms of violence which are not relevant for international criminal justice is inherent in its marketing practices, Schwöbel-Patel suggests: the institutions of international criminal law, she argues, widely and successfully employ marketing strategies and techniques to promote a certain vision of global justice, and a marketing lens provides numerous insights into how international criminal law operates. International criminal justice institutions and, in particular, the ICC, it is further suggested, apply the familiar marketing techniques, such as branding, advertising, and propaganda, that achieve two interrelated and mutually reinforcing purposes: persuasion and distraction.119 The global justice sector, by means of spectacularising the exercise of international criminal justice, indeed distracts from ‘structural injustice’.120 Since the central focus of Galtung’s research is peace, the resort to the concept of structural violence is, in a sense, instrumental, insofar as it is meant to allow for a more robust and extensive understanding of peace, defined as the ‘absence of violence’.121 In fact, the aforementioned concepts of negative peace and positive peace correspond to the absence of personal violence and the absence of structural violence respectively.122 While international criminal law ostensibly aims at contributing to lasting peace, it becomes increasingly unclear how this goal can be achieved through international criminal law. Since international criminal law does not see nor address structural violence, it cannot be expected, based on Galtung’s framework, to contribute to the absence of structural violence, i.e., to positive peace. International criminal law’s relation to the absence of personal violence is also obscure: it purports to ensure the end of such violence through the incapacitation of individuals indicted and prosecuted but given the selectivity of prosecutions and reliance on states’ cooperation for warrant execution, such peace through incapacitation is tenuous at best. Similarly, international criminal law’s inability to contribute to peace would have been less of a problem had it not been widely promoted as an indispensable component of peace. Not only is the insistence on individual prosecutions unlikely to bring us to the sought-after achievement of lasting peace—it also forecloses the exploration of other alternative paths, for instance, addressing the social injustices that cause a conflict through resource and wealth redistribution. The moralising, spectacular practice of international criminal law is a discursive, cultural practice that both relies on and reinforces certain elements of the ‘deep culture’ mentioned by Galtung: it ossifies the perceptions of normal and natural, where structural violence is ubiquitous.123 3.5 Conclusion Hegemonic struggle over the intersubjective meanings of phenomena, concepts, and goals is not a self-indulging exercise. For a ruling class, winning a hegemonic struggle is a crucial instrument in disguising the existing class struggle from the view of the oppressed. The hegemonic operation of international criminal law, as discussed in this chapter, is instrumental, among other things, in reinforcing and embedding a circumscribed vision of violence. By asserting authoritatively what kind of violence needs addressing and through which mechanisms, international criminal law obscures other types of violence, namely structural violence, experienced by the subaltern classes on an everyday basis and in a variety of contexts. Once legalised, the notion of violence becomes non-political and non-contestable, and the attempts to revise the frames of recognition of violence to account for a more pervasive suffering become harder to make: ‘[o]nce you get used to not seeing something, then, slowly, it’s no longer possible to see it’.124

#### The ICC recreates the racialized, violent other by selectively prosecuting spectacularized violence, perpetuating structural violence

Clarke 20 [Kamari Maxine Clarke, Distinguished Professor at the University of Toronto, 7-24-2020, "Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality", Just Security, https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/]/Kankee

Power and White Supremacy Decides What Counts: “Substantive Crimes” in the Rome Statute The set of “substantive crimes” articulated by the ICC is one important site of structural and racialized inequality. Article 5 of the Rome Statute states that the crimes over which the court has jurisdiction represent “the most serious crimes of concern to the international community as a whole.” These “most serious crimes” – namely genocide, war crimes, crimes against humanity and the crime of aggression – are routinely referred to as the “core” crimes of international criminal law. Yet, as I have shown in my book, “Fictions of Justice,” the determination of “core crimes” and the process by which those crimes came to be elevated as international crimes and others relegated to national and transnational concerns was part of a process of brute political negotiation. Over the course of several decades, the list of crimes that emerged as the “most serious” were those that involved mass death and widespread killing – “akin to the forms of violence being perpetrated in sub-Saharan Africa and Latin America at the time.” It was these crimes that were deemed of such gravity that they were to be understood as threats to the peace and security of the international community. In contrast, crimes that had been included in earlier iterations of the negotiating process but that dropped out along the way include “colonial domination and other forms of alien domination; apartheid; recruitment, use, financing, and training of mercenaries; willful and severe damage to the environment; international terrorism; and illicit traffic in narcotic drugs.” As DeFalco and Mégret note, “the constructed distinction between ‘core’ crimes increasingly associated with the worst international stigma, and a range of other crimes or non-criminal forms of harm causation and human rights violations that are implicitly designated as less grave,” overlap with racialized categories in a range of ways. For example, they correctly note that the work of the ICC has myopically highlighted the destruction of cultural property or the sexual violence against “bush wives” as emblematic of (racialized) African violence. Indeed, DeFalco and Mégret write, “[T]he convictions of Thomas Lubanga Dyilo, Germain Katanga, and Jean-Pierre Bemba have had, amongst other things, the effect of associating Black Africans with physical and sexual violence, the abuse of children through the recruitment and use of child soldiers, and the inability to hold ‘civilized’ elections.” This compares with the persistent ignoring or euphemizing of, for example, acts of aggression by the United States in invading Iraq, the torture of detainees in Guantánamo Bay or Abu Ghraib prisons and other black sites, or threatening other states that have nuclear weapons. As Sujith Xavier and John Reynolds have written, the ICC’s catalog of core crimes is rooted in a restricted conceptualization of violence that, by design, “cannot address many of the collective interests of global South peoples that are impacted by the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment, nor in many instances the slow violence meted out by the toxic remnants of certain weaponry.” Ultimately, if international criminal law is to take seriously its claim to be part of a project of global justice, it must at some point begin to tackle the root causes of atrocities – the economic contexts of war, exploitation and scarcity. This will require a comprehensive effort to, in the words of Asad Kiyani, “reconsider the boundaries of criminalization” and question the role of structural adjustment and austerity programs imposed by international financial institutions, which have contributed enormously to insecurity and precarity in Africa and elsewhere. White Supremacy Decides What (and When) Applies: Non-Retroactivity and Temporal Jurisdiction

#### The ICC is an imperial “civilizing” tool for Western power projection, treating black bodies as “savages” in need of Western salvation

Savvias 23 [Gervaise Savvias, researcher at The University of Warwick, 6-12-2023, "Conscious or Unconscious? The issue of race within international criminal law", TWAILR, https://twailr.com/conscious-or-unconscious-the-issue-of-race-within-international-criminal-law/]/Kankee

The Prevailing Nature of Capitalism It is imperative that capitalism is understood as more than an economic theory. It is a ubiquitous structure, and its translation into various systems can only be described as hegemonic. Anievas and Nişancioğlu outline capitalism as a ‘set of configurations…or bundles of social relations…orientated around the systematic reproduction of capital…, but not reducible – either historically or logically – to that relation alone.’3 In so understanding capitalism as the originating force behind racialisation, there comes an acute understanding: perseverance of neo-colonialism and neo-imperialism is rooted in the perpetuation of capitalism as a social phenomenon. The interdependent relationship is evident, then: racialisation perseveres because capitalism does. The capitalism that continues to adapt in a 21st century understanding is racial capitalism.4 Through differentiated exploitation of the Global South, severe inequality exists due to and alongside racialisation. In a pamphlet published in 1899, Rosa Luxemburg vehemently opposed the assertion proposed by Eduard Bernstein5 that capitalism (innately) has a ‘capacity of adaptation’.6 Equally, I argue that a conscientious allowance of capitalism to flourish in an elusive manner and entrench itself into a variety of legal (and non-legal) frameworks must be barred. So long as capitalism continues to be enabled,7 such as in the instance of international criminal law, it becomes glaringly apparent that liberation cannot be achieved, specifically for marginalised people(s).8 While much of Luxemburg’s ruminations deal with an acute deconstruction of Bernstein’s theory around social reform as a means for revolution, my contribution here aims to adapt their thoughts differently. When transposed directly, Luxemburg’s ideas assist in centralising the core argument integral to this Reflection: international criminal law’s symbiotic relationship with capitalism serves as a conduit by which individualised responsibility becomes the core lens that the ICC adjudicates. Or perhaps, as Shirley Scott concretely notes, the ICC (if not international criminal lawyers) are the ‘chefs’9 – necessary servants of a system which works to ‘congeal capitalism’10 while simultaneously maintaining ‘some autonomy of action’.11 Any radical critique of the ICC, as this essay contends, should emerge from contending with the budgeting processes of the ICL institutions in the first instance, for finance is not ‘an external “fact of life” to ICL.’12 The ICC’s need for sustenance keeps it at the economic behest of member states and signatories, as was the case most prominently in the case of Special Court of Sierra Leone.13 This aspect perseveres to this day in the continued workings of the Court,14 but is only a microcosmic example. More concretely, and an aspect typically gleaned over by the literature, is the expectation that the ICC and other tribunals seek private (or otherwise, corporate) funding for their activities.15 Anne Orford implores us to equally interrogate and study the independent auditor’s recommendations as to the clarification of the roles of the Prosecutors and the Registrar of the ICC.16 This analysis serves as insight into the possible budgetary constraints on the prosecutor’s independence, or otherwise further consolidates an argument of the Court’s conscious process of selectivity in its workings. These aspects serve to further flesh out a symbiotic relationship between international (criminal) law and capitalism: one which sees private donors (in the West) as the hidden adjudicators of those to-be prosecuted (in Africa and Asia). In essence, this mirage maintains the North/South dynamic that itself is a by-product of racialisation and capitalism. Naturally, then, it comes as no surprise that the ICC is weaponised in ex-colonial states, paying tribute to the in-built link between colonialism and racialised capitalism. Furthermore, one of capitalism’s most successful ideological tricks is consistently being reproduced in the context of international criminal law: the individual is held solely to blame for atrocities committed. While this Reflection has no intention to alleviate or make light of such atrocity and crimes, we must interrogate how structural violence is obscured and how the very existence of the individual has been manufactured according to hierarchical definitions of power, capitalist rhetoric and individualised conceptualisations of Being (akin to the work of Sylvia Wynter).17 Similarly, as Kamari Maxine Clarke reminds us, the spectacularisation of the rule of international criminal law ‘reinforce[s] the apparent power of the rule of law to affirm guilt or innocence, and to individualise the violence of many and redirect it onto one individual.’18 It is precisely through the (individualising and) governing logics of capitalism that responsibility, culpability, and adjudication are reimagined. I argue that international criminal law serves to reinforce flawed and normative theories around individualised responsibility, the need for justice, and a perpetuation of carcerality, all influenced by neoliberal capitalist rhetoric. Alternatively, as Gramsci reminds us, ‘[n]eoliberal hegemony is not static and must continually renegotiate and re-establish itself as a result of complex social struggles and contradictions that emerge within, are shaped by, and shape, the structures and processes of capital accumulation’.19 In the case of ICL, this renegotiation emerges most succinctly through the enactment of capitalist logic: international criminal law ‘shapes our response to certain instances of suffering and not others’20 as part of a ‘broader liberal-capitalist hegemony.’21 As this Reflection contends, the question of international criminal law should not be who is to be punished, but rather a deconstruction of why there exists a collective call for punishment originally. Drawing from the linearity of history, the Treaty of Versailles assists in illustrating the emergence of a call for punishment, specifically in the context of wartime. Deliberations were concretised in Article 227 of the Treaty of Versailles, which noted that future wars must ensure the protection of civilians in armed conflict, a particular fault of the German Empire in World War I. A special tribunal was held against Kaiser Wilhelm II for his ‘supreme offence against international morality’22, though he was ultimately not prosecuted. The larger pattern and paradigm that this development set in motion is crucial, for justice cannot be achieved solely through retribution produced obscurely within a courtroom. Instead, the question which pushes at the gates remains partially understood, but not wholly answered. What structure does the mirage of justice serve? I argue: white supremacy. In mainstream historical and pedagogical accounts, Nuremberg is typically presented as the first indicator of international criminal law’s judicial scope and importance. Though, as Souheir Edelbi notes, international criminal law ‘typically orientates towards European experiences of violence’.23 Undeniably, the violence and pain of the Holocaust remains incomparable. Nonetheless, as Edelbi continues, making note of the Holocaust’s ‘colonial precursors and antecedents’24 is of paramount importance. Highlighting that violence has existed outside a Eurocentric and white lens and has not solely been enacted on white bodies is integral to deconstructing our normative observation of international criminal law. Even in the shadow of Nuremberg itself, the process of ignoring situations outside the geographical and temporal space of Europe can altogether be equated to the process of conscious inaction. The Allies’ awareness of colonial massacres such as the Herero and Nama Genocide25 illustrates that historical inaction, in and of itself, has relegated non-white bodies to the margins of history, to which they (continue to) cling for life.26 A modern conceptualisation of international criminal law is inherently flawed due to it being innately at the behest of white supremacy. I argue that a system of legal practice, such as that of international criminal law, serves its architect – the elusive white body. This is by no means the physical representation of the white body but rather what a system of whiteness has allowed for. The metaphorical white body remains elusive in the forms of neoliberalism, neoimperialism and capitalism. The systems of whiteness supersede the physical white body. Yet, the physical benefits from the abstract formulation of whiteness. Capitalism individualises all of us.27 Societal organisation operates through the lens of individualised discourse, which remains disconnected from the larger reality that this individualism is harmful and violent. Through penal hierarchies of power manufactured through capitalism’s clandestine involvement and encroachment into our social fabric, carcerality, punishment and retribution remain the victors in the metaphorical path towards egalitarianism. Any other form of critical analysis is relegated to last place. The path, let alone construction of this utopic understanding of equality, remains a mirage if the systems that govern us are not dismantled. Liberation cannot be attained if non-white bodies cannot also share in celebration. Though how can they, when historically violent structures have pushed them into the periphery (and continue to do so)? Neo-Colonialism and Neo-Imperialism I argue that the Scramble for Africa has never ceased. The use of the ICC as a legal instrument within Africa itself is grounded within a colonial and imperialist legacy.28 As Obiora Chinedu Okafor and Uchechukwu Ngwaba argue, ‘the use of the ICC [is] far more robustly [advocated for] in Africa than has ever been done on any other continent.’29 Important to note here is the historical driving aim of colonialism as being inherently attached to capitalist exploitation in order to benefit the coloniser. Only naturally then, this symbiotic relationship continues, irrespective of the ‘decolonisation’ of formal colonies. Instead, what becomes perhaps more interesting is the growing interest of the West30 into West Asia.31 White systems remain to racialize non-white bodies – which is to say that through the logics of capitalism, race has emerged as a tool to hierarchise individuals. To that end, white systems equally deracinate the reality of non-white bodies – particularly through the act of divorcing them from their indigeneity. Sylvia Wynter discusses the coloniality of Being,32 and it is difficult to ignore Maria Lugones’ argument that through a colonial introduction of social organisation, ‘peoples, cosmologies, and communities’33 have been destroyed in order to pave the way for the ‘building ground of the “civilised” West.’34 The Global North has wasted no time in its deconstruction of the Global South, specifically in the context of international criminal law’s dispensation as a means to an end. The anti-Black and anti-Muslim rhetoric existent within ICL is of importance in this regard. Or, as Philippe Le Billon reminds us, the dramatic spectacularisation of African and Arab leaders as ‘warlords’, if not ‘tyrant leaders’35 is particularly dangerous.36 Furthermore, in stretching Anna Tsing’s argument of an (omnipresent) ‘economy of appearances’,37 I contend that rhetoric (or otherwise, language) has to be reconstituted in order to perpetuate the ‘investment frenzy’38 that (consistently) maintains the ‘congealing [of] capitalism’,39 while simultaneously dramatizing the ‘triumph of the rule of law’.40 To date, the ICC has issued indictments against fifty-two individuals, majority of whom are either Black and/or Arab-African.41 The Court’s process is blatantly and inappropriately racialised42 and political. As a ‘selective political instrument’,43 the ICC is unlikely to stand the test of time. In the words of Okafor and Ngwaba, ‘the ICC’s “geo-stationary orbit” over Africa44 has wittingly…masked…the vast extent of…international crimes in other parts of the globe.’45 Mahmood Mamdani argues that the deployment of an international criminal law order is a perpetuation of asymmetries in power and wealth, if not a means of continued subjugation. In Mamdani’s words, ‘the emphasis on big powers as the protectors of rights internationally [is] twinned with an emphasis on big powers as enforcers of justice internationally.’46 The interdependency of neo-colonialism, neo-imperialism and capitalism is a simple Ouroboros. In addition, the ICC lauds its mandate as being in direct opposition of white supremacy; a champion in the fight against injustice globally. This impression, while self-sustaining, remains incorrect. As Kamari Maxine Clarke argues, white systems are ‘rarely acknowledged as shaping (emphasis added) the conditions for (in)justice.’47 Instead, neo-colonialism and neo-imperialism continue to thrive and operate, seemingly unbeknownst and undetected, due to the conscious decision to ignore them. International criminal law and the ICC exist as fans that fuel the flame of the continued prevalence of inequalities (economic, or otherwise) in the Global South. As the ICC continues to entrench itself into the legal orders of states within Africa and West Asia, the exacerbation of violence and totalitarianism of regimes can (and has) become increasingly prevalent. As the warning from global powers of possible investigation by the ICC increases, dangerous and violent leaders cling to power. I argue that the Global North’s aggressive and imperialist aims in a contemporary setting intentionally positions and frames the Global South to be in need of saving by institutions like the ICC. Most pertinently, in postcolonial African states, the ‘spectacle of the rule of law is linked to the spectacle of capitalism’.48 The conscious crafting of racialised images such as that of the ‘African warlord’49 reinforce the notion that African (and otherwise diasporic Black) peoples50 inherently need rescuing by Western frameworks and values. The charge of racism within an international criminal law context is framed through the obvious natures of neo-colonialism and white saviourism. Manufactured instability in the form of coordinated political interference, precipitated by decades of colonialism and capitalist extraction, have manifestly bred further instability within Africa and West Asia. The West’s Influence and the Conscionability of Race As I consider the ICC’s inaction with regards to Iraq and Afghanistan in a latter part of this reflection, it is important to note the particular role of the United States of America (USA) in order to reflect on how its hegemony continues to extend as far as the ICC as an institution itself.51 Unironically, the hypocrisy remains evident. Clarke outlines that international tribunals ‘have become mechanisms for one of the most radical types of polarization’,52 as well as racialisation. The influence of the Global North over institutions such as the ICC are indicative of neo-colonialism in an international criminal law context. Remnants of imperialism and colonialism continue to plague areas of the Global South, allowing for the cultivation of instability and intervention. Without comprehension of the involvement of Western powers in Global South states, there cannot be acute critique of the flawed approach of the ICC and ICL. Manufactured instability in the form of coordinated political interference, precipitated by decades of colonialism and capitalist extraction, have manifestly bred further instability within Africa and West Asia. Considering Iraq and Afghanistan The 2020 announcement of the Office of the Prosecutor (OTP) not to investigate the alleged crimes against Iraqi civilians committed by Britain’s Royal Armed Forces (RAF) in Iraq was disturbing, but came as no surprise. Given the British courts’ failure to submit ‘one single case…for prosecution to date’, the OTP’s fundamental reason for not enacting a genuine investigation into Britain’s war crimes in Iraq is paradoxical, incompatible and wrong. The Final Report details various problems53 with Britain’s inability to appreciate the gravitas of the issue, let alone investigate accordingly. Despite this, the OTP found that British officers had not been shielded from prosecution, and suggested that ‘if shielding had been made out,54 an investigation [by the ICC] would have been warranted.’ Kevin Jon Heller articulates a glaring point: the OTP’s decision is not legal standard – ‘neither procedurally nor substantively.’ In the case of Afghanistan at the ICC, it was held that ‘The Prosecutor is not required to present evidence to support her request and is not required to present information regarding her assessment of complementarity…’55 Unwillingness is not a substantial requirement by the Pre-trial Chamber, and the Office’s decision not to prosecute ‘reinforces longstanding double standards…and shows once again that powerful actors can get away with systematic torture.’ Shielding remains a ‘distinct tradition within the UK and its armed forces’,56 further highlighting the issue behind the decision of the OTP. Considering the West As DeFalco and Mégret argue, the focus on the Levant and African Continent remains ‘embedded within a larger project of Western judicial and military imperialism.’57 In the same breath, the West’s crimes are ‘obfuscated…while highlighting the crimes in the Global South.’58 As DeFalco and Mégret note, the convictions of ‘Thomas Lubanga Dyilo, Germain Katanga, and Jean-Pierre Bemba have had the…effect of associating Black Africans with physical and sexual violence, the abuse of children through the recruitment and use of child soldiers, and the inability to hold ‘civilized’ elections.’59 This contrasts with the persistent ignoring or euphemizing of, inter alia: acts of aggression by the United States in invading areas such as Iraq and Afghanistan; the torture of detainees in Guantánamo Bay; threatening states such as Iran that are assumed to have nuclear weapons; and funding conflict in various regions. Representationalism is a mythical act and practice. The recruitment of Black or otherwise non-white bodies into white institutions does not automatically rectify, let alone answer, larger systemic issues. White institutions by my own definition entail the extensive apparatus of violence and surveillance that the modern conception of the nation-state has at its disposal. The most glaring example of this is the USA, which has often been criticised for its oppressive border regime,60 its (historical, yet ever present) involvement in foreign affairs61 and its gross individualisation of its citizens which translates into incarceration.62 Taking Barack Obama’s tenure as President as the prime example, we see that representation politics cannot be expected to rectify the legacy and active practice of US imperialism. The structurally discriminatory effects of racialisation cannot be alleviated through representationalism alone. John Powell argues that ‘institutional practices and cultural patterns can perpetuate racial inequality without relying on [overtly]63 racist actors’,64 as would be evident in the case of Obama’s tenure, which saw ‘ten times more air strike in the covert war on terror…than under George W. Bush.’ Devon W. Carbado and Mitu Gulati’s analysisis useful in this regard, as the placement of a Black man within a system of whiteness is a faulty excuse for commentators that dub our modern world as a ‘post-racial society’.65 Pan-Africanism and Liberation

#### The ICC’s utility is to excuse imperial and (neo)colonial crimes while racializing the law against Africa

López 22 [Rachel López, Associate Professor, Thomas R. Kline School of Law, Drexel University, 10-4-2022, "Black Guilt, White Guilt at the International Criminal Court", SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4237581]/Kankee

Introduction All but one defendant convicted at the International Criminal Court (ICC) has been a Black man. This is not a coincidence. This chapter elucidates how the jurisdictional and substantive law that governs the ICC systematically results in Black guilt2 being heightened while White guilt is minimized. With these convictions, the ICC builds on a long history of criminalizing Blackness, but there is something particularly invidious about this in the context of international criminal law that this chapter seeks to expose. Since the ICC supposedly prosecutes only “the most serious crimes of international concern,” these convictions express the not-so-subtle suggestion that the “worst of the worst” criminals on the planet are Black men. More troubling still, given the longstanding characterization of international crimes as evil, it perpetuates well-documented stereotypes of darker skin being associated with wickedness, thereby building on a pernicious narrative of the “evil Black body.” Proponents of the ICC have defended the racialized nature of these prosecutions as simply a consequence of the court following its own rules, but as this chapter illustrates, it is precisely these rules that embed systemic racism within the structural design of the court, making the near exclusive conviction of Black men inevitable. Moreover, often these rules are justified as being in the service of peace and security, but a closer look reveals a contradiction. By shifting the focus away from the broader forces that set the stage for violence and toward the inherent wickedness of the defendant, the ICC promotes a shallow understanding of the root causes of atrocity, thereby undermining international criminal law’s potential for contributing to collective peace and security. This chapter thus argues that in order to reach its full potential, the ICC should break from its nominally race-neutral stance and instead adopt an explicitly anti-racist orientation to international criminal punishment. I. Institutionalizing Black Guilt Many have reflected on the African bias at the ICC, arguing that the selective prosecution of the court reflects a bias against the African continent.3 The numbers support such accusations. All those charged as well as all those convicted by the ICC have been from African countries. But the geographic focus of such analyses obfuscates a starker, uncomfortable truth: all those charged and convicted by the court have been Black or Brown and not one has been White.4 Proponents of the ICC have defended these prosecutorial choices by pointing to the fact that the ICC is just following its own rules, acting upon self-referrals from African nations or referrals from the United Nations Security Council.5 Yet, building off the work of others, particularly Kamari Clarke, Randle DeFalco, Rebecca Hamilton, Frédéric Mégret, John Reynolds, and Sujith Xavier, this Part demonstrates why such justifications are inadequate to allay concerns about racial bias at the ICC. They do not explain, for instance, why none of the defendants have been White. Rather, this Part outlines how the institutional design and jurisdictional rules of the court heighten Black guilt, while minimizing White guilt, often under the guise of promoting peace and security. While this invidious process has different instantiations throughout international criminal law, here I focus narrowly on how seemingly technical, “neutral” rules and procedures implicate the ICC in the reproduction of structural racism. In particular, I focus on (1) the outsized role of the U.N. Security Council in creating levers of power for non-member states to amplify Black guilt, while immunizing White violence; (2) the limited temporal and definitional focus of the ICC on certain international crimes to the exclusion of harms that most concern the Global South—especially those involving White guilt; and (3) the general selectivity and the other forms of discretion built into the system which in practice manifest anti-Black bias. As a starting point, the outsized role of the U.N. Security Council in the matters handled by the court is partly to blame. The Rome Statute, the treaty which established the court, empowers the Security Council both to refer and defer ICC investigations, with the Security Council being the sole entity with the power to confer jurisdiction onto the territory of non-ICC members.6 These rules, and how they have been instrumentalized to date, are an example of how the work of the ICC helps cement the racial hierarchy and power imbalances already present within the international legal order into the ICC legal regime.7 Notably, five permanent members, more than half of which are majority White nations, control most of the decision-making at the Council. Each has veto power over non-procedural decisions, including whether to refer cases to the ICC or delay them.8 More troubling still, three of the permanent members are not even parties to the Rome Statute, meaning that international crimes committed in their territories are not subject to ICC jurisdiction. Thus, despite opting out of the ICC, those nations have the power to obstruct or push ICC investigations.9 Specifically, acting through the Security Council, they have the power to grant ICC jurisdiction over other nations which, like them, have not joined the court, while, at the same time, blocking investigations into their own nationals or crimes committed in their territory.10 Through these rules, the power and privilege of majority White nations has become embedded in the Court’s structure and thereby its decision-making.11 And the results are predictable. The Security Council has only asked the ICC to investigate crimes in two African nations, Sudan and Libya, but issued no referrals for documented torture and war crimes by the United States and United Kingdom in Iraq and Afghanistan.12 While Article 16 of the Rome Statute was meant to allow the Security Council to step in and delay prosecutions if doing so is in the interest of maintaining peace and security, so far, it has only been used to immunize White guilt, shielding the citizens of majority White nations from the court’s reach. In fact, the first evocation of the Security Council’s deferral power was only made after the United States threatened to veto a resolution renewing the U.N. peacekeeping mission in Bosnia (as well as all other future peacekeeping operations) unless a provision immunizing its troops from criminal liability was included.13 Since then, the Security Council has invoked Article 16 two additional times, each time at the United States’ behest to immunize soldiers from any criminal liability resulting from military operations authorized by the Security Council.14 While the Security Council has used Article 16 to minimize the guilt of White majority nations, it refused to use this power to defer investigations in two African nations, Sudan and Kenya, despite repeated requests from the African Union to do so.15 Functionally, this has meant that White leaders who authorized torture like George W. Bush and Donald Rumsfeld have evaded criminal liability before the ICC, while Black and Arab-African heads of state like Uhuru Muigai Kenyatta and Omar al-Bashir faced charges.16 In addition to these jurisdictional rules, the temporal and definitional limitations on what counts as a prosecutable crime before the ICC renders White violence less visible and consequential. Like other tribunals that have tried international crimes, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), the ambit of the ICC’s prosecutorial reach is time limited.17 Specifically, the crimes committed before the Rome Statute entered into force on July 1, 2002 are off the table.18 As will be discussed further in Part III of this chapter, this narrow temporal gaze often obfuscates the role of colonial powers in the violence under investigation by the ICC and shields them from prosecution for their past empirebuilding crimes, most notably slavery and genocide. In a broader sense, these rules have criminalized the processes by which Global North became wealthy, at the same time as effectively granting them de facto amnesty for those same acts. The impunity for colonial era crimes of the Global North is compounded by the fact that the type of violence currently perpetrated by these majority White nations also tends to be untouched by international criminal law, while those crimes which typify Western stereotypes of Black men have been vigorously pursued.19 First, as Kamari Clarke illuminated in her groundbreaking book, Fictions of Justice, the choice of acts considered to be the “most serious crimes of international concern” under the Rome Statute and therefore prosecutable by the ICC exacerbates Black guilt, while mitigating White guilt. Omitted from actionable crimes are those most likely to be committed by majority White nations, such as colonial domination, economic aggression, the use of nuclear weapons, the recruitment, use, financing, and training of mercenaries, and environmental atrocities.20 These crimes were all dropped during the negotiation of the Rome Statute because they were considered to “devalu[e] the concept of crimes against the peace and security of mankind.”21 Implicitly, they were not seen as unquestionably undermining peace and security. Instead, the ICC only has jurisdiction over four crimes: war crimes, crimes against humanity, genocide, and the crime of aggression.22 Of these crimes, the crime of aggression is the only one that is most often perpetrated by majority White states and it was left inoperable until 2018 largely due to push back from the United States.23 Even now, the crime of aggression is not prosecutable against the nationals of those countries most likely to engage in military action, like the United Kingdom, the United States, France, and Russia, because these states have not acceded to the ICC’s jurisdiction, either generally, or specifically when it comes to this crime.24 This paradox came to a head recently, as due to this rule, the ICC has been unable to prosecute any Russian nationals for the crime of aggression after Russia’s invasion of Ukraine despite widespread consensus that it constituted aggressive war.25 In addition, when majority White nations have been involved in the other crimes that fall within the four corners of the Rome Statute, they are often dismissed by the ICC, usually for being insufficiently grave, a threshold requirement at the court.26 This has been the case with international crimes, such as war crimes and torture, committed by Israel, the United States, Australia, and the United Kingdom.27 Most recently, the new ICC prosecutor justified his decision to “deprioritise” the investigation into atrocities committed by American forces in Afghanistan, and instead focus on the Taliban and affiliates of the Islamic State, on the basis of the “gravity, scale and continuing nature of alleged crimes.”28 In addition, powerful nations frequently facilitate the international crimes of other less powerful nations from behind the scenes by providing weapons, technical support, or intelligence.29 By acting through proxies, these nations advance their national interest and entrench their power without getting their hands dirty. Their crimes of aiding and abetting others’ grave crimes are likely to escape punishment because they are less visible and perhaps less likely to be considered serious enough to warrant investigation by the ICC.30 II. Prosecuting Evil

#### ICC abuse towards African nations contributes towards beliefs in black criminality

López 22 [Rachel López, Associate Professor, Thomas R. Kline School of Law, Drexel University, 10-4-2022, "Black Guilt, White Guilt at the International Criminal Court", SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4237581]/Kankee

Somewhat ironically given Ocampo’s insistence on rule-following, this persistent focus on deliberate racism breaks the ICC’s own anti-discrimination rules. Namely, the Rome Statute itself requires the ICC to follow and apply the law “consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as [inter alia] race.”35 This nod to human rights law is noteworthy. Under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the primary international human rights treaty to address racism, a violation of its anti-discrimination principles does not require a showing of discriminatory intent. Instead, a policy or practice that appears racially neutral, but has a discriminatory effect is still considered to be discrimination under CERD.36 CERD also requires the ICC to take measures to amend, rescind, or nullify any laws or regulations, such as those described in this chapter, that have the effect of perpetuating racial discrimination.37 Additionally, as Kamari Clarke, Randle DeFalco, and Frédéric Mégret have all pointed out, such repudiations reveal a rather thin understanding of racism.38 By definition, structural racism can be entrenched in institutional design and embedded in rules, even when individual actors in a system harbor no racial animus.39 Yet, as this Part will elaborate, the effects of such “unconscious racism” are no less harmful. Particularly in the context of international criminal law, the ICC’s trained focus on Black men reinforces racialized stereotypes, thereby perpetuating White supremacist ideologies. Indeed, recent empirical evidence has shown that people often associate dark skin with immorality and wickedness.40 Specifically, dubbed the “bad is black” effect, psychologists have found that when people learn about “evil acts,” they are more likely to believe that they were committed by someone with dark skin.41 More problematic still, the darker your complexion, the more likely society is to support extreme punishment of you.42 The operationalizing of these stereotypes in the context of international criminal law is particularly noxious. Since international crimes are often portrayed as inherently evil, the ICC’s narrow focus on the criminal acts of Black men reinforces these racial stereotypes.43 Implicit in such characterization is a lack of reason.44 These crimes are not committed for a specific purpose or under certain conditions, but rather attributed to the inherent wickedness or lust for power or violence.45 Such stereotypes have not been absent from the courtrooms of international criminal law, with prosecutors at times evoking themes of darkness and hell in an effort to secure convictions.46 Cast under such light, international criminal law could be portrayed as replicating the modalities of the civilizing mission of international law of the 19th century, which relied on stereotypes regarding the inherent violence and inferiority of “Blackness” to justify slavery and colonialization.47 Subtly embedded in the race neutral defenses of the ICC is the notion that international criminal law is needed to civilize Africa or as Ocampo’s above remarks imply, that the ICC has been forced to train its eye on Africa because that’s where the most serious violence occurs. Further to this point, when defendants are exclusively dark skinned, as they are at the ICC, international criminal justice becomes a tool for confirmation bias—an expression of our racialized understanding of wrongdoing. Indeed, the construction of certain rules at the ICC create a feedback loop reaffirming pre-existing implicit bias. For example, the ICC can dismiss or move ahead with cases based on how grave the crime is perceived to be. As I have explored in past work, research has shown that an individual’s determination of what constitutes the worst acts is highly dependent on their own demographic characteristics, including their race, class, political orientation, and gender—to name a few.48 Since approximately 69% of all professional staff at the ICC and 68% of those in higher ranks are European (as compared to only 16.5% and 19.8%, respectively, who are African), gravity determinations are more likely than not to reflect Eurocentric understandings of criminality.49 And in the court’s decisions, we can see such implicit biases at work. For instance, the ICC has deemed torture by US forces in Iraq not grave enough to merit prosecution, while the recruitment of child soldiers in the Congo and destruction of cultural property in Mali are.50 Such racialized understandings of international crimes are particularly concerning given the current rationales leveled in support of international criminal law on the whole. As the deterrent effect of international criminal punishment remains unclear, the proponents of international criminal law are increasingly turning to expressive theories of punishment as justifications for the ICC’s work.51 For example, David Luban has argued that, through international criminal punishment, the international community engages in both norm affirmation and norm projection (i.e. the articulation of new codes of behavior).52 In sum, international criminal punishment has value because it reflects our current beliefs and future aspirations. Understanding the purpose of international criminal law through this lens, it is imperative to ask whether the ICC’s near exclusive focus on Black men is sending the right message. Or given the current structural racism embedded in the ICC’s design, are we merely affirming the racial biases of the Global North and cementing the current global power structures under the guise of law? Alternatively, if the international community seeks to express what it values most through international criminal punishment, it should adopt an anti-racist expressive orientation, rather than the nominally race-neutral approach articulated by ICC officials and other proponents.53 Antiracism is a framework developed by Ibram X. Kendi. According to Professor Kendi, striving to be anti-racist means more than just being “not racist.”54 Being “not racist” is akin to being “colorblind” or in a state of denial—that is failing to see or denying the effects of racism.55 Rather, being anti-racist requires playing an active role in identifying and dismantling the systemic racism embedded in the regular practices and rules of institutions.56 To adopt an anti-racist expressive orientation, the ICC would have to openly commit itself to anti-racism in its administration of international criminal law. It must then take a hard look at itself, identifying and rescinding those policies that reproduce racism and instituting new anti-racist policies that eliminate racial inequity.57 This process will take time and be ongoing, but at a minimum, adopting an anti-racist approach would necessitate nullifying rules like Article 16 that reproduce the structural racism embedded in the international legal order, allowing for evolving definitions of crimes that account for the harms of most concern to the Global South, including those involving environmental atrocities that are often perpetrated by majority White States, limiting the power of States who are not Parties to the Rome Statute to influence proceedings at the ICC, and hiring staff in numbers that statistically reflect the racial and national diversity of its State Parties. Through adopting such an expressly anti-racist approach to international criminal punishment, the international community can express its outrage at both atrocity and racism by prioritizing the punishment of pernicious uses of power that harm marginalized people regardless of nationality and race. III. Decontextualizing Harm

#### The ICC is a neocolonial power play to undercut blame for coloniality in ethnic conflicts and increase black responsibility

López 22 [Rachel López, Associate Professor, Thomas R. Kline School of Law, Drexel University, 10-4-2022, "Black Guilt, White Guilt at the International Criminal Court", SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4237581]/Kankee

III. Decontextualizing Harm An anti-racist approach to criminal punishment is also needed, because, as this Part will explain, the racialized nature of international prosecution undermines peace and security by shallowing our understanding of why violence occurs. Instead of trying to analyze and understand what causes violence, this racialized version of “justice” permits atrocity to be written off as “evil,” lacking in reason or purpose.58 Put another way, the othering effect that racism facilitates hides the causes and conditions that foment violence and thereby impedes the international community (or in some cases, regional authorities) from advancing measures that are more likely to arrest violence in the future.59 In the course of demonstrating this point, this Part also documents how the ICC rules related to promoting peace and security have been used by powerful majority White nations to racialize criminal punishment at the ICC in ways that have the potential to undercut collective security. For example, the narrow gaze of the International Criminal Tribunal for Rwanda on the Black Rwandan perpetrators cast the genocide as part of an internal conflict between two tribes, the Hutu and Tutsi. This trained focus averted eyes from the role of the colonial powers like Belgium who created and propagated these racial categories, fomenting the animosity between these two imagined tribes, for their own gain.60 This too minimized the appearance of White guilt as a contributor to violence, while also assuaging White guilt by making the superpowers in the Security Council feel like they had done something, even if they had done very little to stop the genocide in real-time.61 This dynamic is not unique to Rwanda. As Antony Anghie and B.S. Chimni explain, “[c]ontemporary ethnic conflict is not simply the latest expression of primordial forces. Its nature, its conduct, its shape are all inextricably linked both with colonialism and with the very modern forces of globalization that inevitably involve North-South economic relations.”62 Additionally, the institutional design and jurisdictional rules described in Part I have subjected decisions about peace and security to the racial politics of the world stage with destabilizing effects. One of the most enduring dilemmas for nations grappling with the aftermath of atrocity is whether to pursue punishment in the name of “justice” or to forgo prosecutions in the name of “peace.”63 At the ICC, Article 16 was designed to mediate this tension between the search for peace and demands for criminal justice.64 This sensitive role was entrusted to the Security Council, which has the power to delay prosecutions if they might undermine peace and security.65 In practice, however, the consequence has been that the judgment of Black African nations closest and most affected by violence in the region has been supplanted with that of the majority White superpowers on issues of peace and security. Inevitably, this has meant that there is little recourse when powerful majority White nations engage in acts that threaten peace and security, at the same time that prosecutions of African leaders are pursued even if they might derail ongoing peace processes. The Security Council’s involvement in the investigation into atrocities in Sudan is a prime example. Upon determining that “the situation in Sudan continues to constitute a threat to international peace and security,” the Security Council asked the ICC to investigate the ongoing violations of human rights and humanitarian law in Darfur.66 In order to exercise its referral power under the Rome Statute, the Security Council must have thought that criminal trials of those responsible in Sudan would help to maintain or restore international peace and security in the region.67 While the African Union (AU) initially supported the investigation, once the ICC charged the sitting Sudanese President Omar al-Bashir, it vehemently opposed it.68 This decision pitted the UN Security Council, which has “primary responsibility for the maintenance of international peace and security” under the UN Charter, against the Peace and Security Council of the AU, which has “primary responsibility for promoting peace, security and stability in Africa.”69 Instead of promoting peace and security, the AU feared that the pursuit of criminal punishment of the incumbent Sudanese President would derail ongoing efforts at a peaceful resolution to the Darfur crisis.70 On this basis, the AU requested that the Security Council defer the investigation, a request that was supported by a super majority of the international community.71 However, this request was met with silence from the Security Council, which never officially affirmed or denied it.72 If anything, in this context, the Security Council’s use of Article 16 deferral power jeopardized peace and security. At the time, many commentators saw the Security Council’s referral of the situation in Sudan as a sign of the ICC’s growing credence on the world stage, as it signified an acceptance of the court by many of its detractors, especially the United States, which did not veto the referral to the ICC. A closer look reveals a much more complicated picture in which Black guilt is aggravated and White guilt is immunized in ways that ultimately undercut collective security. First, the United States’ decision to abstain from the resolution, rather than veto it, must be understood in context. At the time, U.S. relations with its European allies were strained as support for the Iraq war waned due to emerging evidence of its own international crimes, namely the torture of detainees at Guantanamo and Abu Ghraib.73 This political reality made it too costly to expressly oppose a referral of the situation in Darfur to the ICC.74 Second, embedded in the resolution referring the situation in Darfur to the ICC was an escape clause for the United States. Much like in the resolution authorizing peacekeeping in Bosnia described in Part I, this resolution evoked Article 16 as authority for granting non-parties to the Rome Statute exclusive jurisdiction over any criminal acts by their nationals in Sudan.75 This resolution went a step further than prior Article 16 clauses, offering even greater protection to U.S. troops and leaders. Instead of giving the Security Council the power to authorize criminal proceedings as was the case in prior resolutions, it left it to the States contributing military personnel to waive their exclusive right to jurisdiction. Because this Article 16 clause discriminated between the peacekeepers who are party to the Rome Statute and those who are not, U.S. peacekeeping forces were immunized, while other peacekeepers mostly from Africa, the continent with the most membership in ICC, were not.76 The fact that this provision was designed to protect the United States in exchange for waiving its veto power was no secret. The U.S. Ambassador to the UN at the time commented, “[t]his resolution provides clear protections for United States persons. No United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.”77 In effect, the resolution made the wrongdoing of troops from participating African nations international crimes and that of mostly White U.S. troops matters of domestic affairs.78 Given the very low chance of prosecution of U.S. troops in U.S. domestic courts, in effect, it became an exchange of Black criminalization for White impunity. Many members of the United Nations as well as numerous commentators questioned how the use of Article 16 deferral power to immunize troops of non-parties to the ICC concerned matters of peace and security.79 Judging from the drafting history, legal scholar Carsten Stahn has concluded that “Article 16 was certainly not meant to provide a basis for the immunity of a whole group of actors in advance and irrespective of any concrete risk of indictment or prosecution.”80 In fact, a provision of blanket immunity for peacekeepers was proposed but expressly excluded from the Rome Statute after “widespread doubts” surfaced about its content.81 Rather, Article 16 was meant to be a case-by-case determination of when peace and security interests cautioned against speedy prosecutions, not an anticipatory blanket amnesty.82 Indeed, it would seem difficult to know in advance whether prosecution would threaten peace and security without knowing the circumstances of the act. To the contrary, it is possible that not holding soldiers accountable for committing mass atrocities against a civilian population could undermine the legitimacy of the ICC and impede its ability to promote collective security. Conclusion In short, the racialized nature of prosecutions cannot be justified as the unfortunate consequence of following the rules. As this chapter and the work of others legal scholars have illuminated, the near exclusive focus on Black defendants is the result of rules that systemically heighten Black guilt, while minimizing White guilt. The broader effect of such systemic bias at the ICC is particularly invidious because it reinforces well-documented racialized associations of dark skin with evil. A deeper reckoning with the rules that yield such consistently racially discriminatory results is imperative especially given the increased prominence of expressive theories of punishment in international criminal law, which justify criminal prosecutions for their role in communicating the international community’s sense of right and wrong.83 If not, international criminal law risks being not much more than an expression of racialized perceptions of wrongdoing. Indeed, cast under such light, international criminal law could easily be portrayed as an extension of international law’s civilizing mission, which relied on stereotypes regarding the inherent violence and inferiority of “Blackness” to justify slavery and colonialization.84 Instead, the ICC should adopt an anti-racist orientation to its work, identifying how structural racism is embedded in its institutional design and recognizing the role that race and racism might be playing in its decisions.

#### The ICC is a tool of Western legitimation and power consolidation to topple African “dictators” that challenge Western rule

Saddiqui 22 [Alishbah Saddiqui, researcher at the International Affairs Program at The New School, 5-14-2022, “Double Standards, Hypocrisy, and Impunity: The International Criminal Court’s Neocolonial Bias Case Study: Libya and Muammar Gaddafi,” New School, https://d1wqtxts1xzle7.cloudfront.net/95325450/ICC\_Libya\_copy-libre.pdf?1670313953=&response-content-disposition=inline%3B+filename%3DThe\_International\_Criminal\_Courts\_Neocol.pdf&Expires=1733361730&Signature=J38A74gCFASPKX12c1a3bz3Dsii1e53vrSxgiOtZ9TI-sO3Xl1V8BntOu70QxT4ngAA-ybIGQZduQhgrSliPjJ7wyy3RQlg-eW312tLn5FzBt1GqhI7wTza8Y5-T6~goTO0DSckoAQpX-inzaA-D4rbnjU~h749rYRcxxp3hnUtkF6BQ76i3VcHXxpVEW8BHDkfjk~J5Xz45J-97HJollwmLYuv0JNIssoUHnQ6xQMS2VLVWBjJVBUi6PKQKx~IGoGxn7YV8ibpK-2ih~MT9tMOUKeciXWpMQZsX9zIXsbWY4NIvBoYzQMFdC5HbDkBM5t1mb5wuHiWMF4Cujn4xXQ\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA]/Kankee

Libya was thriving under Gaddafi. Additionally, he was a staunch anti-imperialist. Due to his support of various anticolonial resistance groups around the world, Gaddafi had a hostile relationship with the West for decades. The U.S. even bombed Libya in 1986, killing civilians, one included Gaddafis daughter, a baby at the time. Gaddafi was also a strong pan-Arabist and pan-Africanist. He proposed unifying multiple Arab states into one federation. As chair of the African Union he proposed that the continent switch to a the gold dinar, a new currency that would be independent of the American dollar. “The objective of this new currency was to divert oil revenues towards statecontrolled funds rather than American banks” (“Gold dinar,” 2019). Clearly, this was a threat to American hegemony. What was NATO's violent intervention in Libya really all about? Now we know, writes Ellen Brown, thanks to Hillary Clinton's recently published emails. It was to prevent the creation of an independent hard currency in Africa that would free the continent from economic bondage under the dollar, the IMF and the French African franc, shaking off the last heavy chains of colonial exploitation (Brown, 2016). Libya “did not become a strategic geo-political-military asset of the empire”, rather it was a threat to the empire because of Gaddafi (Petras & Abaya, 2011). And so, as the U.S. does, it initiated a regime change operation against Gaddafi’s regime, with the help of the U.N. In the process, they imposed sanctions, utilized atrocity propaganda, supported rebel groups, and painted Gaddafi as an evil dictator. Yet it seems that Libya was much better off under the cruel and oppressive dictator that the U.S. and U.N. moved so quickly to depose. Prior to the US-led bombing campaign in 2011, Libya had the highest Human Development Index, the lowest infant mortality and the highest life expectancy in all of Africa. Today, Libya is a failed state. Western embassies have all left, the South of the country has become a haven for ISIS terrorists, and the Northern coast a center of migrant trafficking (Chengu, 2015). The rebel groups that were supported by the U.S. were oppressive and cruel as well. “Rebel forces [had] emptied entire villages of black Libyans’ and ‘black African women were raped by rebel forces in the refugee camps outside of Tripoli” (Green, 2019). Yet the current government of Libya has not been demonized by the West or U.N. as was the previous. Many of the claims made against Gaddafi’s regime, which were the basis of the UN’s economic sanctions and referral to the ICC, were incorrect or outright lies. A 2015 investigation by Britain’s House of Commons' bipartisan Foreign Affairs Committee found: ‘While Muammar Gaddafi certainly threatened violence against those who took up arms against his rule, this did not necessarily translate into a threat to everyone in Benghazi,’ the report continues. ‘In short, the scale of the threat to civilians was presented with unjustified certainty.’…The Libyan government had retaken towns from rebels in early February 2011, before NATO launched its air strike campaign, and Qaddafi's forces had not attacked civilians… Qaddafi told rebels in Benghazi, ‘Throw away your weapons, exactly like your brothers in Ajdabiya and other places did. They laid down their arms and they are safe. We never pursued them at all.’ The Foreign Affairs Committee adds that, when Libyan government forces retook the town of Ajdabiya in February, they did not attack civilians. Qaddafi ‘also attempted to appease protesters in Benghazi with an offer of development aid before finally deploying troops,’ the report adds… ‘The disparity between male and female casualties suggested that Gaddafi regime forces targeted male combatants in a civil war and did not indiscriminately attack civilians,’ the committee says. Senior British officials admitted in the Parliament investigation they did not consider Qaddafi's actual actions, and instead called for military intervention in Libya based on his rhetoric. (Norton, 2016) The ICC issued an arrest warrant for Gaddafi based on these uncertain claims as well, and did so unusually fast. The ICC prosecutor announced, in only less than two weeks since the demonstrations began in Libya, that “following a preliminary examination of available evidence an investigation is warranted” (Alterman, 2011). “This speed is unprecedented, as the prosecutor normally spends many months before reaching a decision to actually commence an investigation (Alterman, 2011). COURT’S RACIAL BIAS “White privilege is an absence of the consequences of racism. An absence of structural discrimination, an absence of your race being viewed as a problem first and foremost” ― Reni Eddo-Lodge The West’s war against Libya was a war against Africa. It was a war against African unity, African sovereignty, and African independence. It was also a war against Arabs and Muslims. And it was a war against socialism. The ICC took part in this war when it unnecessarily investigated and issued arrest warrants for Libyan government officials, with unprecedented speed. Many have noticed the ICC’s almost exclusive focus on African countries. There is good evidence that this racist bias is “an attempt by the Western States ‘to keep African countries compliant to the dictates of the West and its allies’ or ‘the sacrificial lambs in the ICC’s struggle for global legitimation’” (Wong, 2019). In 2013, “the African Union called upon African states not to cooperate with the ICC” (Allo, 2018). So far, every convicted individual has been African. To date, the Court “has issued indictments against 42 individuals, all of whom are Black and/or ArabAfricans. Recognizing the existence of anti-Black, anti-Muslim racism globally, one would expect international criminal justice to further interrogate the place of race and racism” (Clarke, 2020). Yet, agents of the Court have strongly opposed the notion that racial bias plays a role in their functions (DeFalco & Megret, 2015). Some have even pointed to the fact that numerous people of color sit at the ICC. However, this paper argues that racial bias does not simply exist among ICC judges and prosecutors, but is rather embedded in the very founding of the Court, in the Rome Statute, and other areas of international law. Ingrained within international law is structural racial inequality and white supremacist, euro-centric tendencies. As mentioned previously, the ICC focuses on four core crimes. This list of crimes that emerged from intense political debates as ‘the most serious’ constituted threats to the peace and security of the global community and were crimes that mainly involved widespread killing and mass deaths; “akin to the forms of violence being perpetrated in sub-Saharan Africa and Latin America at the time” (Clarke, 2020). However, there were crimes that were suggested during the negotiating process, but didn’t make it to the list. These include, “colonial domination and other forms of alien domination; apartheid; recruitment, use, financing, and training of mercenaries; willful and severe damage to the environment; international terrorism; and illicit traffic in narcotic drugs” (Clarke, 2020). Many of these crimes Western powers engage in heavily. The ICC’s core crimes is a restrictive and selective conceptualization of violence that, cannot address many of the collective interests of global South peoples that are impacted by the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment, nor in many instances the slow violence meted out by the toxic remnants of certain weaponry (Clarke, 2020). International law just becomes a temporary bandaid, and a selective one, if it does not tackle the root causes of atrocities and the instability that leads to them: the colonial history; the economic exploitation; the environmental damage; etc… The timeline international criminal law chooses to focus on is also extremely selective. This is exemplified even in courts predating the ICC. For example, the International Criminal Tribunal for Rwanda was limited to crimes that were committed within the year 1994, absolving the complex lead up to the genocide and the pivotal role colonialism played. Likewise, the Extraordinary Chambers in the Courts of Cambodia only had jurisdiction over the period of time the Khmer Rouge held power (1975-1979). This limiting time frame prevented accountability for “international crimes committed by the French in Cambodia during and after colonialism, and also gives the United States de facto immunity for its massive indiscriminate bombing campaign throughout the country, especially during the Cambodian civil war of 1970 to 1975” (Clarke, 2020). Similarly to these courts, the ICC also does not contextualize the various conflicts it investigates. The Third World succumbs to tribalism (they did it to themselves), has become the narrative of choice. These are the cherished notions not only of Canadians but of the West on the whole. They have been used, for example, in connection with the Rwandan genocide and the massacres in the former Yugoslavia. When a counterstory is released, such as when the International Federation of Human Rights Leagues noted in its report that the genocide in Rwanda was not motivated by ancient tribal hatreds but instead 'was organized by an enlightened elite who studied in our (European) schools and universities… Human rights abuses, abstracted out of context and history, work ideologically and materially to support the dominance of white Western nation-states (Razack, 2004, p. 150). It is necessary to understand the colonial histories of violence and various structures of inequality that lead to present day atrocities. If not, wouldn’t it be an implication that African countries are inherently violent? And this is also why, the ICC would not investigate ‘the invisible perpetrators’ – the Western donors, arms merchants, supporters of dictatorships, multinational corporations, and international financial institutions who were involved in African conflicts . It 4 seems that the ICC is being employed merely as an instrument to manage and contain the ‘uncivilized’ effects of neoliberal global inequality in accordance with liberal-legalist rhetoric. In other words, the way in which the ICC seeks selective individual criminal responsibility tends to mask the deeper structural problems that drive armed conflicts, such as struggles over natural resources and land disputes (DeFalco & Megret, 2015). The reality that the violence of colonialism and neocolonialism continues to construct the nature of power and instability in these countries today is something that the ICC ignores, and in doing so, is absolving Western countries of their violent contributions to current day crimes. “The complicity of colonialism’s inequalities in seeding contemporary violence, and economic degradation of neocolonialism, contributes to unresolved issues for the continuing challenges of structural inequality in the current world order” (Clarke, 2020). The lack of effort in attempting to repair or even address the deep structural violence that stemmed from Western colonialism proves that the ICC does not seek true justice or accountability. The double standards of the ICC cannot be ignored. On only two accounts the UN Security Council referred countries/leaders to the ICC, Sudan and Libya. For Sudan, the ICC issued arrest warrants for various Sudanese leaders. The UN Security Council, ‘referred the situation in Libya to the OTP via Resolution 1970, and soon thereafter authorized air and naval intervention–to be effected by NATO powers and their Gulf allies–in Resolution 1973.’ And two days later, NATO commenced an intervention with the establishment of a ‘no-fly zone’ and aerial attacks and, by October 2011, rebel forces took over control of Libya and killed Muammar Gaddafi. (Clarke, 2020) Following the UN Security Council’s referral, the ICC had immediately opened an investigation into the Gaddafi regime and issued arrest warrants for Gaddafi and others. “The speed of these investigations, and arrest warrants compared to other situations involving consenting states, raises questions about the role of UNSC referrals”, additionally, “jurisdiction excluded, the United States troops that intervened” (Clarke, 2020). In the case of Libya, it really seems that the UNSC and ICC chose the side of the West. In contrast, the UN Security Council has not referred the various crimes committed by Western states such as the U.S. and U.K. in Iraq, Afghanistan, Pakistan, Guantanamo Bay, Abu Ghraib, and Israel in Palestine to the ICC. Some scholars have even termed it a ‘selective justice regime’ (Ezennia, 2016). It took unilateral action by the ICC Office of the Prosecutor (OTP) to pursue accountability against U.S. actors for alleged international crimes committed within the context of the Afghan conflict. Meanwhile, the UNSC has failed to show any initiative in this regard, and the possibility of the United States seeking to use its council seat to block the investigation from moving forward has been raised (Clarke, 2020). In fact, the ICC’s prosecutor decided to close a preliminary examination of war crimes by British forces in the Invasion of Iraq even though “there was clear evidence that UK forces were responsible for numerous war crimes in Iraq, including willful killing or murder, torture and other serious abuses of detainees, and rape and other sexual violence” (“United Kingdom:ICC,” 2020). This decision truly proves the “ugly double standard in justice, with one approach for powerful states and quite another for those with less clout” (“United Kingdom:ICC,” 2020). Investigations are closed against Western states because they refuse to cooperate or claim their national courts will handle the matter. However, “the ICC can judicially intervene in failed states that are ‘unwilling or unable to genuinely carry out the investigation or prosecution’” (DeFalco & Megret, 2015). Yet it does not do that for Western states that are unwilling to cooperate. It seems that that phrase is reserved for “the barbarian society that does not meet the standard of civilization”, and that cannot possibly be a Western state (DeFalco & Megret, 2015). “As empires had a mission to civilize barbarian societies then, the international community has a responsibility to protect civilians (R2P) instead of failed states that do not now meet the requirements of sovereign states” (DeFalco & Megret, 2015). This double standard is not simply unjust, but comes from an extremely colonial mindset. The UN Security Council’s referrals, or lack thereof, greatly harm the Courts (intended) impartiality. “The root of the problem is not an obsession with Africa but rather a slow but perceptive shift of the Court away from the apparent independence shown in its early years towards a rather compliant relationship with the Security Council and the great powers” (Schabas, 2011). Many in the Global South, especially in Africa, have been skeptical of the Council’s permanent five, a group they have been excluded from, a group that holds the most power in the UN process. One reason so many African states supported and joined the Court was precisely because it retained independence from the Security Council. That independence has shrunk in recent years and, with the Court enthusiastically taking on the Council’s referral to Libya and subsequently being instrumentalized by the intervening powers, the Court’s independence may well be on shaky ground” (Kersten, 2012). With the impartiality of the court being ‘shaky’, it can no longer be a legitimate administer of accountability and justice. COUNTER-ARGUMENTS

#### The ICC’s “civilizing savagery” narrative obscures Western violence and justifies “democracy-promotion” like the invasion of Iraq

Kotova 23 [Anastasiya Kotova, educator at Lund University, 2023, “Violence in International Criminal Law and Beyond,” Springer, https://link.springer.com/chapter/10.1007/978-94-6265-551-5\_3]/Kankee

What are other characteristics of violence that international criminal law recognises, besides the focus on direct physical harm? Firstly, as suggested above, international criminal law is concerned with mass or large-scale violence. Although it is often asserted that qualifying a crime as international does not rely on a number game,64 the context, necessary for offences to qualify as crimes under the ICC Statute, is that of relatively large-scale violence. For genocide, the Elements of Crimes prescribe that ‘[t]he conduct’, listed in Article 6 paras a–e, must have taken place ‘in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’.65 While this is not, strictly speaking, a contextual element, for a manifest pattern to be established, the violence perpetrated against a protected group has to result in at least a number of victims. Crimes against humanity, according to Article 7 of the ICC Statute, must be ‘committed as part of a widespread or systematic attack directed against any civilian population’,66 whereas war crimes can only be committed in a context of an armed conflict, which also presupposes a certain level of violence, especially in a non-international armed conflict. While domestic criminal law primarily deals with individual acts of violence, international criminal law is normally concerned with a larger number of victims in a situation of conflict or in the presence of a repressive government, in a state where, moreover, the domestic justice system is often unable to deal with each individual case of violence. Secondly, according to Ioannis Kalpouzos and Itamar Mann, the ICC has so far focused on violence that is ‘spectacular’ and ‘radically evil’.67 What is radically evil for the ICC can be gathered from the long history of the ICC Statute, as going back to the ILC Draft Code of the Crimes against the Peace and Security of Mankind, finalised in 1996. In the 1980s, after decades of work on the Code, the ILC abandoned its inclusive, omnibus approach in favour of a limited catalogue of crimes, affirming instead that [t]he code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies.68 This passage, no doubt interesting in several respects, points out at least two characteristics of the type of violence international criminal law addresses. The spectacular nature of violence, of which Kalpouzos and Mann speak, and which the passage sketches, invokes the aesthetics that international criminal law adopts. Aesthetics in this context refers to the ‘formalization of experience’ through adopting a specific kind of imagery, language, and symbolism: it denotes the historical, visual, emotive associations that a reference to ‘core crimes’ invokes.69 According to SchwöbelPatel, by shining a spotlight on spectacular violence, ‘aesthetical bias’ of international criminal law serves to obscure and marginalise instances of other violence.70 Furthermore, the vision of violence in international criminal law is racialised: the language of savagery and barbarity in international law has been traditionally used to legitimise the mission of civilising a savage and barbarous ‘other’ through international law itself,71 and as Claire Nielsen suggests, international criminal law continues this civilising mission.72 The attention paid to the outrages of some political communities and the oblivion to those of other communities are not new in international law, as Ntina Tzouvala shows using the example of slavery: while slavery on the African continent was used as an indication of the savage nature of the locals and, consequently, of the need to civilise them and of the impossibility of granting the rights enjoyed by civilised nations to them, the use of slave labour in the southern states of the United States was never seen to undermine its status as a civilised nation.73 While contemporary international criminal law purports to be universally applicable and is not as blatantly racialised, it still possesses the features that allow the violence of the states in the Global North to remain largely invisible to the eyes of the international criminal justice system. Tallgren underlines, in this vein, the focus of international criminal law on ‘primitive, low-tech forms’ of violence that serves to ‘direct the scrutiny from the centre to the periphery, [away] from infrastructural, high-tech violence’.74 This allows for the high-tech violence of the ‘civilised states’, such as the NATO bombardment of Kosovo, to remain beyond the gaze of international criminal law,75 while low-tech violence is visible insofar as it begs for the ‘other’ to be ‘civilised’, for an appropriate response—a criminal trial shaped by the Western ideals of individual responsibility—to be given. The differential attention to high-tech and low-tech violence, with the latter seemingly privileged by the ICC Office of the Prosecutor, led, for instance, to the dismissal of the situation in Iraq in 2006, that could have implicated the Allied powers’ military, opting instead for the Security Council-backed investigation in Darfur.76 The alleged genocide in Darfur invokes vivid images of savage intracommunal violence, while the democracy-instating intervention of the allied forces in Iraq did not meet the gravity threshold, according to the then Prosecutor. Another gatekeeping mechanism in the ICC system is the principle of complementarity: the ICC will only open an investigation if a state that has jurisdiction is unable or unwilling to prosecute, but since the ability of states parties to prosecute is assessed against the standards of Western criminal law systems, those Western states will hardly ever be claimed to be unable to prosecute. Peripheral states, therefore, will be more prone to allegations that their justice systems cannot cope with an investigation.

#### International criminal law is a strategic tool to reinforce Western power

Brody 24 [Reed Brody, veteran war crimes prosecutor with a JD from Columbia Law School and an honorary doctorate from Fairleigh Dickinson University, 05-09-2024, "Who’s Afraid of the International Criminal Court?", Nation, https://www.thenation.com/article/world/icc-netanyahu-biden-israel-war-crimes/]/Kankee

As the pressure mounted, the ICC prosecutor, British barrister Karim Khan, took to social media to issue his own warning. Threats of retaliation, he said, undermine the court’s “independence and impartiality.” And, he noted, those who issue them could be charged by the ICC with the crime of obstructing justice. While the ICC has not confirmed the reports of impending charges—which would almost certainly be coupled with warrants against top Hamas officials—the furious diplomatic maneuverings are reflective of the unprecedented nature of any such event. The ICC has never, in over 21 years of existence, indicted a Western official. Indeed, no international tribunal since Nuremberg has done so. Up until now, the instruments of international justice have been used almost exclusively to address crimes by defeated adversaries, powerless outcasts, or opponents of the West such as Vladimir Putin or Slobodan Milošević. For 15 years, since the Palestinian Authority submitted a declaration accepting the ICC’s jurisdiction in January 2009, following Israel’s Cast Lead operation, which killed more than 1,400 Gazans, Palestinian efforts to invoke the ICC have gotten the slow walk from three successive ICC prosecutors. Indeed, even after the indiscriminate and disproportionate Israeli response to the horrific Hamas attacks of October 7, many ICC-watchers believed that the savvy Khan was reluctant to cross a historic US red line with an indictment of Israeli officials, despite his increasingly strong warnings to both Hamas and Israel.

#### The ICC disempowers local concerns and traditions, overriding African custom with Western law

Clarke 19 [Kamari Maxine Clarke, Distinguished Professor at the University of Toronto, 2019, “Affective Justice The International Criminal Court and the Pan-Africanist Pushback,” Duke University Press, https://www.jstor.org/stable/j.ctv1131bbn]/Kankee

Proximity and the Redirecting of Culpability Our ethnographic research in Kenya showed that the very survivors of violence that international judicial institutions seek to protect protest the designations of criminal responsibility strictly in relation to individual responsibility, especially when there is an understanding that longer histories of imperial land disenfranchisement created (and were not products of) such forms of contemporary violence. According to a report by the International Center for Transitional Justice, though victims understood that in icc judicial contexts greater responsibility is borne by those who gave orders that led to violent outbreaks, more than half of those who responded to the question “Who should be prosecuted?” identified direct perpetrators or “foot soldiers” of violence as being directly responsible.64 Though supportive of the icc con- cept in principle, many of those in Kenya classified as “victims” also felt that local and national mechanisms were preferable to pursuing a lengthy icc process in order to achieve compensation for violence and property loss.65 In a 2013 survey that we conducted with survivors of 2007–2008 postelection violence in Nairobi’s low-income Kibera neighborhood, an overwhelming majority of residents insisted that criminal responsibility needs to be understood clearly through notions of collective guilt, the role of the police in postelection violence, and the way that the British colonial settlement of the Rift Valley led to the demise of both the Kikuyu and Kalenjin ethnic traditional networks. Thus, individualized criminal responsibility and an expanded perception of time were important. Despite this perception on the ground, international criminal law prioritizes command and superior responsibility rather than holding proximate perpetrators accountable; the expectation is that direct perpetrators will be dealt with under domestic criminal law. Accordingly, for some, the law falls short. This is not only because perpetrators of proximate violence are not being prosecuted in the national context but also because international courts cannot situate crimes historically. Many of my respondents insisted that focusing temporally on the narrow 2007–2008 postelection violence period as way to measure culpability fails to attend to deep-rooted historical and political issues. Recall that Kiamu, a young Kenyan human rights advocate quoted in chapter 1, maintains, “We’ve had victims in this country since the colonial times, so if you’re going to address the system of victims of political violence in Kenya we do it holistically. We begin with the day the British landed here, the evictions that the settlers did—today the biggest land owners are settlers. . . . My reference point is in the eighteenth century. . . . The icc has no capacity to address that, so I’ll not waste time on it. Here we see not only a strong conviction about the limits of individual culpability as a framework in international criminal law but also a critique concerning the inability of legal time to adequately encompass historical forms of violence. Despite these other conceptualizations of guilt, it is unlikely that the icc will permit itself to consider activities that occurred prior to its temporal jurisdiction, thereby violating basic principles of legality.66 Set against this vexed juridical backdrop, who should be held responsible for contemporary crimes of violence?

Despite the articulation of culpability by the icc and deep-seated sentiments that supported historical hostilities against warring ethnic groups and parties, public discourses surrounding icc activity shifted the terms of engagement about justice, increasingly narrating its measure through the longu durée. John, a well-known Kenyan journalist, insisted that in 2007–2008 neither Kenyatta nor Ruto were heads of state, so it is not clear why they would be seen as bearing more responsibility than others

#### ICC erasure of US crimes in Afghanistan, selectively prosecuting only those disempowered, proves the ICC is a colonial power play

Speri 21 [Alice Speri, writer on U.S. foreign policy for the Intercept with a PhD from NYU, 8-30-2021, "How the U.S. Derailed an Effort to Prosecute Its Crimes in Afghanistan", Intercept, https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/]/Kankee

Last week, the new chief prosecutor of the International Criminal Court — the only international body with the authority to prosecute individuals over genocide, crimes against humanity, and war crimes — sought to reopen a previously suspended investigation in Afghanistan but with a caveat. The probe would not include conduct by the United States and its allies, including the U.S.-backed former Afghan government, all of which have committed crimes that fall squarely within the court’s jurisdiction. The court’s prosecutor, Karim Khan, who has been on the job for just over three months, wrote in a statement that his office would focus exclusively on crimes committed by the Taliban and by the Islamic State Khorasan Province, or IS-K, the Islamic State group’s affiliate in Afghanistan. A preliminary investigation of crimes committed in Afghanistan since the country joined the court in 2003 had been underway for more than a decade, before a full investigation was authorized and then suspended in favor of an Afghanistan-led process. That investigation included crimes committed by all parties to the conflict, marking the first time the ICC probed crimes committed by U.S. forces, which in Afghanistan include extrajudicial killings, drone strikes that killed an untold number of civilians, and torture. Now, if a panel of ICC judges authorize the prosecutor’s request, the resumed investigation would “deprioritise other aspects of this investigation,” Khan said, an implicit reference to the U.S. and its allies. The announcement dealt a blow to victims, human rights advocates, and those who had placed in the ICC their last hope to see the crimes committed by U.S. personnel and officials prosecuted in a court of law. While many Afghans welcomed the reopening of a case that they hope will preserve the international community’s scrutiny of the newly installed Taliban government, they warned that the decision would threaten the credibility of a court that has long faced questions about its ability to take on the world’s most powerful countries. “This just proves one more time to Afghans that international mechanisms do not value their life when foreigners are involved and international forces are involved,” Shaharzad Akbar, who chaired Afghanistan’s Independent Human Rights Commission until the Taliban took control of the country in August, told The Intercept. “This decision reinforces the perception that these institutions set up in the West and by the West are just instruments for the West’s political agenda.” The ICC has historically operated with limited resources, with an annual budget of roughly $172 million paid for by its 123 members. In a world starved for justice and accountability, the ICC’s resource problem has at times become a political one, raising questions about how the court prioritizes which cases to tackle. In recent years, the ICC has opened inquiries into potential Russian crimes in Georgia and Ukraine and Israeli crimes in Palestine, and it has opened, and then shuttered, preliminary inquiries into acts committed by British troops in Iraq. All have faced significant opposition. The United States, which is not an ICC member, has also long taken a hostile stance toward the court, opposing investigations into its allies, including Israel, and fiercely contesting the court’s jurisdiction over U.S. nationals. U.S. officials have put extensive pressure on the court, the Afghan government, and U.S. allies in an effort to derail any investigation of American crimes. “This was clearly a political decision — there’s really no other way it can be interpreted. It gave the US, the UK and their allies a get out of jail free card,” Jennifer Gibson, an attorney focused on extrajudicial executions at the human rights group Reprieve, wrote in a statement to The Intercept in response to Khan’s announcement. “It’s almost as if the two countries wrote the script for him. He mentions the attack on Kabul Airport in the waning days of the withdrawal, but ignores the U.S. drone strike that killed a family of ten, including seven children, soon afterwards.” A Doomed Investigation

#### ICC complementarity treats Africa as unworthy and unable to try war criminals, encouraging the West to force colonial, non-African practices on the Global South

Manley et al. 23 [Stewart Manley, PhD candidate at the Faculty of Law at the Universiti Malaya , Pardis Moslemzadeh Tehrani, Associate Head at the School of Law at the Faculty of Business Law and Tourism at the University of Sunderland, and Rajah Rasiah, Distinguished Professor of Economics at the Asia Europe Institute at the Universiti Malaya, 2023, “The (Non-)Use of African Law by the International Criminal Court,” Oxford University Press, https://unlv-primo.hosted.exlibrisgroup.com/permalink/f/6tvje6/TN\_cdi\_oup\_primary\_10\_1093\_ejil\_chad035]/Kankee

1 Introduction The initial enthusiasm and support of many African countries for the International Criminal Court (ICC) has been largely replaced with antagonism.1 Grievances primarily centre around the ICC’s overwhelming focus on African situations, its disregard for the immunity of senior government officials, the impact of prosecutions on peace efforts and on the United Nations (UN) Security Council’s referrals of African non-state parties (Sudan and Libya) to the Court and the Security Council’s refusal to defer prosecutions of African defendants.2 The ICC’s failure to involve enough local African experts, institutions and judicial mechanisms in its work are additional concerns.3 The complementarity requirement – that the Court defer to national investigations and prosecutions unless the state is unwilling or unable genuinely to carry them out – has been another target of complaint, with claims that the Court has disregarded sovereignty by not respecting national processes,4 that complementarity is inherently biased against underdeveloped states5 and that the Office of the Prosecutor (OTP) lacks patience in working with African states to build their local court capacity.6 One African legal scholar sees international criminal law in Africa ‘in such an advanced state of decomposition only bones scattered in the valley are what remains’.7 Perhaps most painful and damaging is that these criticisms are often accompanied by claims that the Court has an anti-African bias based on neo-colonial or racist grounds.8 In 2016, the Gambia, South Africa and Burundi filed notifications of withdrawal from the Court.9 In 2017, the African Union called for the mass withdrawal of member states.10 Though these efforts have not led to as many withdrawals as some predicted, the Court’s relationship with many African nations remains strained. This article suggests that a more subtle ‘anti-Africa bias’, or, more broadly, ‘antiglobal South bias’, is occurring behind the scenes in judicial chambers.11 When ICC judges decide legal issues, they must determine which law to apply and which legal authorities should be used to interpret that law. Sometimes this is an easy task, but often it is not. Laws like the ICC’s Rome Statute, even at their most detailed, can be ambiguous, broad or vague.12 In these more difficult instances, the judges must turn to other laws and principles for interpretive guidance. Eventually, their search may involve national laws. It is at this step that this article asks both an empirical and a normative question. First, how often does the Court consult African and other global South country laws? Drawing from a database of 16,192 ICC citations collected over nine years, this article shows that, at least in the ICC records examined, the Court rarely turns to national laws, but, when it does, it gives almost no attention to the laws of African and other global South countries and, instead, more frequently cites laws from the UK and the USA. How a court cites (or does not cite) illuminates judicial practices because it reflects how the court ‘chooses to use jurisprudential materials to interact and communicate with its constituencies and institutional surrounding’.13 The second section of the article discusses the method of data collection and the database’s limitations, the key empirical findings and select case details. Second (and this is the normative question), should the Court consult the laws of African and other global South countries? This article argues that it should. The lack of adequate consideration of these laws reflects and perpetuates Third World Approaches to International Law (TWAIL) concerns that the well from which the sources of international law are drawn continues to unjustifiably neglect Third World nations.

#### Decolonial and abolitionist critique towards the ICC is key – reforms legitimize the system and don’t change underlying power structures

Burgis-Kasthala and Sander 24 [Michelle Burgis-Kasthala, Professor of International Law and Global Governance at the University of Edinburgh, and Barrie Sander, Assistant Professor of International Law at Leiden University, 6-17-2024, "Contemporary International Criminal Law After Critique: Towards Decolonial and Abolitionist (Dis-)Engagement in an Era of Anti-Impunity", OUP Academic, https://academic.oup.com/jicj/article/22/1/127/7695263]/Kankee

A. Race, Coloniality, and the Decolonization of International (Criminal) Law While ICL scholarship from the 1990s onwards was perhaps slower than general international law literature to grapple with its persisting Eurocentric and racialized qualities,146 this is no longer the case. TWAIL scholarship over the past two decades has striven to illustrate the (neo)colonial dimensions of international law,147 including ICL.148 In practice, this has played out most fiercely in relation to the controversies over Africa and the ICC.149 This (unfinished) episode has forced even mainstream ICL scholars to confront a range of uncomfortable racialized dimensions of contemporary ICL policies and practices. We see similar concerns playing out in relation to the Gaza conflict as well. More fundamentally, however, recent decades have witnessed a wholesale rethinking about the colonial nature of epistemology and learning in relation to a range of scholarly fields, including international (criminal) law.150 Here, it is imperative to be clear on the meaning of the terms ‘decolonial’ and ‘decolonization’. This is captured well by Adébísí who contrasts the period of decolonization — as an event of ‘flag independence’151 — with the far more profound process of decolonization of epistemology and ‘global power structures’ which remains unrealized. What occurred in the mid-twentieth century was only a ‘performative gesture to decolonisation [sic]’.152 As Adébísí explains, ‘Physical and overt political manifestations of imperialism and unfree labour were removed from sight, but epistemological, geopolitical, and financial mechanisms remain in place’.153 Persisting (Western) ‘universalizing’ structures of knowledge entail that the experiences and life-worlds of peoples across the Global South have been and continue to be irrevocably framed as deficient, deviant, and lacking.154 Theoretically, this has resulted in the ‘seemingly ingrained resistance to the idea that theory can be generated from the trajectories, dilemmas, and experiences of non-Western politics’.155 Calling out these practices requires that we recognize all knowledges as situated, or what Mignolo calls ‘geo-epistemology’.156 For researchers wishing not only to uncover but also to understand coloniality, this requires an explicit commitment to reflecting on our own responsibility in producing ways of seeing the world and the power and complicity embedded within the Global North academy.157 Turning to decoloniality cannot simply entail the chance for us ‘to create new comfortable canons, within which the subaltern still cannot speak’.158 Lentner presents this burden of responsibility as arising from our role as experts who ‘provide the (socially constructed knowledge of) facts, interests and forces that are understood to impinge on a decision or those that need to be considered’.159 For example, in framing acts as atrocity crimes requiring ICCTs, we narrow the horizon of possibility for other ways to imagine types of harm and types of redress. For Al-Hardan, a form of decolonial responsibility: means paying attention to what happens “before” the research as an inherent part of the research process, taking into account the structural mechanisms embedded in the academy that guard and reinforce colonizing epistemologies that presume an unmarked universal position that masks its own colonial economy of power through disavowing it, and is anything but anti-oppressive for the colonized and stateless that we set out to research. The encounters with the academy’s web of power relations and the implications that these encounters have on our research are further compounded by our encounters in the communities we set out to research, whether ours or not, and thus of the very conditions that make knowledge production itself possible.160 For ICL, this also plays out in the way it functions not simply as a regulatory tool of intervention within ‘errant’ Global South spaces,161 but in the way lawyers are trained to understand and then apply seemingly neutral normative categories that were not generated and do not reflect experiences outside the Global North. Greater circumspection and humility are required before listening to a range of experiences and visions for what ICL does mean and could mean to those in the Global South. At times, this will entail a (re)turn to the criminal trial and specifically, the ICC, such as has been the case for many Tamil and Palestinian claimants.162 While critical scholars of ICL can easily point to the ICC’s failings, it is crucial that they can also listen to and respect survivor desires not only through simple acceptance of extant institutions, but in working towards their radical improvement. Survivor-centred responses could also entail greater openness to plural ‘adjunct’ or ‘extralegal strategies’,163 such as peoples’ tribunals,164 as well as (individualized and community-based) reparations.165

For ICL to move towards a decolonial future, it must democratize its constituency166 and embrace particular justice struggles as a ‘pluriversity of knowledges’.167 Time and again, these struggles are not necessarily concerned solely with contemporary atrocity crimes by aberrant Global South state and non-state actors. Instead, struggles over radical economic inequality within a global racialized capitalist world demand far, far greater recognition of structural harms in their historical and contemporary dimensions. Thus, for Reynolds and Xavier: Resistance from the periphery to the Hague’s hegemony as the centre of international justice would benefit from the evolving organic intellectual traditions of indigenous social movements, alter-globalization and decoloniality. This can open space for the recognition and inclusion of non-Western epistemologies and legal cultures—on their own terms … and prepare the ground for top-down criminal processes to ultimately give way to anti-colonial sensibilities and indigenous notions of justice and restitution.168 While ICL scholars might find these suggestions to be ‘unsettling’, Kilroy, Lean and Davis stress that this is the point.169 To decolonize is not only to unsettle our scholarly selves, but to unsettle the lands from which our privilege resides. One option here would be for ICL to embrace a shift to ‘non-reformist reforms’. Such an approach rejects reformism (as embodied in liberal legalism and the state)170 because it ‘consolidates the hand of those in power and deepen[s] preexisting inequalities’.171 For Akbar, it has two key dimensions: First, a non-reformist reform aims to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of world-building. Second, [it] draws from and builds the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions … It is part of a democratic project.172 In her most recent evaluation of this sensibility, Akbar delineates three key sites of struggle that embody this ethic: decolonization and decommodification (such as the cancel rent and cancel debt movements), democratization, and abolition and decarceration. While each of these strands shares many synergies and sympathies, it is to the last that we now turn for its particularly productive problematization of crime and criminalization whether at the domestic or international level. B. Moving towards an Abolitionist Approach to ICL At its core, abolitionism is deeply sceptical of the state with its mandate to criminalize and constrain the lives of various marginalized groups. The term historically is associated with the eradication of slavery and the attendant liberal legal ideal of realizing (formal) racial equality. While enslaved peoples were indeed emancipated in metropoles and colonies from 1794 onwards, a range of racializing policies and laws have ensured various forms of enduring structural and physical harm, such as Jim Crow laws in the US South, indentured labour for millions of ‘freed’ slaves required to ‘pay back’ their freedom, along with large-scale debt, such as Haiti’s, which amounted to more than 300% of its national income in 1825 that was only paid off in 1947.173 Black liberation movements such as the Black Panthers and the African National Congress in Apartheid South Africa have mobilized around ongoing forms of oppression that they have confronted on a daily basis across the globe. Resisting practices of criminalization and incarceration have been central to the struggles of Black liberation movements seeking to radically confront the state’s legitimation of violence. In his wonderful overview of these movements over the past century, Weber points to a range of rhetorical registers that activists have used to question and re-envision their lives. In contrast with Samuel Moyn’s account of the birth of human rights occurring in the 1970s,174 Weber shows how earlier Black radicals such as Marcus Garvey and Malcolm X intoned human rights in expansive and radical ways to frame their anti-carceral and liberationist struggles.175 According to Weber: Far from only a bid for legal recognition or redress, this tradition of human rights activism has sought to pry open the very underpinnings of the unequal world system and ground an anti-carceral Black human rights tradition in a global framework of anti-racist, antisexist decolonization that seeks total transformation.176 These themes of persisting racialized logics resonate with decolonial sensibilities and highlight some points of convergence. They also provide a different genealogy through which ICL can (re)imagine itself. Invoking the language of abolition today is a way to recognize and confront unaddressed past injustices centred on slavery and colonialism as well as persisting racialised, gendered and classist practices that coalesce around police violence and the ‘prison industrial complex’.177 Speaking of a ‘complex’ rather than a prison per se is crucial here as it points to a range of society-wide relations that support and legitimize (often-racialized) criminalization and incarceration (or death). Thus, for Kilroy, Lean, and Davis: … we cannot simply look at institutions of incarceration … The same is true of police abolition … We have to examine the afterlives of colonialism, slavery, and gender that are products of and help to reproduce racial capitalism and heteropatriarchy, not only as they are expressed in the structures of imprisonment and policing, but also in healthcare, housing, education, political representation, etc178 With its history of slavery and ongoing racialized inequalities, the US is the epicentre of abolitionist activism and scholarship. The most prominent recent campaign against state-backed criminalization, incarceration, and death centred on the killing of George Floyd in 2020. The degree of rage that ensued in the wake of this killing of an unarmed Black man by the police, arose not because of its exceptional nature, but rather because it stood as a symbol for endemic police brutality. Widespread protests in the midst of a disproportionately lethal Covid pandemic solidified the symbolic and political potency of the Black Lives Matter movement, which had grown out of another White-on-Black killing seven years earlier.179 Whether for Floyd or the many other Black men and women incarcerated or killed, an abolitionist approach calls on us to focus on structural accounts of criminalization and incarceration. In the case of ICL, Gerry Simpson recently suggested that ICL’s ‘greatest ally’ tends to be an intuition that it would be unconscionable to remain passive in the face of widespread atrocities. Yet, as Simpson explains: 180 This move, of course, forgets that we are already highly inactive: ‘a catastrophic year for millions of people around the world’ as a Radio Four headline announced in September 2015 (quoting an Amnesty International Report). We choose, therefore, between different forms of fatal inaction. It is true that you have to start somewhere. But do we have to start here? In a way this must be the critic’s response to the incrementalist objection. Starting here, in this particular universe of possibilities, might itself be thought of as a form of giving up. Maybe we can hope for more. Oumar Ba, Kelly-Jo Bluen, and Owiso Owiso similarly suggest, ‘If the field and the [ICC] are both failing to perform and if what they are to perform is mired in violence, perhaps it is time for better questions’.181 Perhaps some better questions to ask either in relation to racialized police brutality or ICL’s failings would be to explore who is benefiting from such criminalizing practices and how we could change them. C. Lessons from Abolition Feminism

#### Counteracting the ICC’s racialization of black bodies is the a priori obligation; absent decolonial critique, the ICC fails to absolve structural harms

Savvias 23 [Gervaise Savvias, researcher at The University of Warwick, 6-12-2023, "Conscious or Unconscious? The issue of race within international criminal law", TWAILR, https://twailr.com/conscious-or-unconscious-the-issue-of-race-within-international-criminal-law/]/Kankee

Pan-Africanism and Liberation The final aspect this Reflection turns to is discussion of the theoretical differences embedded within liberation movements such as Pan-Africanism, which stand in direct contrast to institutions such as the ICC. While grassroots and transnational movements such as Black Lives Matter (BLM) and Pan-Africanism look to systematically confront social inequality, ICL serves an entirely different purpose. Adom Getachew argues that in order to reconstitute ‘the international order’,66 promises of Pan-Africanism and solidarity with non-white bodies remain the ‘radical rupture’67 needed to achieve liberation. Transnational solidarity remains an increasingly enticing register, as it challenges the monolithic understanding of collective organisation and knowledge. Getachew writes that the USA’s incessant aim to stifle and suppress the Global South with regards to economical means continues to be a systematic and intentional ‘counterrevolution against the aspiration for an egalitarian global economy.’68 Resistance to institutionalised and systemic oppression is given little to no attention in the context of ICL, save for key TWAIL theorists who have grappled with the colonial and imperial history of the Global North, subsequently cogitating its reproduction in our modern landscapes. Through generated solidarity out of the collective experience of racialisation, colonisation and forced displacement, non-white bodies continue to envision political possibility. Pan-Africanism, for example, endures as a global phenomenon, while remaining ever-present within the margins of history. I would argue that even though the theorists might be disregarded by the mainstream, the collective call to non-white bodies to continue to persist and oppose cannot be ignored. The ideas central to collective African freedom transcend any liberal construction of borders – from the Caribbean workers who dug the Panama Canal, to the African Americans who escaped to the North of the Americas in the Great Migration, to the vernacular of collective freedom featured in reggae and rap music, to the 21st century reverberations of ‘Black is beautiful’. Political ideals are rooted in visions, in dreams, in hopes for the future. Pan-Africanism and transnational solidarity has been rooted, first and foremost, in love. Love and community are quintessentially important in a discussion around liberation movements, prior to their characteristic roots in anti-imperialist, anti-colonial and anti-capitalist rhetoric. bell hooks argues that love is not only a practice of care, but rather also a ‘practice of resistance’.69 The active undertaking of (re)imagining our world is fundamental in building something that not only withstands the test of time, but also leads to more fulfilling future for generations to come. Global racialised inequality has only served to bolster white supremacy. This is in correlation with the gruelling manifestation of capitalism in the investors, bosses and shareholders who rake in profits at the expense of workers, and landlords who feed off of the precarious social landscape. Conclusion International criminal law is a (non?)legal liberal construct. It is a fluid material that consistently congeals and regurgitates hegemonic capitalist rhetoric. The mandate of the ICC, and even the basic aims of ICL, are simply not designed to address structural and systemic violence. Perhaps, then, it is more apt to say that ICL, as a concept, is intended to maintain the neoliberal capitalist status-quo. To that end, this Reflection has maintained that the world we exist in centres itself in carceral understandings of power, hierarchy and punishment. By drawing attention to the intersectionality of various socio-economical aspects (historical or otherwise) and their inherent relationship with capital, we come one step closer in our critique, gearing ourselves to actively pursue strategies that propel our political thinking forward. The politicisation of ICL and the ICC, inserted neatly into a global political economy that would prefer to mask the influence and importance of capital can only be viewed as coloniality persevering. Racialisation and the inherent question of race has been construed into a matter of law – which presents an inherent danger, as it largely ignores the legacies of colonialism. Rather than racialisation being viewed as a violent framework that needs to be dismantled, instead it is presented as a strict and confined construction––which simply serves to further codify an economy of (racialised) appearances in the first instance. This conceptualisation supersedes any discussion around the presumed importance of the ICC, which itself can be considered a violent institution perpetuating a colonial legacy.

#### Reject totalizing assumptions of international justice that presuppose the moral superiority of colonizers’ values and judgements

Saddiqui 22 [Alishbah Saddiqui, researcher at the International Affairs Program at The New School, 5-14-2022, “Double Standards, Hypocrisy, and Impunity: The International Criminal Court’s Neocolonial Bias Case Study: Libya and Muammar Gaddafi,” New School, https://d1wqtxts1xzle7.cloudfront.net/95325450/ICC\_Libya\_copy-libre.pdf?1670313953=&response-content-disposition=inline%3B+filename%3DThe\_International\_Criminal\_Courts\_Neocol.pdf&Expires=1733361730&Signature=J38A74gCFASPKX12c1a3bz3Dsii1e53vrSxgiOtZ9TI-sO3Xl1V8BntOu70QxT4ngAA-ybIGQZduQhgrSliPjJ7wyy3RQlg-eW312tLn5FzBt1GqhI7wTza8Y5-T6~goTO0DSckoAQpX-inzaA-D4rbnjU~h749rYRcxxp3hnUtkF6BQ76i3VcHXxpVEW8BHDkfjk~J5Xz45J-97HJollwmLYuv0JNIssoUHnQ6xQMS2VLVWBjJVBUi6PKQKx~IGoGxn7YV8ibpK-2ih~MT9tMOUKeciXWpMQZsX9zIXsbWY4NIvBoYzQMFdC5HbDkBM5t1mb5wuHiWMF4Cujn4xXQ\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA]/Kankee

While in theory, the International Criminal Court was intended to bring the world’s most serious criminals to justice. In practice, the ICC works to reinforce colonial-era power structures between the West and Global South, specifically African countries. The problem with the ICC, is also a problem that affects numerous other areas of international law, and that is its unequal application. This selective enforcement and selective justice both stem from and perpetuate a colonial world landscape. Though there is undoubtedly an imbalance inherent in international law and the international system, the ICC was intended to be impartial; in fact, the concept of justice revolves around impartiality. Despite this, the ICC has failed to live up to its intended purpose and even its own mandate. The ICC repeatedly prosecutes and investigates African and Muslim countries. However at the same time, it shies away from investigating repeat human rights offenders if they are Western states. A prominent example is the United States, which has even threatened consequences if the ICC attempts to probe into war crimes during the invasion of Afghanistan. Due to this double standard, many states in the Global South have accused the ICC of having a neocolonial, and even racist, agenda. Some have even accused it of being a tool of the West to punish non-compliant states in the Global South. This will be evaluated in this paper through analyzing the case study of the ICC’s investigation into Libya and its former leader, Muammar Gaddafi. THEORETICAL APPROACH “The real tragedy of our postcolonial world is not that the majority of people had no say in whether or not they wanted this new world; rather, it is that the majority have not been given the tools to negotiate this new world.” -Chimamanda Ngozi Adichie This analysis will predominantly be utilizing a Post-Colonial understanding of international politics. This approach focuses on the continuation of colonial-era global power structures, and the endurance of racism through the North-South divide in the international system. Post-Colonialists challenge the Western-centricism in international discourses, especially the belief that Western values and modes of governance are superior and universally applicable on a global scale. This goes hand-in-hand with constructing the ‘other’ (the Global South in this context) as being primitive, under-developed, backwards, barbaric, violent, etc… Whereas the Global North is portrayed as the harbinger of justice, order, and civilization. This binary representation of the world gives rise to doctrines such as the ‘white man’s burden’, in which the West/Europe/Global North believe it is their duty to ‘liberate’ and civilize the rest. More often than not, this results in the exploitation and oppression of the other side instead. A major theme of this theory is evaluating the legacy and ongoing affects of past and present-day European colonization and imperialism, or coloniality, and how this influences international politics and institutions today. Therefore it is important to note that the ‘post’ in Post-Colonialism is not meant to suggest that colonial systems and structures are long gone, but rather it illuminates the affects they have today in shaping the modern international system, forms of knowledge, and scholarly discourses. While this lens seeks to analyze and explain why the world is as it is, it also seeks to demonstrate how the world should be. Power imbalances such as disparities in global hierarchies and wealth distributions are examined and why some states are able to enforce more power over others. Post-Colonialism emphasizes that the Global North and Global South both need to be analyzed separately within their own contexts. Consequently, a one-size-fits-all approach to global institutions and even morals is challenged and debated. This lens is critical of modern day international institutions because of their Western liberal origins, and hence, bias. While there are numerous economic and social challenges in Western countries, they are almost completely excluded in UN development programs which focus mainly on the Global South. There have also been critiques that the UN is often enforcing the Western perspective on development, human rights, etc… on to the Global South. The UN also recognized Israel, a settler-colonial state; and in so called ‘peace’ negotiations, Palestinian voices were very minimal. Also, use of force can be deemed ‘legal’ simply because the UN allows it. Additionally, the UN’s ‘war on terror’ in Afghanistan was embedded with racist and islamophobic tropes, as well as white-savior rhetoric. According to Post-Colonialists, these are some of the many examples of the UN being a tool to maintain colonialism and promote imperialism. The ICC is a prominent example as well, which will be further explored in this paper. The specific branch of this critique this paper will utilize is Post-Colonial Legal Criticism. This branch specifically focuses on international law and perceives it to be a social and cultural construct, which is not static or constant, but rather changes over time and is largely affected by the context it is working in. During colonization, Western states created international laws that legitimized colonization, slavery, and genocide. The Doctrine of Discovery and terra nullius were prominent international doctrines during this time that furthered Western interests. They denied indigenous populations, in their own territories, their status as legal persons and their sovereignty, while green-lighting European theft of land and resources. And since much of modern international law became solidified in a world system still entrenched in these colonialera power hierarchies, it still benefits and perpetuates those hierarchies. However, there is hope in the mutability of international law. Though it is tainted currently by its colonial origins, at the end of the day it is also interpretive and dependent on its context. Therefore, the Global South has the ability to utilize the legal system to their advantage; in fact on many occasions, indigenous peoples from various parts of the world have begun utilizing the international legal system in their anti-colonial struggles. The reason this approach was chosen for this topic is because it fits naturally within the arguments that will be brought up. Issues of potential racism and double standards between the East and the West are entrenched in colonial legacy; there is no way to discuss them without a Post-Colonialist framework. Ignoring the affect of colonialism in such a topic would be willful ignorance. After all, the present is a result of history. CONCEPTS Firstly, it is important to clarify and discuss certain concepts that will be necessary for this analysis. The main term this paper will examine is international criminal law (ICL); “a body of public international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for their perpetration” (Wikipedia contributors, 2022). The main international institution which focuses on this body of law is the ICC. For the discussions in this paper, it is important to evaluate what is defined as ICL, why it is defined as such, what is excluded in the definition and why, by who, who does it benefit, who does it harm, etc… “The contemporary production of international criminal law ‘reflects choices and historical patterns in the development of’ juridical and political practices ‘that have tended to relegate’ to the margins the significance of structural inequalities that continue to marginalize African voices and African solutions” (Clarke, 2020). For example, in principle, while ICL (and the ICC) tend to claim that ‘all lives matter’ and all ‘crimes matter,’ in practice it is very selective. “These measures reflect a multilayered set of selectivity measures that are shaped by power, politics and racialized analytics, permeating each layer and shaping the conditions under which certain lives can be preserved–or prosecuted–while others are not” (Clarke, 2020). However, this is “not exceptional but part of a long history of the uneven application of international law in situations of colonial and imperial conquest and the routine disregard and subordination of non-European peoples to the interests of European powers (Gathii, 2006, p. 131). It is not just in practice that these colonial attitudes present themselves, but in the very foundations of ICL and the Rome Statute which derive from a Euro-centric mindset as they were made to protect the interests of the West (will be elaborated on later). “It exists through an international treaty that represents a negotiated settlement structured to protect the interests of economically powerful states. This political-juridical mechanism helps to preserve larger sets of international and transnational processes that maintain existing power relations” (Clarke, 2020). In short, ICL is blind to its own racial bias. “The cultures and systems of white supremacy are rarely acknowledged as shaping the conditions of (in)justice both within and outside this framework” (Clarke, 2020). Even the term justice needs to be re-examined. Is punishing one individual for such heinous crimes truly justice? Most of these crimes require the cooperation of a group of people. And what about all the other causes of conflicts (ie economic challenges, resource scarcity, environmental degradation, land disputes, etc…)? And what about the various other actors involved? What about Western states? What about colonial histories and structures that led to current day crises? “The question then is among whom will this allocation take place” (DeFalco & Megret, 2015). Is selective justice truly justice? Even as the ICC focuses exclusively on cases presumed to rescue and protect Black and Brown bodies, its very foundation–shaped by White supremacy– renders the current work of international criminal law difficult to reconcile with the contemporary global call to center Black lives and experiences and eradicate ongoing structural inequality (Clarke, 2020). Perhaps the promise of justice is all just a vision. “The allure is encapsulated in the illusion of universality, promises of accountability and deterrence, and expectations of a documented chronicle of history bearing the imprint of legal legitimacy” (Reynolds & Xavier, 2016). If it works on paper, but not in practice, then what is the point?

### Contention 3: ICC Bad/Ineffective (ICC)

#### ICC encourages terrorism and civil wars

Weiss 21 [Uri Weiss, a Polonsky Fellow at the Van Leer Jerusalem Institut, 2021, “The ICC Should Not Encourage Occupation,” Touro Law Review, https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=3318&context=lawreview]/Kankee

3.2. Incentive to Encourage Terrorist Leadership Among Occupied People Another problem with ICC jurisdiction is that it might provide an incentive for the occupying state to encourage terrorist leadership among the occupied people in order to discourage the leadership of the occupied state from adopting the Rome Statute. In this case, even the emerging free state might not join in order prevent the investigation and prosecution of its former leadership. The occupying power might encourage the occupied people to prefer an end to occupation without jurisdiction to an end to occupation with jurisdiction. This incentive is valid not only in the case of occupied people who are not considered to have a state but also in the case in which it is beyond any doubt that the occupied people have an absolute right to join. The occupying state may be interested in a game “without ICC” and thus may incentivize the occupied state to choose not to join the Rome Statute by convincing leadership that joining the ICC will put them at personal risk. This incentive is valid not only in the case of occupation but also in cases in which one state may significantly influence the identity of the leadership of another state. 3.3. Incentive to Encourage a Civil War A further potential problem that could arise from the ICC’s jurisdiction is that the occupying state might encourage a civil war, in which war crimes would be expected to be committed, in order to prevent the emerging free state from joining the ICC. This is because, in such a case, the occupied power would be motivated to prefer no jurisdiction to jurisdiction. This leads to the conclusion that since occupied free people are potentially able to adopt the Rome Statute and to accept its jurisdiction retroactively, the occupying power might have an incentive to encourage the emergence of terrorist leadership among the occupied people and to encourage a civil war in the occupied territory. Moreover, if the Court sees civil war as cancelling the status of the occupied as a state, then it may incentivize the occupied state to encourage a civil war in the occupied territory. 4. POTENTIAL SOLUTIONS

#### The ICC encourages perpetual occupations to avoid prosecutions of the occupier

Weiss 21 [Uri Weiss, a Polonsky Fellow at the Van Leer Jerusalem Institut, 2021, “The ICC Should Not Encourage Occupation,” Touro Law Review, https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=3318&context=lawreview]/Kankee

3. NEW PROBLEMS WITH THE ICC’S JURISDICTION 3.1. Incentives for Continuing the Occupation One of the new problems with the ICC’s jurisdiction is that in some circumstances, it might provide incentives for the occupying state to continue the occupation. This is the case when the occupied people can join the ICC regime after, and only after, the end of the occupation. This may be because the occupied people will not be recognized as having a state, as Israel claims regarding the Palestinians, and it may be because the occupying state may appoint a “puppet leadership” for the occupied people, and it may be because during the period of the occupation, the occupier has the power to extort the occupied people. The capacity to neutralize the ICC by appointing a “puppet government,” or the capacity to extort the occupied state, may also, in particular circumstances, incentivize a state to occupy in order to appoint such a government. First, we will show that the right to join retroactively might encourage the continuation of the occupation; next, we will show that, similarly, even the right to join prospectively might encourage continuation of the occupation. Thus, we strongly recommend preventing those games, first of all by recognizing the right of occupied people to join the ICC. a. The Effect of the Right to Join Retroactively Even if the occupying state was not a party to the statute in 2010, it can adopt it retroactively in 2022, and then the ICC might have jurisdiction even over crimes that were committed by the occupier during 2010. Thus, on the one hand, the right to join retroactively deters the occupier from violating the Rome Statute, even when the occupied state is not a party to it; this effect of the ability to join retroactively promotes human rights. On the other hand, the occupied people can sometimes join the ICC only after the occupation is ended, and this provides the occupying state with a strong incentive to maintain the occupation. This may be because the occupied people do not meet the condition of statehood, and it may be because the occupied people are controlled by puppet leadership. The occupying power might continue the occupation in order to prevent the occupied people from establishing a free state in order to prevent them from adopting the Rome Statute and possibly accepting ICC jurisdiction retroactively. This scenario might happen even if the cost/benefit analysis on behalf of the occupying state would lead it to end the occupation. A mechanism that is intended to protect human rights might become a mechanism of maintaining the occupation. Let us now show by a game tree that the Rome Statute might prevent the occupier from ending the occupation: 1. We have two players: occupier state and occupied people. 2. This is the sequence of events: first, the occupying state should choose between “continue the occupation” and “end the occupation.” If it chooses “continue the occupation,” that ends the game, and the result will be “continuation of the occupation.” If the occupying state chooses “end the occupation,” then the occupied people need to choose between “accepting the jurisdiction of the ICC retroactively,” and “not accepting the jurisdiction of the ICC retroactively.” If the occupied people choose to accept the jurisdiction of the ICC retroactively, that ends the game, and the result will be “end of the occupation, with the ICC having jurisdiction over previous crimes.” However, if the occupied people choose not to accept the jurisdiction of the ICC retroactively, then that ends the game, and the result will be “end of the occupation with the ICC having no jurisdiction over previous crimes.” 3. The occupier state’s order of priority is: I. end of the occupation with the ICC having no jurisdiction over previous crimes; II. continuation of the occupation; III. end of the occupation with the ICC having jurisdiction over previous crimes. 4. The occupied people’s order of priority are: I. end of the occupation with the ICC having jurisdiction over previous crimes; II. end of the occupation with the ICC having no jurisdiction over the previous crimes; III. continuation of the occupation. 5. Both sides know the game. 6. The occupying state and the occupied people are rational players, and the occupying state knows that the occupied people are rational. Let us now show the situation in the form of a game tree. In the tree, the payoff of the result most favored by a player is 1 (his best result), the payoff of his second-best result is 2 (his second-best result), and that of his worst result is 3. The result of this Game will be a continuation of the occupation. This is because the occupier chooses first whether to continue or to end the occupation. If the occupying power chooses to end the occupation, then the occupied people will have two alternatives: end the occupation without giving jurisdiction to the ICC or end the occupation with jurisdiction given to the ICC in which case the occupied people will choose to accept the jurisdiction of the ICC, which is the worst result in the eyes of the occupying power. However, if the occupying power chooses to continue the occupation, then the players will obtain a result of occupation without jurisdiction, which is the occupier’s second-best outcome. Thus, the occupier will choose not to end the occupation, which leads to its second most favored outcome and to the worst from the point of view of the occupied people. The result of this game will be the “continuation of occupation.” Although both players prefer the end of occupation without giving the ICC jurisdiction over the previous crimes, the result will be a continuation of the occupation.44 In technical language, this is the unique sub-game perfect equilibrium of this game. Thus, this game should be prevented. We will discuss later how to prevent this game; particularly, the occupied people should have a right to join the ICC even before the end of the occupation. If we change the game such that the occupied people have no possibility of adopting the Rome Statute and accepting its jurisdiction retroactively, then we will achieve an end to occupation, but without jurisdiction, which would be better for both sides. Hence, in this particular situation, it would be better for both sides that the occupied party had had no option of obtaining the jurisdiction retroactively. Actually, in the course of the implicit negotiation between the occupying power and the occupied people, it might be better for the occupied people to make a commitment not to accept the jurisdiction of the ICC retroactively.45 Thus, the occupied people might benefit from not having this right. Thus, the above game should be prevented. One may criticize the above analysis: why does the application of the game theory start where it starts in this analysis—that is, after the occupation has been established? Our reply is that every new legislation is in the middle of some games. This is also the legislation of the Rome Statute: in the Israeli-Palestine case, for example, the new rule enters long after the occupation has been established.46 b. The Effect of the Right to Join Prospectively Moreover, sometimes, the occupying state might assume that even after its withdrawal, further rounds of war and bloodshed between it and the previously occupied people would be expected to take place; and therefore, the power of the new state to adopt the Rome Statute, even prospectively, might discourage the occupier from ending the occupation. Thus, in order to protect themselves from being exposed to the ICC’s jurisdiction in subsequent rounds of the conflict, they might continue the occupation.47 This is another counterproductive incentive provided by the Rome Statute; if the conflict is expected to continue, then it might be better for the occupied people to undertake a commitment not to join the ICC, even prospectively. Or, to restate this speculation more formally, if and only if, 1) both parties prefer an end of the occupation with no joining the ICC to continuation of the occupation, and the occupying state prefers ending the occupation with no prospective jurisdiction of the ICC to continuation of the occupation; and additionally, 2) the occupied people prefers to join the ICC after the end of occupation rather than not to join it after the end of occupation—under these conditions, they would both benefit from making joining the ICC impossible for the new state formed by the formerly occupied people. In this situation, it would be to the benefit of both of them to relinquish the right to join the ICC.48 In this case, the occupation will end but will be transformed to a new order in which the former occupied state has no right to join to ICC. Thus, the above game should be prevented. We will discuss later how to prevent this game. c. The Effect of Benvenisty’s Proposal

#### ICC interventions remove dictator’s political rivals and justify Western wars

Clark 18 [Phil Clark, educator at the school of Oriental and African Studies at University of London, 10-24-2018, “Distant Justice The Impact of the International Criminal Court on African Politics,” Cambridge University Press, https://www.cambridge.org/core/books/distant-justice/FD4410B6160CD17836297D9503A219DD]/Kankee

Second, the ICC’s relatively scant resources have shaped all of its interventions in Africa so far. This has influenced the limited time spent in situ by most ICC personnel as well as the OTP’s decision to focus on contiguous African states where investigators can be used across borders in multiple situations (for example, in Kenya/Uganda/DRC/ CAR, CAR/Darfur/Libya and Mali/Côte d’Ivoire).105 Cross-border factors have impinged on various ICC cases, for example the OTP’s decision to overlook Ugandan government crimes in Ituri; the Defence’s claim of undue influence by the Congolese government over the prosecutorial strategy in CAR; and the Ugandan government’s increased criticisms of the ICC because of its intervention in Kenya, one of Uganda’s key regional allies. Third, because of insecurity and limited resources, the ICC has been forced to cooperate extensively with domestic states for the security of ICC personnel, sharing of evidence and the transport of suspects and witnesses to The Hague. The last issue has led to a high degree of opportunism on the part of the OTP, which has in several instances selected crimes and suspects for prosecution because particular individuals had been arrested by state authorities, for example in the DRC and Mali situations. The ICC has also cooperated with powerful Western states – mainly because of the ICC’s lack of its own police and military to enforce arrest warrants – which has drawn the Court into controversial foreign military interventions in Libya, Côte d’Ivoire and Mali and the regional military response to the LRA. Fourth, often because of recent or ongoing conflict, the ICC has intervened in – and exacerbated – situations of immense political volatility. A crucial challenge for the Court has been determining how best to engage with interim governments, some of which comprise former rebel groups and other actors who have emerged victorious from the same conflicts the Court is attempting to investigate, or in cases of post-election violence in which government actors have come to power following highly contentious votes. The ICC has often made these situations more volatile by substantially altering the political landscape, for example removing key presidential contenders such as Bemba and Gbagbo (after state referrals or invitations to intervene by the political opponents of those suspects) or bolstering the election campaigns of Bashir, Kenyatta and Ruto (who have framed the ICC’s involvement through either UN Security Council referrals or use of the Prosecutor’s proprio motu powers as an egregious form of external interference in domestic affairs). Across these African situations, these structural factors have had two principal effects. First, the ICC has shown itself unable to deal effectively with cases involving sitting members of government because of the Court’s fundamental reliance on state cooperation. When the Court has pursued current government actors – in the Darfur and Kenya situations – those cases have faltered, with the Prosecutor forced to hibernate all cases in the former and drop all charges against the suspects in the latter. While it is highly problematic for the ICC to focus only on non-state suspects, as it has in Uganda, the DRC, CAR, Côte d’Ivoire and Mali, it has so far proven incapable of doing otherwise. Second, in the cases that have reached The Hague, the quality of both Prosecution and Defence evidence has often been called into question, not least by the Pre-Trial and Trial judges. Evidentiary problems led to two pauses in the Lubanga trial, while the charges against two suspects, Mbarushimana in the DRC and Abu Garda in Darfur, have not been confirmed because of lack of evidence. The judges were also forced to amend the charges in the Katanga, Ngudjolo and Bemba cases based on the preliminary evidence submitted.106 In response to the challenges above, the ICC has persisted with a broadly distanced approach to the African situations analysed here. Prosecution and Defence investigators have spent limited time on the ground in all eight situations, while ICC outreach programmes through the Registry have often begun years after the launch of investigations and sometimes not at all. While the Court lauds victim participation as a central feature of its operations,107 this has also increasingly taken a distant form through the use of common legal counsel, designed to aggregate victim perspectives, as opposed to giving individual victims a voice in the courtroom, as occurred in the early ICC cases in the DRC. The Prosecution has been particularly energetic in both limiting victim participation in trials and arguing against in situ trials, which would bring the ICC’s work closer to affected populations. All of these factors, coupled with perennial weaknesses in ICC witness protection, have greatly undermined the Court’s relations with local communities. A final recurring feature of the ICC’s distanced approach has been its inconsistent – and sometimes dismissive – response to admissibility challenges by domestic judiciaries. Nearly all of the eight African situations have generated such challenges but only the al-Senussi case in Libya has led the ICC to cede jurisdiction to national courts. As argued earlier, the Lubanga, Katanga, Ngudjolo and Simone Gbagbo cases provided an equally, if not more, compelling basis to challenge the ICC’s admissibility on the grounds of ensuing domestic investigations into these individuals. A key outcome of these issues concerning admissibility and complementarity is the weakening of relations between the ICC and domestic courts, with lasting consequences for the reform of national judiciaries in several of the African situations within the ICC’s purview. Taken together, the first fifteen years of the ICC’s work – with its singular focus on situations, crimes and suspects in Africa – shows a Court that, in key respects, is ill-equipped to fulfil its mandate of addressing serious crimes in contexts that are geographically removed and foreign to most of its staff. Attempting to distance itself from domestic politics, it has become embroiled in – and has profoundly shaped – the politics of African states. Compounding these problems is the Court’s insistence on its superiority to domestic responses to mass atrocity and its failure to live up to its own principle of complementarity. The final chapter in this book provides some insights into ways to make the Court more effective by returning it to this core principle.

#### ICC prosecutions threaten US foreign interventions to prevent atrocities, adding unnecessary restrictions that stifle US enforcement of human rights

Yoo and Stradner 20 [John Yoo, Emanuel S. Heller Professor of Law at the UC Berkeley School of Law, Visiting Fellow at the Hoover Institution at Stanford, and Visiting Scholar at the American Enterprise Institute, and Ivana Stradner, research fellow at the Foundation for Defense of Democracies, 3-17-2020, "The U.S. Must Reject the International Criminal Court’s Attack on Its National Sovereignty", National Review, https://www.nationalreview.com/2020/03/united-states-must-reject-international-criminal-court-attack-on-national-sovereignty/]/Kankee

Last week, the International Criminal Court (ICC) authorized an investigation of alleged war crimes and crimes against humanity by U.S., Afghan, and Taliban troops in Afghanistan, as well as by CIA black sites operated in Poland, Lithuania, and Romania. While the prosecution will likely fail, it represents another effort by a global elite — consisting of European governments, international organizations, and their supporting interest groups, academics, and activists — to threaten American sovereignty. The Rome Statute, which established the ICC in 1998, was supported by 120 states. It had the worthy goal of preventing the world’s most horrific crimes. Today the ICC can exercise jurisdiction over war crimes, crimes against humanity, aggression, and genocide. Its founders believed that an international organization in the form of a court could replace the customary role of nation-states to punish those who violate the rules of civilized warfare. The Clinton administration signed the treaty in 2000, but did not submit it for Senate ratification. American support for the court dissolved after 9/11, as American officials worried that the ICC would become an anti-American kangaroo court used by certain countries to constrain nation-state sovereignty. In 2002, the Bush administration announced that it would not sign the agreement, and empowered then-State Department official John Bolton to lead a U.S. campaign to sign bilateral immunity agreements with more than 100 countries to protect both parties from the ICC’s jurisdiction. Ever since, the ICC has labored ineffectually. To date, the Court has spent more than $2 billion dollars and yielded just eight successful convictions and four acquittals, focusing only on African countries. While there are 123 member states, nations that still might have to wage war, such as the U.S., Israel, India, South Korea, China, and Russia, have refused to join. America’s Western European allies, perhaps still hoping for a utopian future where war has disappeared and meager conventional forces are all that is needed, lend the ICC its greatest support. Most ICC officials have long hoped to achieve international relevance by attacking the ICC’s greatest critic: the United States. Since November 2017, ICC chief prosecutor Fatou Bensouda has sought to use alleged crimes in Afghanistan to bring charges against the U.S. military and intelligence community. America’s response has been tough, and after numerous threats by the ICC, U.S. secretary of state Mike Pompeo ordered the revocation of the ICC chief prosecutor’s U.S. entry visa (though Bensouda managed to circumvent the ban and attend her UN meetings last April). The ICC Pre-Trial Chamber later ruled against an investigation (and possible prosecution) of the U.S. for alleged crimes in Afghanistan because both would most likely fail. Last week, however, the ICC’s appellate court reversed this finding and allowed Bensouda to continue her pursuits of American activities in Afghanistan and elsewhere after 9/11. To end this charade, the U.S. should continue to challenge the Court’s jurisdiction and protect the rights of nations that are bound only by rules to which they consent. The Trump administration should continue to deny ICC officials and any government officials (such as any military or law enforcement officers) that assist them from entering the United States or using its financial system. Most important, the United States should strike at the ICC through its supporters. Japan, the United Kingdom, France, Italy, Canada, Spain, Mexico, and Australia are all major Court funders. The Trump administration should warn countries who are ICC top funders yet depend utterly on the U.S. for their defense (such as Japan) that they cannot expect American troops to protect any nation seeking to prosecute and imprison them. It should weaken defense ties with ICC member countries, and cut foreign aid to any nation that cooperates with the Court. With these actions, the Trump administration will defend the rights, not just of the United States, but of all sovereign nations. America did not join the Rome Statute. It remains unfettered by its requirements. To protect international law, it should refuse to recognize any ICC probe. International rules should only bind nations that consent to them. Allowing the ICC to claim power over the U.S., which does not consent to its jurisdiction will erode any incentive to obey any international rules at all. The ICC’s actions threaten the only true mechanism for deterring human rights abuses. Subjecting U.S. forces to an after-the-fact and idealistic human-rights barometer will only discourage Washington from intervening to end massive human-rights abuses in difficult world hotspots. If the global elite want the U.S. to lead efforts to end killings in places such as Syria, Yemen, or Sudan, the last thing it should do is prosecute American troops when they take on the difficult jobs that no other nation can or will do.

#### US ratification makes war crimes worse – they co-opt the ICC and loosen rules

Wheeler 24 [Caleb Wheeler, Senior Lecturer in Law at Cardiff University, 2024, “Strange bedfellows: The relationship between the International Criminal Court and the United States,” Wake Forest Journal of Law and Policy, https://orca.cardiff.ac.uk/id/eprint/159100/]/Kankee

Article 31’s provision on excluding liability could also support the position taken by the United States. It confirms that an accused acting in self-defense or the defense of others may be shielded from responsibility for their otherwise criminal acts. That being said, it does not prevent the Court from investigating and prosecuting them and it does not offer a member of the military protection from prosecution solely due to their involvement in a defensive operation. Determining whether someone acted in self-defense or the defense of others is a judicial one made during the trial or the confirmation of charges hearing. That means a proceeding must first be instituted before an accused can benefit from Article 31. This undermines the argument that the ICC’s purpose is limited to only prosecuting atrocity crimes resulting from aggressive acts Despite the existence of some textual support for its position, the United States’ conception of the ICC must also fail on policy grounds. Adopting the American approach would disrupt the functioning of the court and limit its overall effectiveness. It would effectively authorize people to commit atrocity crimes far out of proportion with the harms they are trying to prevent because their criminality could be excused on the basis that it was the only way to respond to the commission of other crimes. A strict interpretation of the proposed principle could theoretically lead to a genocide going unprosecuted so long as its perpetrators were able to link its commission to stopping other atrocity crimes. Further, the solutions to the United States’ concerns are already being pursued by the ICC in other forms. By considering the gravity of the alleged crimes before pursuing prosecutions and excluding responsibility under certain circumstances, the ICC is taking a reasonable approach to the problem. Implementing further protections from prosecution on the basis of the context in which a crime is committed would be fundamentally incompatible with the ICC’s goal of ending impunity. IV. Conclusion Since its inception, the ICC has sought universal ratification of its Statute. In that context, significant emphasis has been placed on convincing the United States to join the Court. The United States has consistently resisted those calls, citing a host of concerns about the Court’s Statute and the perceived dangers it poses to American citizens. Despite this longstanding opposition to ICC membership, it seems more likely now than at any time in recent history. The Russian invasion of Ukraine has seen American sentiment shift in favor of the ICC, manifesting itself in a somewhat sympathetic presidential administration and a measure of bilateral support from Congressional Republicans and Democrats. However, calls for American membership in the Court have largely failed to consider whether the ICC should want the United States as a member. The United States’ long-standing concerns about the Court would need to be resolved before it could be considered a viable member of the ICC. That leaves the Court with a choice if it wants to accomplish its stated goal of achieving universality. It can either change its mission to secure American membership by adopting mechanisms shielding some people from prosecution or stay the course and give up its hope for universal ratification. Were it to pursue the former it would likely receive greater political, intelligence and financial support from the United States, making it easier for the Court to conduct investigations and prosecutions. In exchange, it would almost certainly need to institute a policy exempting American citizens from prosecution in at least some situations. This could lead other states, particularly those that also regularly participate in peacekeeping efforts, to seek similar protections for their own citizens. That would result in the ICC developing a two-tiered jurisdictional structure under which individual criminal responsibility would depend as much on the citizenship of the accused as the circumstances surrounding their alleged criminality. The Court’s other option is to continue on its present path and accept that the United States is not a good candidate for membership and that it should remain outside of the ICC structure. Should the Court follow that path it will maintain its integrity while also missing out on receiving additional support from the United States that could help it further its mission in other areas. Neither is a perfect solution, and whichever route the ICC chooses to take will keep its overarching goal of ending impunity stubbornly out of reach.

#### ICC fails – lacks membership, prosecutions are a joke, and doesn’t affect warlords

Kontorovich 24 [Eugene Kontorovich, professor at George Mason University Antonin Scalia Law School, 11-26-2024, "The International Criminal Court’s Folly", Atlantic, https://www.theatlantic.com/international/archive/2024/11/icc-arrest-warrant-israel/680820/]/Kankee

The charges are baseless as a matter of law and fact, issued by a court with no jurisdiction, alleging as crimes things that simply never happened, while ignoring settled international law and practice. But before turning to the Israel warrants, we need to understand what the ICC really is. The ICC, seated in the Netherlands in The Hague, was created in 1998 by a treaty known as the Rome Statute, to provide a forum where the perpetrators of the world’s worst atrocities could be prosecuted, a kind of permanent Nuremberg Tribunal. The new court would not impinge upon national sovereignty, because it would have jurisdiction only over countries that voluntarily joined. In the optimistic decade between the fall of the Soviet Union and the attacks of 9/11, some hoped that the court would lead to an “end to impunity” for mass atrocities—such as the Bosnian and Rwandan genocides—and lead to a “rules-based international order.” That dream has never seemed further off. A quarter century later, most of the world’s population lives in countries that never joined the court—including the United States and China, India and Pakistan, and pretty much the entire Middle East. Many of the countries that joined the ICC face little serious prospect of engaging in armed conflict; for them, membership entails little risk, and is merely a feel-good ritual. Despite a roughly $200 million annual budget, the tribunal has convicted only six people of perpetrating the mass atrocities it was created to address. Numerous high-profile cases have collapsed. Its indictments against incumbent dictators such as Russia’s Vladimir Putin have been laughed off. The current and past presidents of Kenya both rode ICC indictments to reelection. (The cases against them had been dropped because of what the ICC’s presiding judge described as “witness interference,” a claim the ICC disputed.) Two countries have quit the court altogether, shaking belief in the inevitable, gradual expansion of The Hague’s writ. The composition of the ICC’s membership has created a serious problem for the court. The largest concentration of member states is in Africa, but every defendant tried by the Court has been a sub-Saharan African, leading to a threat of mass walkout by African Union states. The charges against Israel can be understood, in part, as a solution to this predicament. They serve to deflect criticism of the court as a Western tool, and were received with enthusiasm by international NGOs. And they come with a major advantage: As a non–member state, Israel can’t quit in protest. But that also means the court should not, by rights, have jurisdiction over Israel. To overcome this obstacle, the court decided that Palestine is a state that can join the court, despite not satisfying the legal criteria for statehood. Such an exception has not been made for any other entity. It also controversially decided that Gaza was part of that state, in addition to the West Bank, despite each having had an entirely different government for nearly two decades. Then the ICC ignored a second limitation on its reach. Its governing statute instructs it to intervene only when a state is “unwilling or unable” to prosecute crimes by its leaders, in order to shield them from responsibility. Not only is Israel’s attorney general willing to prosecute Prime Minister Benjamin Netanyahu—she is already doing so in several high-profile cases involving alleged corruption. The more likely reason the Israeli justice system is not pursuing the charges brought by the ICC is because they appear to be unfounded. The main thrust of the court’s claims (the details of which remain sealed by the tribunal) is that Israel purposefully starved the people of Gaza, as well as restricted electricity to the area. Yet in June, the UN’s own hunger watchdog released a report denying that famine occurred during the period addressed by the prosecutor. Nor does Israel’s allowing shipments of food into the Gaza Strip, which one estimate placed at more than 3,000 calories a day per person, suggest an attempt to starve the population, even if conditions in parts of the Strip have been dire. Hamas controls food distribution within Gaza, and has been seizing aid convoys. Aid groups complain that Israel has been constricting the flow of food into Gaza; Israel counters that aid has piled up on the Gaza side of the border without distribution. Moreover, international law allows for besieging an enemy force, even if civilians are within the besieged area. Exceptions allow for the provision of essential medical supplies, but even those exceptions are suspended when there is a credible fear of “diversion” to the enemy force, as there surely is with Hamas. If anything, Israel is being blamed for Hamas’s starvation of its own population. Supporters of the ICC should be embarrassed that its decision was cheered by Hamas and Hezbollah. Those groups understand that the court’s indictments of Israeli officials will make it more difficult for Israel to defend itself. Yet the ICC cannot deter dictators and warlords, because they can fall into its hands only if they lose power. If they remain in power despite their atrocities, a minor crimp in their travel plans is more than offset by the power and wealth they will enjoy. The three Hamas leaders indicted by the tribunal have already been killed by Israel; they might have preferred a cell in The Hague. Leaders of democracies must make different calculations; they rotate out of power, and their private benefits in office are relatively minimal. ICC warrants against them, even if entirely unjustified, could deter them from vigorously and lawfully prosecuting defensive wars, for which their civilian populations would pay the price. Thus, the prosecutions of Israeli officials will actually make war crimes more likely, by tipping the scales against liberal democracies. All of this poses a threat to the U.S.—as a non–member state that engages in a high level of global armed conflict—as well as to its leaders and soldiers. The ICC could recognize the Islamic State in the Levant as a “state” for purposes of its jurisdiction, just as easily as it recognized Palestine, and investigate American officials for alleged crimes during the U.S.-led campaign against the terror group. That campaign, started during Barack Obama’s presidency, included battles in Mosul, where an effort to evict approximately 5,000 ISIS fighters in the city led to perhaps 10,000 civilian deaths and the destruction of the city. The ICC did not have jurisdiction, because Iraq had not joined the treaty—but the Palestine precedent shows that this is not an insurmountable problem. The ICC’s disregard for law also threatens American troops on counterterror missions in countries that have joined the ICC. Washington has long relied on treaties signed with such countries as a safeguard against Hague jurisdiction, but the tribunal’s boundless view of its powers gives no assurance that those treaties will be honored. This is not far-fetched: The ICC is already investigating alleged U.S. crimes in Afghanistan. Indeed, the ICC prosecutor recently suggested that sitting U.S. senators may have committed crimes against the court’s charter by speaking out in support of bipartisan legislation that would impose sanctions on the body. Not all efforts to solve the world’s problems work—some backfire. The high aspirations with which the tribunal was founded should not shield it from the consequences of its decision to pursue other agendas.

#### ICC deterrence fails – other non-signatories, low budget, and lack of authority

Saddiqui 22 [Alishbah Saddiqui, researcher at the International Affairs Program at The New School, 5-14-2022, “Double Standards, Hypocrisy, and Impunity: The International Criminal Court’s Neocolonial Bias Case Study: Libya and Muammar Gaddafi,” New School, https://d1wqtxts1xzle7.cloudfront.net/95325450/ICC\_Libya\_copy-libre.pdf?1670313953=&response-content-disposition=inline%3B+filename%3DThe\_International\_Criminal\_Courts\_Neocol.pdf&Expires=1733361730&Signature=J38A74gCFASPKX12c1a3bz3Dsii1e53vrSxgiOtZ9TI-sO3Xl1V8BntOu70QxT4ngAA-ybIGQZduQhgrSliPjJ7wyy3RQlg-eW312tLn5FzBt1GqhI7wTza8Y5-T6~goTO0DSckoAQpX-inzaA-D4rbnjU~h749rYRcxxp3hnUtkF6BQ76i3VcHXxpVEW8BHDkfjk~J5Xz45J-97HJollwmLYuv0JNIssoUHnQ6xQMS2VLVWBjJVBUi6PKQKx~IGoGxn7YV8ibpK-2ih~MT9tMOUKeciXWpMQZsX9zIXsbWY4NIvBoYzQMFdC5HbDkBM5t1mb5wuHiWMF4Cujn4xXQ\_\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA]/Kankee

One of the prominent flaws regarding the ICC is the extent to which its jurisdiction is applicable. Its jurisdiction only extends to offenses that occurred after 2002, meaning all crimes made before this cannot be brought to court. Additionally, the Court can only investigate cases in member states, states that voluntarily ratified the Rome Statute. States can leave their membership at any time. Although there are a few specific cases in which the Court can investigate individuals from non-member states (mentioned in the previous section), the fact remains that major states such as the U.S., Israel, Russia, Saudi Arabia, and China are not members of the ICC, despite them being repeat human rights offenders. States can opt out, and numerous have in fear of the ICC infringing on their sovereignty . Due to the anarchic 2 international system, this is expected; there is no central ‘international authority’ that can force every state to join. “Despite the number of signatories to the Rome Statute, there are more than 70 States that have yet to join, including the world’s four most populous countries. This leaves the majority of the globe outside the legal jurisdiction of the Rome Statute” (Wong, 2019). Therefore, the Courts authority is insufficient and limited. Aside from the limitations on what the ICC has jurisdiction over, it also lacks the resources to effectively go through with a trial process. While the Court tries the most heinous crimes in the world, it is given a budget that enables it to handle only a handful of prosecutions a year (Wong, 2019). Additionally, it has a small number of sitting judges as well, meaning the Court can only hear a small number limited number of cases. According to The Coalition for the International Criminal Court, “international justice costs a fraction of the conflicts that make it necessary. Every year, governments spend $14 trillion on conflicts, then squabble over $170 million for justice” (“A sufficient budget.” n.d.). It really goes to show that while many say they want justice, not many are willing to pay up. Aside from the limited amount of resources, the Court’s power is inherently dependent on its member states. The duty to arrest and transfer the accused individual depends completely on member states and if they are willing to use their military or police and economic resources to extricate a leader from their country. The ICC itself does not have the institutional resources to ensure that the accused actually shows up to the trial; it does not have a military or police force of its own, nor are member states obliged to cooperate. An illuminating example of this is the ICC’s request to arrest and surrender Sudan’s President Omar Al-Bashir for the commitment of the crimes under Article 5. The arrest warrant, first issued in 2009, was ignored by 19 different countries, 9 of with are signatories of the Rome Statute (Wong, 2019). This is the same reason why the prosecution’s gathering of information would be prevented. This makes the prosecution firstly assess whether or not they will receive support from the state in question before deciding to launch an investigation. “The very design of the ICC entrenches a two-pillar system where the Court serves as the judicial pillar while States act as the enforcement pillar. Without State cooperation, the Court is rendered unworkable as it has no enforcement mechanism of its own” (Wong, 2019). The Court is highly dependent on the willingness of the state to cooperate. This leads to a lot of functionality challenges due to the complex nature of the crimes the ICC has jurisdiction over. “‘The sheer size of international trials with multiple crime sites, a high number of distinct charges’, the sheer amount of witnesses and volume of documentation per case all lead to a high degree of legal and factual compliance” (Wong, 2019). Considering all these design flaws, it is no surprise that only four criminals have been convicted by the ICC in two decades (“ICC in numbers,” n.d.). The lack of resources and state’s cooperation can give a false impression to leaders that these heinous crimes are permissible and would go unpunished. This severely undermines the Court’s credibility and prevents deterrence. “Without States’ support and cooperation, the ICC would have no funding, no defendants to prosecute, and no evidence with which to conduct prosecutions, all of which would go against the very purpose of setting up the ICC (Wong, 2019). The main flaw of the court is that it is dependent on the very people its made to hold accountable. CASE STUDY OF LIBYA AND MUAMMAR GADDAFI

#### ICC norm-setting fails – they prosecute individuals, not states, and ICC crimes are not codified

Pillai 24 [Priya Pillai, international lawyer and heads the Asia Justice Coalition at the Lowy Institute, 4-30-2024, "The need for a convention on crimes against humanity", Lowy Institute, https://www.lowyinstitute.org/the-interpreter/need-convention-crimes-against-humanity]/Kankee

In international law, there is a legal gap in relation to the prohibition of crimes against humanity. There is no standalone international treaty that exists codifying these crimes, unlike the crime of genocide (Genocide Convention) and war crimes (Geneva Conventions). From 1-5 April, and on 11 April 2024, the UN General Assembly Sixth Committee – the legal committee of member states – discussed a potential new treaty on crimes against humanity. This was a crucial step in a two-year process before this committee, building upon years of work of the International Law Commission (ILC), which has deliberated on this topic since 2014, as well as other independent initiatives. The ILC prepared a draft of the treaty in 2019, recommending it as the basis for UN treaty negotiations on crimes against humanity. The Sixth Committee now has the responsibility to make a decision on this crucial step, before the end of the year, and held deliberations on the content of this draft this month. At present, the only multilateral treaty that does in fact address crimes against humanity – but only for the purposes of holding individuals criminally responsible before an international court – is the 1998 Rome Statute. This is a very specific treaty, negotiated to establish the International Criminal Court in the Hague that has jurisdiction to prosecute these crimes in specific instances, usually when a state is unable or unwilling to prosecute these offences itself, and based on whether a state has consented to the jurisdiction of this international court by ratifying this treaty. This is very different for instance from the Genocide Convention, which is a treaty that establishes the responsibility of states to undertake particular actions, and is not solely about the responsibility of an individual. In this vein, a treaty on crimes against humanity would be a step towards state responsibility for these mass atrocity crimes. The scope and understanding of what constitutes crimes against humanity has evolved over the years, through jurisprudence at international courts including for the Former Yugoslavia, Rwanda, Sierra Leone, and Cambodia, and at the International Criminal Court. The commission of crimes against humanity are unfortunately extensive, and are arguably the most prevalent of all international crimes. Crimes against humanity include crimes that are widespread or systematic, that are committed against any civilian population, in times of conflict or peacetime, with knowledge of the attack. Various acts could fall within this category, including murder, enforced disappearances, extermination, persecution, torture, rape and other crimes. The protection of civilians and the fact that these crimes are not just committed in armed conflict, but may be committed in times of peace, is a significant component of crimes against humanity. It is not sufficient to only be able to hold some individuals to account from states that have ratified the Rome Statute establishing the International Criminal Court. State responsibility is also crucial, and is missing in the legal lexicon for crimes against humanity. This will also provide a legal pathway for redress, due to incorporation into domestic law, before national courts, as well as in international courts. It is also time to break the perceived hierarchy of atrocity crimes with a convention on crimes against humanity. At the Sixth Committee this month, the ILC draft articles were subjected to a thorough examination, the second such exercise after the previous session in April 2023. The articles were divided per cluster, with states able to present their viewpoints on each cluster via statements, as well as by means of “mini-debates”.

#### ICC fails – Western bias, budget, authority, and poor results

Callamard 24 [AgnèS Callamard, former Director of the Columbia University Global Freedom of Expression project and secretary general of Amnesty International with a PhD in Political Science from the New School for Social Research, 11-4-2024, "The World Needs a Treaty on Crimes Against Humanity Now", Foreign Policy, https://foreignpolicy.com/2024/11/04/treaty-crimes-against-humanity-united-nations/]/Kankee

From China’s mass internment of Uyghurs in Xinjiang, to Syria’s torture and extermination of thousands of detainees, to Russia’s forcible transfer of civilians from occupied areas of Ukraine, no region of our planet is free from crimes against humanity. Nor are the perpetrators limited to state actors. Between 2014 and 2017, the militant group calling itself Islamic State committed unthinkable crimes against the Yazidis and many other communities in Iraq and beyond, including mass killing, abductions, enslavement, torture, and rape. In the last 12 months in particular, we have witnessed the most horrific crimes in Israel and the occupied Palestinian territories, with potential crimes against humanity by both sides being investigated by the International Criminal Court (ICC), yet nothing seems capable of putting an end to the carnage in Gaza and the decades-long cycle of impunity. The absence of justice for many such crimes is a shameful indictment of the international justice system. It has to do largely with the breakdown of the rules-based order and double standards in the application of international law. But impunity for these crimes is also because of glaring gaps in how these acts are criminalized and prosecuted. This is a problem that the project on a Convention on the Prevention and Punishment of Crimes Against Humanity seeks to address. After years of discussions, this fall the United Nations General Assembly must seize the opportunity and finally open formal negotiations on adopting the treaty—lest these efforts be shelved indefinitely. Unlike other international crimes, such as genocide and war crimes, there is currently no standalone convention for crimes against humanity. Crimes against humanity entail certain acts committed as part of a widespread or systematic attack against a civilian population. The Rome Statute of the ICC describes them as “atrocities that deeply shock the conscience of humanity,” including murder, extermination, enslavement, deportation or forcible transfer of population, unlawful imprisonment, torture, rape and other sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts of a similar character. In the last decade, Amnesty International has found that such crimes have been committed in at least 18 countries, including the draconian crackdown on women and girls’ rights in Afghanistan, sexual violence and unlawful killings by Eritrean forces in Ethiopia, and mass arbitrary detentions and extrajudicial executions in Venezuela. A Crimes Against Humanity Convention would impose obligations on states not only to criminalize and punish such crimes through national legislation, but also to prevent them and to cooperate with other states in gathering and exchanging information on suspects and victims, proceeds of crime, and other evidence. This would allow the community of states to investigate and prosecute a much larger number of crimes against humanity than an international court such as the ICC could, given its jurisdictional, budgetary, and staff limitations. A case in point is the proceedings opened in several European countries against suspected perpetrators of international crimes in Syria, over which the ICC has no jurisdiction at present. The current draft would make states obligated to either prosecute or extradite any suspects of crimes against humanity in their territories or within their reach, regardless of where the crime was committed or the nationality of the suspect or victim. This is a vital principle rooted in the belief that some crimes are so heinous, they fall under the responsibility of every state in the international community. It is for this reason that the Geneva Conventions and the U.N. Convention Against Torture include this same obligation, which has proven key to prosecute certain war crimes and torture. For instance, the Convention Against Torture provided the legal basis for the United Kingdom to arrest Chilean dictator Augusto Pinochet in 1998, acting on a warrant from Spain. The treaty could also bring much-needed improvement of international standards on gender justice, including by incorporating new gender-based crimes against humanity, such as forced marriage and forced abortion. In particular, the convention represents an important opportunity for the world to heed the calls of the trailblazing women of Afghanistan, Iran, and beyond, and recognize gender apartheid as a crime against humanity. That said, it would be naive to consider this a panacea that will entirely eradicate these heinous crimes or the impunity around them. There are still considerable hurdles to overcome in terms of both adopting and enforcing a convention. Regarding the former, the prognosis is generally encouraging. As of late October, close to 90 states from all over the world—including the United States—have formally expressed support to enter negotiations. But more are still needed. The convention’s supporters will have to be unequivocal and firm in their backing, lest they be sidelined by a vocal minority including China, Russia, Syria, and Saudi Arabia, who are masking their opposition in calls for further discussions and delays. Some states have argued that the ICC makes a convention redundant given that that court already has jurisdiction over such crimes in some cases. Such a position seems to be aimed at slowing or even blocking consensus—and rings particularly hollow when voiced by states that are not even parties to the ICC. The Rome Statute outlaws and aims to punish crimes against humanity committed by individuals, among other crimes. But a dedicated Crimes Against Humanity Convention would move beyond this framework by adding duties of states. It would not create a new international court but provide states with a comprehensive, updated, and harmonized model for domestic legislation on crimes against humanity. It would be applied by and between states, including any not accepting the ICC’s jurisdiction. Despite these tensions, we can draw encouragement from the consensus behind the Ljubljana-The Hague Convention that was adopted last year and has already been signed by 36 states. That landmark treaty clarifies and cements the duties of states to cooperate with each other in the investigation and prosecution of genocide, crimes against humanity and war crimes. It introduced several groundbreaking provisions that the Crimes Against Humanity Convention can build upon, such as the general obligation for states to either extradite or prosecute suspects; and strong and survivor-centric provisions on the rights of victims and witnesses, including enforcing orders between states for reparations to victims. The two conventions would be complementary. The Ljubljana-Hague Convention is primarily aimed at enhancing legal cooperation between states after a crime is committed, while the Crimes Against Humanity Convention would encompass the entire set of obligations related specifically to crimes against humanity, including their prevention. Once adopted, the biggest challenge will be to ensure that this new convention avoids the pitfalls around meaningful and effective enforcement that undermine so many international treaties. Common criticisms of the ICC—made by Amnesty International, among others—are its selective approach to investigations; its lack of prompt and tangible results; and its double standards and Western bias. Until the recent applications for arrest warrants against Russian President Vladimir Putin and Israeli Prime Minister Benjamin Netanyahu, it had focused exclusively on prosecuting a small number of offenders, all of whom were in Africa. The 2020 decision not to investigate war crimes by U.K. forces in Iraq, despite its own prosecutor finding that such crimes had been committed, was particularly inexcusable. The new convention cannot address the absence of political will to deliver justice. But it will strengthen the hands and advocacy of all those who fight against impunity and for the universal and absolute commitment to justice for all. It will empower activists to demand investigations and prosecutions by national authorities for crimes against humanity committed in their countries, but also abroad—similarly to the criminal case brought against Venezuelan authorities in Argentine courts. This will make it a powerful tool to pursue accountability for such crimes irrespective of who committed them and where. Enabling and emboldening state authorities and independent judiciaries to better conduct their own investigations and prosecute crimes through their domestic courts—including cases that the ICC is unable or unwilling to pursue—means victims will be less reliant on the ICC to take up a case. In short, the proposed convention would significantly improve the present system. Its benefits leave states with a clear choice. Even a cursory glance at the state of the world and the strain on the international justice system should convince governments to commit to backing the convention. After more than a decade of discussions, they must not let opposing states obfuscate and further delay the process. Now is the time.

#### The ICC track record is abysmally awful – arrests are low, mostly self-referred, and all rebels. No government leader has convicted

Yigzaw 24 [Destaw A. Yigzaw, Assistant Professor in Law at the Modern College of Business and Science, 2024, “THE INTERNATIONAL CRIMINAL COURT IN A WORLD RETREATING FROM INTERNATIONAL RULE OF LAW,” Syracuse University, https://jilc.syr.edu/wp-content/uploads/2024/10/501-A-World-Retreating-from-Intn-Law.pdf]/Kankee

\*card converted with OCR

Introduction The establishment of the International Criminal Court (ICC or Court) in 1998 as the first permanent criminal tribunal with worldwide jurisdiction over genocide, war crimes, crimes against humanity, and, later, aggression was greeted with a soaring sense of optimism.¹ It was seen as a revolutionary moment in international law.² The ICC was profusely dubbed as the “last greatest international institution of the twentieth century.”³ It was described as “a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”⁴ The adoption of the Rome Statute was further praised as an “international epiphany.”⁵ Its rapid ratification seemed to confirm that the optimism was well-placed. Against the prevailing buoyancy and triumphalism, however, few advised caution as states (especially powerful ones) may use the Court as a vehicle to advance their own interests, which may not always coincide with the collective interest of humanity.⁶ Some even flatly dismissed the ICC as a “Court of Dreams,”⁷ meaning an institution with unrealistic promises that may follow the path of the League of Nations.⁸ As if to prove the skeptics right, the ICC has yet little to show outside of Africa. Not a single non-African has been brought before the ICC in the Court’s two decades of existence. The Office of the Prosecutor (OTP) has opened a total of thirty-one cases (forty-seven defendants) so far, all from Africa. Even in Africa, the Court’s record is unflattering. It has handed down just ten convictions in twenty years.⁹ Of these, only six resulted from violations of core crimes the ICC was established to combat; the other four were convicted of offenses against the administration of justice.¹⁰ It must also be stressed that all convictions resulted from situations self-referred by African governments, and the convicts are all former leaders of rebel groups.¹¹ The only exception is the case of a rebel leader turned politician, Jean-Pierre Bemba, who was arrested in Brussels while serving as a Senator in the Democratic Republic of the Congo (his conviction has since been overturned on appeal).¹² So, the Court that was built on a grandiose promise that “no ruler, no State, no junta and no army anywhere can abuse human rights with impunity,”¹³ has only managed to convict a handful of African rebels. If the ICC’s dismal conviction record is not enough, its conviction rate has sharply declined in recent years—just two convictions since 2016 is hardly a success story. As a result, many believe that the Court has gone off the rails.¹⁴ Even former Presidents of the Court’s Assembly of States Parties had to come out publicly, calling for an external investigation of the divergence between the vision in the Court’s constitutive instrument and its actual operations.¹⁵ The Court’s near-exclusive focus on Africa has unsurprisingly brought the ICC into collision with African governments that have mounted fierce resistance against what they consider as an imperialistic assault. The absence of investigations elsewhere and the hypocritical role of the United Nations Security Council (SC) played into their hands, as it fed the perception of neo-colonial bias against Africa.¹⁶ At the height of the confrontation, African states even threatened to pull out of the Rome Statute en masse.¹⁷ When targeted, some, both in Africa and beyond, have already pulled out (Burundi, Philippines) or threatened to pull out (Gambia) of the Rome Statute.¹⁸ Israel is a potential target.¹⁹ The ICC Prosecutor has also opened investigations in Ukraine, which may lead to the indictment of Ukrainians and Russians. It is also engaged in investigations in Myanmar/Bangladesh, Venezuela, and the Philippines.²² These moves are supposed to resuscitate the Court’s damaged reputation. The vexing question, however, is: In the face of political obstruction, even hostility from superpowers, is there a reasonable prospect of success for the ICC in prosecuting citizens of powerful nations and of their allies? Conversely, if the ICC fails, what are the implications for the beleaguered Court? Clearly, the ICC has been a stunning disappointment. It is at a crossroads. It faces a veritable danger of being driven into irrelevance. Still, many believe that with a much-needed soul-searching and necessary corrective measures, the ICC can redeem its authority and effectiveness.²³ Indeed, the ICC has already launched an expert review process.²⁴ Granted, there are several technical issues experts have already pointed out, which can be addressed through appropriate judicial policy. However, the challenges facing the ICC are primarily political. First, the political competence of the SC over ICC affairs undermines the Court’s legitimacy. That is the ICC’s birth defect. Second, the hypocritical role of big powers that dominate the SC has made state cooperation look as though it were optional.²⁵ Third, and this has hardly been explored, the ICC’s disappointing performance is directly linked to the palpable retreat from international rule of law in the broader sense.²⁶ Accordingly, without fresh political negotiations and a renewed political commitment to international criminal justice, it is submitted here, the Court will struggle to maintain its “selective prosecution” of African suspects, let alone successfully prosecute an American, an Israeli, or a Russian. Fighting the Fight against Impunity

#### ICC fails and major powers not key – states don’t cooperate when its not in their interests

Yigzaw 24 [Destaw A. Yigzaw, Assistant Professor in Law at the Modern College of Business and Science, 2024, “THE INTERNATIONAL CRIMINAL COURT IN A WORLD RETREATING FROM INTERNATIONAL RULE OF LAW,” Syracuse University, https://jilc.syr.edu/wp-content/uploads/2024/10/501-A-World-Retreating-from-Intn-Law.pdf]/Kankee

The Way Forward: What Should Be Done? If the road for the ICC has so far been bumpy, the future looks deeply precarious, if not one of existential struggle. The challenges facing the Court are multidimensional. Some are self-inflicted wounds. The judges' unfortunate dispute over pay has attracted unwanted publicity. Their public altercation over who should preside over an appeal in the Gbagbo case has also generated a perception of breakdown in collegiality among judges. It also raises suspicions, especially in view of the controversial conclusion of the case. Crucially, the Court's disappointing performance has prompted many, including States Parties, to call upon the Court to justify its cost. To address these and other deficiencies, commentators offer various recommendations. Suggestions are often about how the ICC ought to operate, which is a legitimate concern. The ICC leadership has also finally come to grips with the sorry reality and undertaken corrective measures through a review process, which has already identified a long list of serious technical problems. However, the most daunting challenges to the ICC remain crippling noncooperation and hostility, which cannot be addressed by expert review. It cannot be stressed enough that state noncooperation is not limited to big powers. There is, for example, an overblown criticism of the ICC disproportionately targeting Africans. What is seldom emphasized is that the ICC's limited success in Africa almost exclusively concerns cases in which the ICC and African governments have mutual interest. African states have always supported the ICC when it is in their political interest. As a matter of fact, five of the ten African situations were self-referred by African governments. When the ICC went after sitting heads of State, Omar Al-Bashir of Sudan (2009) and Kenyan President Uhuru Kenyatta (2016), however, African governments realized the danger the ICC poses and began to fight back. When it comes to situations that implicate those in power, African states have not only been uncooperative, but also engaged in a hostile campaign, individually and collectively, against the ICC. As a result, the ICC has only managed to convict just one African government official so far, and even that conviction has already been overturned. Beyond Expert Review

#### Focus on humanitarian law undercuts anti-war efforts that would otherwise stop the impetus of war crimes

Pomper 21 [Stephen Pomper, Chief of Policy at the International Crisis Group and former Special Assistant to the President and Senior Director for Multilateral Affairs and Human Rights at the National Security Council, and former Assistant Legal Adviser for Political-Military Affairs at the U.S. State Department, 9-21-2021, "Has War Become Too Humane?", Foreign Affairs, https://www.foreignaffairs.com/reviews/has-war-become-too-humane]/Kankee

Anyone hoping that this month’s 20th anniversary of the 9/11 attacks might bring some closure after two decades of war is going to be disappointed. By withdrawing U.S. troops from Afghanistan, the administration of President Joe Biden sought to create a sense that the United States’ string of exhausting and counterproductive interventions in the Middle East and South Asia was coming to an end. But the truth is more sobering. For all its commitments to end “forever wars,” the administration has given no sign that it is preparing to pivot away from the use of military force to manage perceived terrorist threats. Its ongoing counterterrorism policy review appears to be focused more on refining the bureaucratic architecture around drone strikes and other forms of what the military refers to as “direct action” than on a hard look at the costs and benefits of continuing to place military force at the center of U.S. counterterrorism policy. Part of the reason may be that there is little meaningful pressure on the administration to revisit the scope of U.S. military action against jihadi groups around the world in what has become known as the “war on terror.” Executive branch lawyers have long read the broadly worded Authorization for Use of Military Force (AUMF) that President George W. Bush signed into law a week after the 9/11 attacks as allowing them to decide—often secretly—where and against whom the United States is fighting this war. Congress and the courts have largely acquiesced. Because military action against jihadi groups is often conducted by drones or through light-footprint operations in remote locations, it rarely attracts public attention. The exception is when something goes terribly and publicly wrong, as happened last month during a drone strike in Kabul that killed an Afghan aid worker and nine of his family members, including seven children, and when U.S. soldiers died during a 2017 operation that went wrong in Niger—a place few Americans even realized was a front in the war on terror. But even in those cases, the headlines rarely last; within days, the story usually fades away. In his new book, Humane: How the United States Abandoned Peace and Reinvented War, the Yale Law School professor Samuel Moyn acknowledges this pattern but also sees another factor that helps explain the war on terror’s persistence. The problem, according to his provocative argument, is not the war’s brutality but its relative humanity. Moyn does not at all advocate a return to brutal methods or so-called total war, but he does suggest that in vilifying torture, reducing casualty counts, and otherwise focusing on how the United States conducts hostilities, lawyers and advocates have stunted public criticism and diverted energy from the peace movements that might otherwise bring it to an end. Moyn’s craft, erudition, and insight make for a book that succeeds on many, but not all, levels. He does not quite make a persuasive case that humanitarian efforts were instrumental in girding domestic support for the war effort. Nor does the book fully explain what lawyers and advocates who sought to curb some of the war on terror’s ugliest features might have actually done to bring the war to an earlier end. Still, one can disagree with aspects of Humane and nevertheless appreciate the way it challenges acquiescence to the status quo. Beyond being a meditation on the meaning of war, it is a history of the tension between pacifism and humanitarianism. In a culture that has come to valorize the latter, Moyn gives the former its due and pushes readers to think about how law can aid the cause of peace. Reining in the executive branch’s unilateral war powers and requiring public deliberation over where and against whom the United States is waging war would be a good place to start. Humanizing the War on Terror If the book has a single protagonist, it is Leo Tolstoy, who features prominently in its lengthy exploration of nineteenth-century peace movements and whom Moyn admires both for his ferocious commitment to the pacifism and for advancing the idea that humanizing war may well entrench it. Moyn sees precisely this dynamic at work in the war on terror, especially the years that immediately followed the 9/11 attacks. Humane’s account of this period is in many ways the emotional core of the book. There is some irony in this line of argument, in that Bush’s response to the attacks is remembered more for its brutality than for respecting humanitarian protections: the era’s totemic images remain those of shackled detainees in orange jumpsuits at the makeshift U.S. detention facility in Guantánamo Bay, Cuba, and of prisoners suffering vicious torture at the hands of U.S. service members at the Abu Ghraib prison in Iraq. Nevertheless, Moyn argues, the administration’s abuses need to be viewed alongside the reaction they provoked. Scholars, lawyers, and advocates rallied in protest. They flooded the courts with filings, took their cases to international bodies, and worked passionately to close legal loopholes to make sure such things never happened again. In so doing, Moyn intimates, they may have missed the forest for the trees. Yes, they secured a combination of U.S. Supreme Court decisions, executive orders, and new statutes that reined in torture. But they did little or nothing to address the underlying conflicts in which the torture took place. Why didn’t the same lawyers who shook with fury in the face of custodial abuse harness the same energy to oppose the wars that created a pretext for it? To illustrate this tendency, Moyn profiles three lawyers who played prominent roles in shaping the contours of the war on terror. One is Jack Goldsmith, a legal scholar who as head of the U.S. Justice Department’s powerful Office of Legal Counsel (OLC) in 2003–4 withdrew the infamous opinions effectively authorizing torture that had been written by his colleague John Yoo. Another is the late Michael Ratner, a longtime antiwar activist and celebrated civil liberties lawyer who in 2004 won a landmark Supreme Court case securing the right for Guantánamo detainees to challenge their detention under the federal habeas corpus statute. The last is Harold Koh, a political progressive and former Yale Law School dean who became the top lawyer at the U.S. State Department during the administration of President Barack Obama. (I worked for Koh at the time.) Moyn perceives an element of tragedy in their work. Although he applauds Goldsmith and Ratner for their efforts on behalf of the rule of law, he strongly intimates that their energies were wrongly focused. “If there had been a chance to put limits on the war itself,” he writes, “after Goldsmith’s years in power and Ratner’s years of filing petitions, it had been missed.” He criticizes Koh yet more sharply for explaining and defending the international legal framework for Obama’s war on terror. Three Critiques

#### The ICC is useless – great powers won’t follow it

Economist 24 [Economist, 05-08-2024, "The world’s rules-based order is cracking", https://www.economist.com/international/2024/05/09/the-worlds-rules-based-order-is-cracking]/Kankee

RARELY HAVE international courts been busier. In The Hague, the International Criminal Court (ICC) is considering war-crimes prosecutions against Israeli leaders, including Binyamin Netanyahu, the prime minister, over the conflict in Gaza. It has already issued an arrest warrant for Vladimir Putin, Russia’s president, for war crimes in Ukraine. The International Court of Justice (ICJ), also in The Hague, is weighing genocide charges against Israel. In Strasbourg the European Court of Human Rights will hear a request in June for Russia to pay compensation to Ukraine. And yet, for all the legal action, rarely have activists seemed gloomier about holding rulers to account for heinous acts. “We are at the gates of hell,” says Agnès Callamard, head of Amnesty International. Countries are destroying international law, built over more than seven decades, in service of “the higher god of military necessity, or geostrategic domination”. For a time after the cold war the world seemed to move towards an international rules-based order with less conflict, more democracy and open trade. Lawyers looked forward to “universal jurisdiction”—a borderless fight against impunity. Some leaders, such as Slobodan Milosevic of Yugoslavia and Charles Taylor of Liberia, even stood trial for atrocities. But the order, always imperfect, is breaking up because of intensifying geopolitical rivalries—and efforts to uphold it may only expose its weaknesses. Russia blatantly violated the UN Charter by invading Ukraine. China supports Russia abroad, represses minorities at home and bullies neighbours. America, the chief architect of the system, undermined it with the excesses of its “war on terror”, not least after the invasion of Iraq in 2003. Now critics accuse it of being complicit in atrocities by supporting Israel’s war on terror. Israeli forces have killed tens of thousands of Palestinians in an attempt to destroy Hamas, which killed or kidnapped some 1,400 Israelis on October 7th. China and Russia mock the “rules-based international order”, a phrase intoned by President Joe Biden, as a cloak for American dominance. The fuzzy term is similar in meaning to “liberal international order” (a more common phrase that can confuse Americans, for whom “liberal” means left-wing). For Mr Biden it is the antonym of a world governed by brute force. Antony Blinken, his secretary of state, says it is the broad system “of laws, agreements, principles and institutions” to manage relations between states, prevent conflict and uphold human rights. Critics reckon America avoids referring to “international law” so as to preserve its freedom to use force. Theorists have long debated whether international order is best preserved by a balance of power—such as the “concert of nations” that followed the Napoleonic wars in Europe—or by laws and institutions of the kind America has repeatedly tried to build since the end of the first world war. For Matthew Kroenig of the Atlantic Council, an American think-tank, a liberal global order requires both of these. International rules create stability and prosperity; American power, channelled through its alliances, acts as enforcer in an otherwise anarchic world. International law has long recognised states’ sovereign immunity, which protects them from legal action in foreign courts. But their use of violence at home or abroad is circumscribed. The UN Charter of 1945 forbids the use of force in international disputes except in self-defence. The Universal Declaration of Human Rights of 1948 enshrines individual rights to life, liberty and the security of the person. The Geneva Conventions of 1949 regulate war and protect non-combatants. Further conventions ban genocide, torture and more. International courts punish breaches. But there is no global policeman to enforce their rulings. Worse, the UN Security Council, the pinnacle of the system—which can authorise force to maintain peace and security—is all but paralysed by the power of veto held by its five permanent members (see chart). Coups abound and UN peacekeepers are being ejected from several countries. The consensus to curb nuclear proliferation is eroding, too. In March Russia vetoed a resolution to extend the work of experts who monitor UN sanctions against North Korea’s nuclear-weapons programme—a reward for North Korean supplies of weapons to Russia. Richard Gowan of the International Crisis Group, a think-tank in Brussels, notes that the Security Council can reach tenuous agreement on some crises, for example in Somalia and Haiti. “And it can still agree on sending humanitarian aid, as an alibi for inaction,” he says. But geopolitical rivalry is creating intense battles over who should run the alphabet-soup of UN bodies. Though Russian candidates don’t get far these days, China courts UN members assiduously. It tries to nudge the UN away from protecting individual rights and towards upholding the primacy of states. America increasingly aims to preserve the liberal order through military alliances in Europe and Asia. It regards the G7 as the “steering committee” of the world’s advanced democracies. Some foresee a dual order: a liberal one dominated by America and an illiberal one centred on China. Even so, human-rights lawyers are trying to preserve the idea of universal rules, and are working through international courts given the UN’s impotence. The system has many gaps, in jurisdiction and enforcement. It is “a broken-down car that somehow keeps moving”, says Harold Koh of Yale University. The ICJ, akin to a civil court, mostly weighs disputes between states, but has jurisdiction over the Genocide Convention. In 2019 it agreed that any party to the convention could bring a genocide case, though it must prove intent to “destroy, in whole or in part, a national, ethnic, racial or religious group”. The ICC, more like a criminal court, investigates people rather than states. But it can prosecute a broader range of offences—not only genocide but also crimes against humanity and war crimes. Independent prosecutors decide whether to issue arrest warrants, but rely on states to enact them. They can charge anyone involved in crimes committed on the territory of countries that have ratified the ICC’s statute, or by their citizens. The ICC can investigate a fourth crime, of “aggression”—regarded as the “supreme international crime” that leads to other atrocities—but only if suspects are citizens of state parties. The ICC’s work is thus limited because dozens of countries have declined to join the court—among them America, Russia, China, India and Israel. Throw the book at them

#### US international law and treaty credibility is screwed – ICC/UNCLOS ratification is a drop in the bucket

Noh 22 [K.J. Noh, activist and educator, 1-10-2022, "The U.S. Makes a Mockery of Treaties and International Law", CounterPunch.org, https://www.counterpunch.org/2022/01/10/the-u-s-makes-a-mockery-of-treaties-and-international-law/]/Kankee

U.S. Secretary of State Antony Blinken and other members of the Biden Cabinet are fond of proclaiming the "rules-based international order" (RBIO) or "rules-based order" every chance they get: in press conferences, on interviews, in articles, at international fora, for breakfast, lunch, dinner, and cocktails. Along with the terms "human rights" and "democracy," the RBIO is routinely used to claim a moral high ground against countries that they accuse of not following this RBIO, and wielded as a cudgel to attack, criticize, accuse, and delegitimate countries in their crosshairs as rogue outliers to an international order. This cudgel is now used most commonly against China and Russia. Oddly enough, whenever the United States asserts this "rules-based order" that China (and other "revisionist powers"/enemy states) are violating, the United States never seems to clarify which "rules" are being violated, but simply releases a miasma of generic accusation, leaving the stench of racism and xenophobia to do the rest. This is because there is a fundamental contradiction at the heart of the RBIO. The RBIO isn't "rules-based," it isn't "international," and it confounds any sense of "order," let alone justice. It is, at bottom, the naked exercise of U.S. imperial power and supremacy, dressed up in the invisible finery of an embroidered fiction. The RBIO is a fraudulent impersonation of international law and justice. There are many layers to this misnomer, to be deconstructed piece by piece. 'RBIO' in Contrast With 'International Law' First, the RBIO is not "international" in any sense of the word. There actually is a consensual rules-based international order, a compendium of agreed-upon rules and treaties that the international community has negotiated, agreed to, and signed up for. It's called simply "international law." This refers to the body of decisions, precedents, agreements, and multilateral treaties held together under the umbrella of the Charter of the United Nations and the multiple institutions, policies, and protocols attached to it. Although imperfect, incomplete, evolving, it still constitutes the legal foundation of the body of international order and the orderly laws that underpin it: this is what constitutes international law. The basic foundation of the UN Charter is national sovereignty-that states have a right to exist, and are equal in relations. This is not what the United States is referring to. When the United States uses the term RBIO, rather than the existing term "international law," it does so because it wants to impersonate international law while diverting to a unilateral, invented, fictitious order that it alone creates and decides-often with the complicity of other imperial, Western, and transatlantic states. It also does this because, quite simply, the United States does not want to be constrained by international law and actually is an international scofflaw in many cases. The United States as International Outlaw For example, the United States refuses to sign or to ratify foundational international laws and treaties that the vast majority of countries in the world have signed, such as the Rome Statute of the International Criminal Court (ICC), CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women), ICESCR (the International Covenant on Economic, Social, and Cultural Rights), CRC (the Convention on the Rights of the Child), ICRMW (the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), UNCLOS (the UN Convention on the Law of the Sea), PAROS (the Prevention of an Arms Race in Outer Space), the Ottawa Treaty (the Anti-Personnel Landmines Convention), and the majority of labor conventions of the ILO (International Labor Organization). In fact, the United States harbors sweatshops, legalizes child labor (for example, in migrant farm labor), and engages in slave labor (in prisons and immigration detention centers). Even the U.S. State Department's own 2021 Trafficking in Persons Report acknowledges severe problems in the U.S. of trafficking and forced labor in agriculture, food service, manufacture, domestic service, sex work, and hospitality, with U.S. government officials and military involved in the trafficking of persons domestically and abroad. Ironically, the United States tries to hold other countries accountable to laws that it itself refuses to ratify. For example, the United States tries to assert UNCLOS in the South China Sea while refusing-for decades-to ratify it and ignoring its rules, precedents, and conclusions in its own territorial waters. There are also a slew of international treaties the United States has signed, but simply violates anyway: examples include the Chemical Weapons Convention, the Biological Weapons Convention, UN treaties prohibiting torture, rendition, and kidnapping, and of course, war of aggression, considered "the supreme international crime"-a crime that the United States engages in routinely at least once a decade, not to mention routine drone attacks, which are in violation of international law. Most recently, the AUKUS agreement signed between the United States and Australia violates the Nuclear Non-Proliferation Treaty (NPT) by exploiting a blind spot of the International Atomic Energy Agency (IAEA). There are also a multitude of treaties that the United States has signed but then arbitrarily withdrawn from anyway. These include the Joint Comprehensive Plan of Action (JCPOA) with Iran, the Agreed Framework and the Six-Party Talks with North Korea, the Geneva Conventions, the Intermediate-Range Nuclear Forces (INF) Treaty, and many others. There are also approximately 368 treaties signed between the Indigenous nations and the U.S. government; every single one of them has been violated or ignored. There are also unilateral fictions that the United States has created, such as "Freedom of Navigation Operations" (FONOPs): this is gunboat diplomacy, a military show of force, masquerading as an easement claim. FONOPs are a concept with no basis in international law-"innocent passage" is the accepted law under UNCLOS-and it is the United States and its allies who are violating international laws when they exercise these FONOPs. Air Defense Identification Zones (ADIZs) are likewise notions that have no recognition in international law-the accepted concept is "sovereign airspace"-but the United States routinely claims that China is violating Taiwan's ADIZ or airspace-which covers three provinces of mainland China. These are some examples of the absurd fictions that the United States invents to assert that enemy states like China are violating the RBIO. This is weaponized fiction. The United States also takes great pains to undermine international structures and institutions; for example, not liking the decisions of the World Trade Organization (WTO), it has disabled the WTO's Investor-State Dispute Settlement (ISDS) mechanism; it has undermined-and threatened-the ICC (by passing the American Servicemembers Protection Act [ASPA], also known as the Hague Invasion Act), and more recently, sanctioned the ICC prosecutor and her family members; it thumbs its nose at the International Court of Justice (ICJ) and its decisions, and generally is opposed to any international institution that restricts its unbridled, unilateral exercise of power. Former U.S. Ambassador to the UN John Bolton, in blunt candor, asserted that there is "no such thing as the United Nations," but this unhinged ideology is quietly manifested in the day-to-day actions of the United States throughout successive U.S. administrations. Whose Rules? The United States Applies Its Laws Internationally On the flip side of this disdain for agreed-upon international law and institutions is the United States' belief that its own laws should have universal jurisdiction. The United States considers laws passed by its corrupt, plutocratic legislature-hardly international or democratic by any stretch of the imagination-to apply to the rest of the world. These include unilateral sanctions against numerous countries (approximately one-third of the world's population is impacted by U.S. sanctions), using the instruments of the Office of Foreign Assets Control (OFAC), the U.S. legislature and courts, as well as currency and exchange systems (SWIFT). These unilateral sanctions are a violation of international law and humanitarian law, as well as perversions of common sense and decency-millions have perished under these illegal sanctions. To add insult to injury, the United States routinely bullies other countries to comply with these unilateral sanctions, threatening secondary sanctions against countries and corporations that do not follow these U.S.-imposed illegal sanctions. This is part of the general pattern of the exercise of U.S. long-arm jurisdiction; examples abound: the depraved arrest, imprisonment, and torture of journalist and WikiLeaks publisher Julian Assange-an Australian national-for violating U.S. espionage laws; the absurd kidnapping of Huawei executive Meng Wanzhou (a Chinese national) on Canadian soil, for violating illegal U.S. sanctions on Iran (which Canada does not itself uphold); and many other examples, too many to enumerate. This long-arm bullying is often exercised through a network of kangaroo courts within the United States, which arrogate to themselves unitary, plenipotentiary international powers to police the citizens of other countries. Not surprisingly, the United States also applies its own laws in a similarly corrupt way within its own borders, with its own gulag system fed through these kangaroo courts. The most dramatic examples of the corruption of these courts can be noted in the routine exoneration of police-inflicted murders of civilians, except under the most extreme protest and activism; and absurd judgments, such as the prosecution of Steven Donziger by a Chevron-linked corporate law firm; or the exoneration of Kyle Rittenhouse by a judge allowing the accused to run the juror lottery. Note, however, the system itself is set up for conviction: over 99 percent of federal cases that go to court result in conviction; most do not even go to trial: 90 percent of U.S. federal indictments are settled by defendants pleading "guilty" or "no contest" to charges filed against them. The idea that there is any impartial notion of justice is belied by the fact that fair and adequate legal representation is unaffordable for most defendants; that appointed public defenders are so overstretched that they often spend literally minutes on each case, simply counseling defendants to plead guilty-which most do-and individuals, in the rare cases where they do win, are often bankrupted and psychically destroyed by a system that has unlimited resources and finances to beat down its victims. This corrupt system of oppression, despite its obvious injustices and iniquities, is exacerbated within vast gray areas of the justice system where even counsel, appeal, scrutiny, or oversight does not apply, and where a single individual may be judge, jury, and executioner. These include, for example, certain parole and probation systems, review boards within prisons, debt collection systems, immigration proceedings, asset forfeiture systems, and many other quasi-judicial systems of oppression. Generally, these violations and injustices are excused or erased by the international and national media, which are complicit in maintaining an illusion of impartial, high-standards justice in the United States. This is an illusion without substance: the U.S. legal system, like the U.S. health care system or the U.S. educational system, is essentially a failed system that is designed to work only for the rich and powerful. It delivers substandard, so-called care, if not outright abuse, harm, violence, and death, to the vast majority of people who have the misfortune to enter its sausage-making chambers. Routine Exemptions, Deadly Disorder Nevertheless, from time to time, dramatic incidents of the United States flaunting the international "rules-based order"-i.e., international law by the United States-occasionally make headlines (before being rapidly silenced). One type of recurring violation is the abuse of diplomatic immunity. This type of case is mundane and repetitious: a U.S. (or Western-allied) government employee kills or harms native citizens; the United States immediately claims diplomatic immunity. Sometimes the perpetrator is drunk, out of control, or paranoid; often they are spies or contractors. For example, according to recent reports, Anne Sacoolas seems to have been a drunk U.S. spy who killed a British teenager in 2019. She was spirited away immediately as a diplomat. Raymond Allen Davis was a U.S. contractor, possibly acting CIA station chief, who shot dead two people in the street in Pakistan. Another person was killed by a vehicle picking up Davis to take him away from the crime scene. Davis was spirited out of the country, no explanations were given, and the murders were erased from media consciousness. This mindset of exceptionalism and impunity is not anecdotal, but manifests on a general, structural scale in the numerous one-sided U.S. status of forces agreements (SOFAs) in the countries where the United States has troops stationed. These give a blanket immunity similar to diplomatic immunity: the violating U.S. soldier or contractor cannot be arrested and rendered to domestic courts unless the United States chooses to waive immunity; U.S. extraterritorial exemption/immunity can be applied despite cases of murder, mayhem, violence, torture, rape, theft, sexual trafficking, and a host of other sins. This type of exceptionalism also applies to national health policies and international health regulations. For example, multiple COVID-19 outbreaks have been traced to U.S. violations of domestic public health measures-screening, testing, contract tracing, and isolation-in many territories or countries (especially island regions) where the United States has military bases. For example, several major COVID outbreaks in Okinawa have been traced to U.S. troops entering the island without following local health protocols. The United States takes the cake for hypocrisy, however, when, in several COVID lawsuits, it accused China-without evidence-of violating UN/World Health Organization (WHO) International Health Regulationsby failing to notify the United States and the rest of the world in a timely manner about the outbreak of COVID-19. This is entirely refuted by the facts and the well-established timelines: no other country has worked as assiduously and as rapidly in investigating, ascertaining, and then notifying the world of the initial outbreak, as well as sharing necessary information to control it. The United States, however, has carved out a pandemic-sized exemption from reporting any infectious diseases to the WHO if it deems it necessary for its national security interests. Ironically, this exemption is carved out for the single institution most likely to propagate it-the U.S. military: "any notification that would undermine the ability of the U.S. Armed Forces to operate effectively in pursuit of U.S. national security interests would not be considered practical." When the United States disingenuously uses the term RBIO, or rules-based international order, it may be playing at international law, but once its applications are unpacked and defused, it becomes clear that it is a weaponized fiction that the United States uses to attack its enemies and competitors. If "hypocrisy is a tribute that vice pays to virtue," the RBIO is the vicious first tribute that the United States sends to its law-abiding opponents to undermine international order, no less dangerous for its falsehood.

#### Uniqueness overwhelms – US credibility is impossible to recover

Cohen and Bremmer 23 [Jared Cohen, Adjunct Senior Fellow at the Council on Foreign Relations with a master's degree in international relations from Oxford University, and Ian Bremmer, president of Eurasia Group with a PhD in political science from Stanford University, 12-6-2023, "The Global Credibility Gap", Foreign Policy, https://foreignpolicy.com/2023/12/06/global-geopolitics-credibility-us-china-competition-alliances-deterrence-military-economic-power/]/Kankee

Washington’s military lead, moreover, is shrinking in the world’s most strategically important region, the Indo-Pacific, amid a rapid build-up and modernization effort by Beijing. And with ongoing wars in Europe and the Middle East, it’s an open question how Washington would manage if another crisis were to materialize in the Taiwan Strait. But the credibility crisis ailing the United States results principally from factors closer to home: its own recent foreign-policy choices and deepening domestic division and dysfunction. In the last two decades, U.S. foreign policy decisions have alienated both traditional U.S. allies and developing countries in the Global South. The 2003 invasion of Iraq was especially damaging, seriously eroding global trust in Washington. The decision not to enforce the “red line” over chemical weapons use in Syria further undermined U.S. credibility. More recently, U.S. threats to withdraw from NATO and its abandonment of the Trans-Pacific Partnership undercut its reliability as both a strategic and commercial partner. Because credibility is context-specific, however, different countries can draw different conclusions about the same policies. When the U.S. withdrew from Afghanistan in 2021, for instance, many commentators and policymakers saw it as a massive hit to U.S. credibility. Yet others suggested that the withdrawal could bolster U.S. credibility elsewhere by signaling that Washington was serious about reorienting its foreign policy. U.S. military, humanitarian, and financial aid to Ukraine and wide-ranging sanctions on Russia, moreover, bolstered Washington’s credibility with many advanced industrial democracies while leading some countries in the Global South to conclude that U.S. policymakers prioritize European over non-Western interests. But the most serious factor undermining U.S. credibility may be what Kennan called the “problems of its internal life.” In recent years, the United States’ society and political system have become increasingly divided and dysfunctional. Life expectancy has declined as income inequality has grown, and many indicators point to increasing polarization: public trust in the U.S. federal government is at record lows, nearly two-thirds of Democrats and Republicans believe that members of the opposite party are more dishonest and immoral than other Americans, and a small but growing number of Americans—on both sides of the aisle—believe that political violence can be justified. After Jan. 6, 2021, the United States no longer has an uninterrupted history of peaceful transfers of power. Small pockets of the country are also driving big political swings. Fewer swing states and districts mean that members of Congress have fewer incentives to compromise, and control of the executive branch depends on the same narrow group of swing states. This results in foreign-policy volatility in the White House and partisan gridlock on Capitol Hill, with Congress regularly slowing or blocking appointments and confirmations. One recent example makes the point: when Hamas launched its brutal terrorist attacks on Israel on Oct. 7, the United States had no speaker of the House and no confirmed ambassadors in Israel, Egypt, Oman, or Kuwait. Mounting evidence makes clear that domestic politics have eroded the United States’ global credibility. U.S. allies in Europe fear that American support for both Ukraine and NATO will shift with the domestic political winds. Many of Washington’s traditional partners in the Middle East are growing skeptical about long-term U.S. commitments, prompting some to increase economic and even military ties with China. And in the Indo-Pacific, even staunch U.S. allies worry about Washington’s reliability. U.S. adversaries, for their part, seek to exploit its polarization through influence and intelligence operations. While the United States remains the world’s leading power and retains a great deal of international goodwill, Washington’s allies are less sure of its leadership, its competitors are more emboldened, and countries in the middle are increasingly hedging their bets. China—in contrast to the United States—played a relatively minor role in developing the current international order. Although Beijing was an important foreign-policy actor at times during the 20th century, it was largely preoccupied with domestic concerns and punched below its weight in international politics, given its population and potential.

### Contention 4: Unilateral CP (ICC)

#### The United States ought to:

#### Codify all crimes listed under the Rome Statute and prosecute violators, irrespective of nationality, in the US absent an existing warrant from the International Criminal Court

#### Repeal the American Service-Members' Protection Act

#### Aid the International Criminal Court with all prosecutions of foreign nationals

#### Independently review all new military trials outside of military purview to ensure US troop compliance with international law

#### Sign, but not ratify, the Rome Statute

#### Increase accountability measures for foreign arms transfers and sales

#### Unilateral prosecution of Rome Statute crimes laws solves without the need for ICC involvement

Tambay and Yager 22 [Esti Tambay, Senior Counsel at the International Justice Program for HRW, and Sarah Yager, Washington Director for HRW, 9-21-2022, "Finally, a Better U.S. War Crimes Bill. Now What?", Human Rights Watch, https://www.hrw.org/news/2022/09/21/finally-better-us-war-crimes-bill-now-what]/Kankee

Justice is having a moment. Ongoing atrocities in Ukraine have put accountability for serious international crimes in the spotlight in ways not seen for decades. That’s especially true in the United States, where legislators usually skeptical of non-U.S. legal efforts are lining up on congressional resolutions to hold Russian officials accountable for alleged abuses committed in Ukraine, including welcoming International Criminal Court (ICC) involvement. One significant bipartisan and bicameral effort is the Justice for Victims of War Crimes Act. It would improve upon the 1996 war crimes legislation so that those implicated in war crimes committed abroad who are found in the U.S. can be brought to justice even if they or their victims are not U.S. citizens or members of the U.S. armed forces, which the 1996 law requires. Sen. Chuck Grassley, R-Iowa, one of the bill’s authors and sponsors, said this bill would ensure that the U.S. does not become a “safe haven for war criminals.” The bill was introduced in May and is expected to have bipartisan support. Creating jurisdiction in the U.S. for war crimes committed abroad regardless of the alleged perpetrator’s or victim’s nationality is a long time coming. The expanded conflict in Ukraine may be the catalyst, but the abuses seen there aren’t new or unique. Grave international crimes—in places such as the Central African Republic, the Democratic Republic of Congo, Ethiopia, Myanmar, Palestine, South Sudan, and Syria—continue to be committed with impunity, often with much less media and political attention. The victims of those crimes deserve every bit as much access to justice as the victims in Ukraine. So what other steps can the U.S. take to look beyond what’s happening in Ukraine and support international justice consistently? First, Congress should consider legislation to prosecute crimes against humanity, which, unlike war crimes, can be committed during peacetime as well as during war. Second, liability should be expanded to ensure that leaders responsible for war crimes as a matter of command responsibility can also be prosecuted. Third, Congress should remove legislative obstacles that it previously adopted so that the U.S. can constructively support the ICC. Fourth, the Department of Justice, evidence permitting, should bring cases based on these newly improved laws. We’ll discuss all of these current gaps in U.S. law or practice below after a brief analysis of the proposed War Crimes Act. While the U.S. contributed to the development of the global criminal justice architecture at Nuremberg and has continued to do so, it hasn’t uniformly supported justice efforts over the decades, in part due to lack of political will and concern over non-U.S. investigations of U.S. military personnel as well as legislative obstacles. Here, we focus on bipartisan legislative fixes to help restore the U.S.’s reputation on promoting justice for international crimes, although there are other practical ways to consistently support international justice (as we highlight in our conclusion).

War Crimes Bill Provides for Jurisdiction Based on Presence in the U.S. The Justice for Victims of War Crimes Act would finally give the U.S. the ability to prosecute suspected war criminals found inside U.S. borders regardless of nationality. Currently, the 1996 war crimes statute only allows the U.S. to take on cases in which the alleged violator or victim is a U.S. national or a member of the U.S. armed forces. The new bill would help U.S. judicial authorities catch up with the national courts of an increasing number of countries that have used the principle of universal jurisdiction to prosecute people implicated in serious international crimes committed abroad, even if neither they nor the victims are citizens of the prosecuting country. These cases have been crucial to providing justice, especially when domestic courts in countries where the crimes were committed are unable or unwilling to pursue investigations and prosecutions. Consider the prosecution in Switzerland last year that led to the first conviction on war crimes committed in Liberia. That case currently would not be possible in the United States. Right now, criminal suspects living or traveling inside the U.S. can move freely without fear of domestic prosecution for war crimes because of the nationality requirement, which has left the 1996 war crimes bill effectively a “dead letter” law. Indeed, there has not been a single prosecution based on the statute in the 26 years since it was enacted. As discussed further below, because of this challenge, atrocities that could be prosecuted under the war crimes act have instead repeatedly been charged under U.S. immigration and counterterrorism laws. The value of the new bill isn’t only in the ability of the U.S. to prosecute alleged war criminals found on U.S. soil regardless of nationality. It would also bring the U.S. into compliance with the 1949 Geneva Conventions, which obligate states to investigate or extradite war crimes suspects found within their jurisdiction. The new bill would also complement domestic U.S. laws on genocide, torture, and the use of child soldiers, which cover suspected perpetrators in U.S. territory regardless of their nationality. Finally, the proposed legislation extends the statute of limitations for war crimes discovered years after they occur. International law has been ahead of the U.S. for some time on this issue. The current statute does not explicitly provide a limitation period and therefore the general five-year statute of limitations period for criminal offenses applies. The new act provides that prosecutions may take place “at any time without limitation.” Extending the time in which victims can seek justice is essential, since their pain and suffering has no time limit and neither should justice for what they’ve endured. It’s also important because war crimes cases are complicated. Investigations can stretch well beyond a typical statute of limitations, and those allegedly responsible may arrive on U.S. territory years later. The draft bill does not have retroactive application, however, which means it would not cover, for example, any war crimes that have been committed from the start of the Ukraine conflict through the date the bill is adopted. For all of its positive attributes, the new war crimes bill isn’t without shortcomings. Purportedly to avoid conflicts with countries that do not want U.S. officials prosecuting their citizens, the bill requires the attorney general or their delegate to certify in writing that a war crimes prosecution “is in the public interest and necessary to secure substantial justice,” creating a political check that builds on prior guidelines for other human rights-related prosecutions. While the bar for certification is relatively low and the attorney general could delegate this decision, this requirement should not stand in the way of efforts to bring future prosecutions. The legislation also does not address the death penalty provision in the original legislation as a potential punishment, even though many other domestic jurisdictions around the world and international courts do not impose capital punishment, even for genocide. (Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and inhuman punishment.) The Justice for Victims of War Crimes Act would help ensure the U.S. is not a safe haven for serious human rights abusers. Now Congress should close other legal loopholes that allow impunity for grave international crimes. Closing the Justice Gap on Crimes Against Humanity One major gap in the U.S. justice architecture is the lack of legislation expressly to make crimes against humanity a criminal offense. Sen. Richard Durbin, D-Ill., one of the primary sponsors behind the new war crimes bill, has been pushing for a crimes against humanity bill since 2009. War crimes are serious violations of the laws of war committed in the context of armed conflict, while crimes against humanity can be committed during peacetime as well as war. Crimes against humanity have been defined as serious offenses committed as part of a widespread or systematic attack on a civilian population. As Human Rights Watch wrote, “The conviction of a former Syrian intelligence officer for crimes against humanity by a German court” in Koblenz is a ground-breaking and recent example of how domestic prosecutions for crimes against humanity can advance justice for serious crimes committed elsewhere. The initial scope of the new war crimes bill was much broader, also adding crimes against humanity to the criminal code and expanding both the Torture Victim Protection Act (which currently limits civil remedies to victims of torture and extrajudicial killing) and the Immigration and Nationality Act (which includes immigration-related offenses related to human rights violations and war crimes) to make war crimes and crimes against humanity grounds for inadmissibility. While those elements didn’t make it into the proposed war crimes bill, we understand that Durbin intends to introduce a broader bill—the War Crimes Accountability Act—to pick up all of those other important legislative pieces. Such initiatives should be seized with a view to increasing access to justice for serious crimes wherever possible. Expanding Liability Along the Chain of Command The duty of commanders to prevent or punish war crimes committed by their subordinates is a long-standing principle of the laws of war. Since World War II, this principle has been integral to holding those in positions of command accountable for abuses before domestic and international tribunals. Under this principle, liability extends not only to those who are directly involved in serious international crimes but also commanders and civilian leaders who knew or should have known about the crimes being planned or committed and failed to take appropriate action. That basis of liability is already expressly recognized in the U.S. military manual, upheld by the U.S. Supreme Court in cases brought after World War II, and has been recognized in several civil cases in federal courts involving human rights violations. But U.S. federal law does not include command responsibility for federal crimes or serious international crimes. Said another way, there is no path for criminal liability along the entire chain of command. Currently under U.S. federal law, alleged perpetrators may only be prosecuted as principals and accomplices, under theories of attempt, or when they commit crimes as part of a conspiracy. Congress has an opportunity now, with so much attention on Moscow’s role in the serious crimes being committed in Ukraine, to build out this body of law and expand the definition of liability. Indeed, a theory of liability should apply to all statutes dealing with serious international crimes. Though it may not be feasible to add this to the current war crimes bill under consideration, a legislative fix to expand liability would give U.S. prosecutors a broader remit. Accountability, after all, should apply to everyone involved in the chain of command, from the foot soldier to the military commander or political leader. Removing Legislative Obstacles to Supporting the ICC The U.S. government has had a long-standing objection to the ICC because of its potential jurisdiction over nationals from non-member countries. This jurisdiction could extend to U.S. citizens implicated in crimes committed in ICC member countries. But lawmakers who have vigorously opposed the ICC are suddenly speaking favorably about the court’s investigation to prosecute the alleged crimes occurring in Ukraine. Sen. Lindsey Graham, R-S.C., for example, led a unanimous Senate resolution supporting “any investigation” into crimes “levied by President Vladimir Putin,” which would include those investigations by the ICC. He also encouraged ICC member states to petition the court to take steps to investigate those crimes. (Graham is also a co-sponsor of the new war crimes bill and even met with the ICC prosecutor during his recent visit to Washington, saying that the ICC’s Ukraine investigation is “a proper exercise of jurisdiction” and “what the court was created for.”) The U.S. has a complicated history with the ICC, and was one of only seven countries voting against the Rome Statute, the court’s founding treaty. The George W. Bush administration was initially hostile to the court when it was established in 2002, though later didn’t veto a U.N. Security Council resolution asking the ICC prosecutor to investigate crimes in Darfur, Sudan. While the Obama administration didn’t wholeheartedly embrace the court, it made some positive strides toward justice through its “case-by-case” approach. It voted in favor of a U.N. Security Council resolution that referred the situation in Libya to the ICC prosecutor, played a critical role in the transfer to the court of two suspects, and expanded the U.S. War Crimes Rewards Program to include ICC fugitives. (That program offers financial incentives for information leading to the arrest, transfer to, or conviction by international criminal tribunals.) The Trump administration aggressively reversed course, culminating with issuing sanctions against the then-prosecutor, which the Biden administration later rescinded. More recently, Reps. Joaquin Castro, D-Texas, and Jim McGovern, D-Mass., introduced a bill barring sanctions on international organizations, including the ICC. The Biden administration and Congress have now unequivocally stated their support for the ICC’s investigation in Ukraine (although some questions remain as to how this stated support translates into practice). But maintaining the U.S. jurisdictional objection to the court while also supporting the ICC’s investigations of Russian officials, when neither Russia nor Ukraine is a member of the court (though Ukraine accepted the court’s jurisdiction through declarations), is contradictory and unsustainable. The political rhetoric supporting the ICC’s Ukraine investigation has been intense since the start of the conflict, but rhetoric isn’t enough when there are legislative obstacles to providing real assistance to the court. A central legislative restriction is the American Servicemembers’ Protection Act (ASPA), enacted the same year as the establishment of the ICC. The law aims to protect U.S. service members from the ICC’s jurisdiction. Since its passage, the ASPA has been watered down by amendments, which have been interpreted to allow the U.S. to engage in diplomatic activities with the ICC, provide information in particular ICC cases involving foreign nationals, and train ICC personnel or detail employees to the court when limited to such specific cases. Now, Congress needs to withdraw all remaining provisions of the ASPA—including broad restrictions on general support for the court and the act’s infamous “Hague invasion” provision, which authorizes the use of military force to liberate any U.S. citizen or citizen of an U.S.-allied country being held by the court. A bill from Rep. Ilhan Omar, D-Minn., would do just that. Removing ASPA from the law books would show broad and unconditional support for accountability for the worst crimes. And, despite what ICC critics have said, the U.S. would always have the option of prosecuting American service members implicated in serious crimes before the ICC ever became involved. The ICC was created to be a court of last resort and remains so. While a wholesale repeal of ASPA is unlikely to pass, removing some specific obstacles to cooperation with ICC investigations would go a long way to putting the U.S. on the right side of justice. The new Atrocity Crimes, Relief and Accountability (ACRA) Act introduced by Rep. Bill Keating, D-Mass., is an initial effort in that direction. The ICC is currently prohibited from conducting any investigative activity in the U.S., which means the court could not even interview witnesses to war crimes in Ukraine who are now living here, which has always been a nonsensical limitation. The ACRA Act would allow ICC investigators onto U.S. soil to conduct investigations related to crimes occurring in Ukraine. The ACRA legislation as introduced may be an incremental step, and further efforts are needed to expand its narrow scope beyond Ukraine. Another necessary fix is repealing legislation that broadly restricts U.S. material assistance to or general cooperation with the ICC. Section 705(b) of the FY 2000–01 Foreign Relations Authorization Act (FRAA) restricts any funding “for use by, or for support of” the ICC unless the U.S. ratifies the Rome Statute. One bill by Rep. Sara Jacobs, D-Calif., would repeal this restriction and allow the U.S. to provide “material and technical” support to all ICC investigations; she has also introduced a narrower bill focused only on Ukraine along with Rep. Victoria Spartz, R-Ind. Separately, annual appropriations legislation prohibits funds being made available to the ICC, while allowing certain technical assistance training, assistance to victims and witness protection, law enforcement, and other activities. The current draft Senate appropriations bill would clarify that some prior funding restrictions “shall not apply with regard to support, including funding, information, or in-kind support, to the International Criminal Court to assist with investigations into and prosecutions related to the Situation in Ukraine or circumstances in which the Secretary of State determines that it is in the national security interest of the United States to provide such support.” This would be a significant step forward to expand the type of support the U.S. could choose to provide to the ICC. There is no moment like the present for the U.S. government to stand with victims of atrocities by making greater assistance to justice efforts possible. Pursuing Prosecutions for Serious Crimes Laws matter most when they’re put into effect in actual cases. We hope stronger accountability laws will increase the prospects of prosecutions for serious crimes in courts in the U.S. The Human Rights and Special Prosecutions Section of the Department of Justice has a mandate to pursue serious crimes cases. But the U.S. has successfully prosecuted only one individual, Charles “Chuckie” Taylor Jr., the son of the former Liberian president, under its substantive human rights statutes. Instead, the U.S. has relied mostly on immigration laws to prosecute or deport foreign nationals who committed immigration fraud or perjury and are also implicated in serious international crimes, instead of prosecuting them for the underlying substantive crime. One case currently in pretrial proceedings shows how powerful current U.S. domestic laws can be when they’re actually used. Michael Sang Correa of Gambia was indicted in June 2020 under the U.S. torture statute. In its indictment before the U.S. District Court for the District of Colorado, the Department of Justice alleges that Correa, who was living in Colorado, is responsible for the torture of at least six people in 2006, following an attempted coup against the former Gambian president, Yahya Jammeh. Correa and other members of a Jammeh “death squad,” for which he was allegedly a driver, beat their victims with plastic pipes, wires, and branches, covered the victims’ heads with plastic bags, and subjected some to electric shocks. Consider also the situation of former Sri Lankan President Gotabaya Rajapaksa, who as defense secretary during the civil war with the Liberation Tigers of Tamil Eelam, which ended in 2009, was implicated in extrajudicial killings, enforced disappearances, and other grave abuses over many years. Rajapaksa, a U.S. citizen until he relinquished his citizenship to become Sri Lanka’s president, had long avoided possible prosecution and civil lawsuits in the U.S. under cover of diplomatic immunity. He is currently outside of Sri Lanka and an ordinary citizen, which may create opportunities to pursue legal action against him in the U.S. These cases should receive more attention and bandwidth, including under the new war crimes bill once adopted. Congress is already pushing the government to be more forward leaning on justice and accountability. It can do more, for example, by holding regular briefings on the U.S. role in investigating and prosecuting war crimes. Such hearings were once held by the Senate Judiciary Committee’s Subcommittee on Human Rights and the Law. Such efforts could present an important opportunity for the public and Congress to stay apprised of how substantive human rights criminal statutes are being used to prosecute suspects found on U.S. soil. In addition, the U.S. should continue to provide support for credible investigations pursued in other countries on the basis of universal jurisdiction, including through cooperation and sharing of information and intelligence with other national judicial authorities as they build these cases. This is an essential element of coordination in Ukraine, where there are now a number of such investigations. Practical Ways for the United States to Consistently Support International Justice

#### Re-signing the “unsigned” treaty increases US human rights credibility and international law leadership without adding obligations on the US

Goodrich 21 [Austin Goodrich, Lieutenant Colonel and Judge Advocate in the United States Army Reserve and juris doctor from the University of Florida Levin College of Law, 12-6-2021, "The United States and the International Criminal Court: Is It Time to Reaffirm Our Signatory Status to the Rome Statute?", Air University (AU), https://www.airuniversity.af.edu/Wild-Blue-Yonder/Articles/Article-Display/Article/2863074/the-united-states-and-the-international-criminal-court-is-it-time-to-reaffirm-o/]/Kankee

“I believe that a properly constituted and structured International Criminal Court [ICC] would make a profound contribution in deterring egregious human rights abuses worldwide and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.”1 With this 31 December 2000 statement, President Bill Clinton announced the United States’ decision to become a signatory to the Rome Statute establishing the ICC. However, the decision to sign the Rome Statute was not without a great deal of controversy due to legitimate national concerns about the proposed jurisdiction and operational framework of the court as contemplated by the Rome Statute itself. In fact, in signing the Rome Statute, the outgoing President Clinton expressly indicated his intent to advise the next President not to “submit the treaty to the Senate for advice and consent [i.e., ratification] until our fundamental concerns are satisfied.”2 From Clinton’s calculus, the US interest in promoting an international criminal justice body was worth the limited investment of a signature, which would further the US’ ability “to influence the evolution of the court” and address US concerns going forward.3 The question of Senate ratification was never reached, however, as on 6 May 2002, the Bush Administration notified the United Nations that it did “not intend to become a party to the treaty” and did not view itself as having any “legal obligations arising from its signature on December 31, 2000.”4 The effect of this action was to effectively “unsign” the Rome Statute. It appears that, technically, the United States remains a signatory to the Rome Statute and is recognized as such. Yet, because the Bush Administration’s 6 May 2002 notification to the United Nations announced that the United States did not intend to ratify the Rome Statute and that it had “no legal obligations arising from its signature,” the practical effect of the notification was to “unsign” the Rome Statute (i.e., withdraw its signatory status).5 Notably, the Bush Administration’s decision to “unsign” the Rome Statute was not the result of a disagreement in the underlying concept of an international court of justice that “could be a useful tool in promoting human rights and holding perpetrators of the worst violations accountable before the world,” rather the Administration unsigned the treaty “to make our objections clear … and so as to not create unwarranted expectations of U.S. involvement in the Court.”6 But what was it about the ICC as an institution that could lead the US to “unsign” the Rome Statute and create the international perception, walking away from its traditional leadership role in promoting the rule of law? And, more importantly, in light of its “shared common goal”7 with the international community regarding the need for an ICC, was the US decision to “unsign” the Rome Statute the best course of action as opposed to remaining a bona fide Rome Statute signatory and then using that perch to influence change within the organization? The answer to this question is straightforward. In light of the US’ superior ability to influence organizational change working closer to the inside of the ICC than the outside, its historical leadership role in promoting compliance with the laws of armed conflict and the creation of international institutions of justice, and the public support within the US for participation with the ICC, it is incumbent upon the US to reengage with the ICC as a bona fide signatory to the Rome Statute. Yet, before it is possible to fully understand the problems at the root of the US’ discontent with the ICC, one must first understand the structure, jurisdiction, and procedural rules of the court itself. Pursuant to the requirements of the Rome Statute, the ICC became operational on 1 July 2002 in the Hague, Netherlands, after achieving its 60th nation-state ratification.8 There are now 123 State Parties to the Rome Statute, with the US being one of 31 countries who have signed, but not ratified the Rome Statute.9 Upon beginning operations, the ICC became the first permanent international judicial body with jurisdiction to prosecute individuals under international law for the offense of genocide, crimes against humanity, and war crimes.10 A fundamental underlying concept of the ICC is its application of the principle of complementarity.11 That is to say, the ICC is designed to operate as a court of last resort which will defer to the domestic court of a nation-state having primary jurisdiction, unless it is determined by the ICC that the nation-state at issue “is unwilling or unable” to carry out the prosecution.12 Yet, it is this “unwilling and unable” language that is at the root of one of the US’ primary objections to the Rome Statute. In particular, the “malleable” nature of the “unwilling and unable” language raises concerns within the US about the ICC’s “nearly unlimited authority to second-guess the prosecutorial discretion” of the US should it ultimately become a State Party to the Rome Statute.”13 Structurally, the ICC consists of four organs: The Presidency, the Office of the Prosecutor, the Registry, and the Judiciary (comprised of an Pre-Trial Division, a Trial Division, and an Appeals Division).14 Critically, the Rome Statute confers jurisdiction to the ICC over crimes committed not only by the nationals of State Parties but also to crimes committed within the territory of State Parties. This latter aspect of ICC jurisdiction is a particular objection point for the US as it creates the potential scenario for the ICC to assume jurisdiction over a national— a nonparty state—from the US for alleged criminality occurring within the territory of a party state; a scenario that is now playing itself out with the recent decision of the ICC Appeals Division to allow a continued formal investigation by the ICC Prosecutor into alleged international law violations committed by US armed forces in Afghanistan.15 Furthermore, cases can be brought before the ICC in one of three ways: a referral by a State Party to the Prosecutor, a referral by the United Nations Security Council to the Prosecutor, or via an investigation initiated sua sponte by the Prosecutor (with authorization from the Pre-Trial Chamber).16 Similar to its concerns about the ICC’s discretion to second-guess US prosecutorial discretion with respect to its own nationals, the US has deep concerns about the ICC Prosecutor’s significant authority under the Rome Statute to initiate investigations on her own initiative, which might “embroil the court in controversy, political decision-making, and confusion.”17 Yet even acknowledging the legitimacy of US concerns regarding the jurisdiction and structure of the ICC, the simple fact remains that the US is better served by reengaging with the ICC as a bona fide signatory, rather than continuing with the alternative approach of modus vivendi that characterized the period between 2002 and 2018,18 or the more hostile approach that is clearly taking shape in the aftermath of the ICC Prosecutor’s efforts to continue her pursuit of a sua sponte investigation into alleged American atrocities in Afghanistan.19 As has already been noted, the US maintains a significant foreign policy interest in the creation of an effective international court of justice that promotes the rule of law. In fact, even with its outspoken and substantial objections to the ICC as constituted, the US has continued to operate behind the scenes to promote the court’s mission in those instances, like the Darfur situation, where it can do so consistent with US law.20 Best of all, the US would seemingly have nothing to lose through reengagement as a signatory; a point best illustrated by US concerns over ICC jurisdiction referenced above. Specifically, in the aftermath of the Bush Administration’s decision to unsign the Rome Statute, Congress passed the American Service-member Protection Act (ASPA), which sought to insulate service-members from potential ICC jurisdiction by, among other things, authorizing “[t]he President … to use all means necessary… to bring about the release of any [service-member]… by, or on behalf of, or at the request of the [ICC].”21 The ongoing ICC Afghanistan investigation demonstrates the ICC’s commitment to potentially exercising its broad jurisdiction against nations from nonparty States like the US, and the ASPA bluntly demonstrates the US unwillingness to stand for such an outcome. Given these realities, the US has nothing to lose through reengagement as a signatory to the ICC, where it might just be able to use its resources and influence to attempt to alter ICC jurisdiction in a manner that alleviates US concerns. In the worst-case scenario, a failure to achieve this end will do nothing more than return the ICC and the US to their current status quo. In addition, reengagement with the ICC as a bona fide signatory allows the US to continue to promote and advance the rule of law in the international community; a cause that is foundational to the heritage of the United States. In fact, history demonstrates that the United States has always “been in the forefront of bringing war criminals to justice.”22 From its early advocacy in ensuring that Nazi war criminals were tried at Nuremburg, to its push for the UN ad-hoc trials addressing atrocities in the former Yugoslavia, Rwanda, and Sierra Leone,23 and culminating most recently with its initial but unsuccessful efforts to shape the language of the Rome Statute, the US has consistently lead the international community in advancing the argument for an effective ICC, albeit one that ensures that its interests are adequately protected from cynical international politics. As John Bellinger has noted, “The U.S.-ICC dispute cries out for a diplomatic resolution.”24 By reaffirming its signatory status, the US could announce to the world its continued commitment to the ideals of human rights, international rule of law, fairness, and justice, and utilize its vast resources to achieve these ends all while “keeping its options open and avoiding actions that would undermine the court and imperil a future US relationship with the institution.”25 Finally, a US recommitment to the ICC in the form of a reaffirmation of its signatory status would be consistent with domestic popular opinion, the trends of recent Presidential administrations, and the more democratic international community. In particular, a 2016 Chicago Council poll of 2,061 Democrats, Republicans, and Independents on Global Affairs revealed that 72 percent of these individuals were in favor of a US approach towards participation in the ICC.26 Moreover, until 2016, although the US trend within Presidential administrations has never reached a level of outright commitment to the ICC due to the structural, procedural, and jurisdiction issues previously noted, prior Administrations nevertheless recognized the ultimate necessity of an effective ICC and were, thus, generally supportive of the ICC where possible.27 Finally, a recommitment to the ICC in the form of a reaffirmation of our signatory status would be in keeping with the views of other western democratic nations who have already signed and ratified the Rome Statute including, but not limited to, all of the member nations of the European Union,28 and two of the five UN Security Council nations (United Kingdom and France).29 Thus, each of these trends supports the conclusion that US reengagement with the ICC in the form of reaffirming our signatory status is consistent with national public opinion, the majority of recent Presidential administrations, and the international consensus of democratic nations. Unfortunately, despite the growing evidence suggesting that the best course of action would be a renewed effort to promote US foreign policy efforts through a more formalized reengagement with the ICC, it appears that the current Administration is pursuing a much more confrontational approach to the ICC in light of the ICC Prosecutor’s decision to continue her pursuit of an investigation into alleged atrocities committed in Afghanistan (which might potentially involve ICC criminal action against American service-members). In fact, with the issuance of his 11 June 2020 “Executive Order on Blocking Property of Certain Persons Associated with the [ICC],” President Trump has now declared a “national emergency” related to threat of any such investigation and imposed sanctions against individuals associated with the ICC.30 However, even in taking this executive action, President Trump also reaffirmed that “[t]he United States remains committed to accountability and the peaceful cultivation of international order.”31 Although the current trend is clearly a movement away from any meaningful engagement with the ICC, perhaps the crack in the door left in President Trump’s executive order leaves hope that the US might reconsider its current approach to the ICC and, instead, reaffirm its signatory status in the future. Clearly, the US’ superior ability to influence organizational change working closer to the inside of the ICC than the outside, its historical leadership role in promoting compliance with the laws of armed conflict and the creation of international institutions of justice, and the public support within the US for participation with the ICC, make such an approach the best course of action for America future in the global community.

#### Domestic courts solve better than international courts – independently, if we kick the CP, these are all solvency deficits towards the aff

Tochigi 12 [Aya Tochigi, researcher at Seton Hall Law, 2012, Removing Head of State Immunity: Utilizing Domestic Courts to Promote Access to Justice,” Seton Hall, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1026&context=student\_scholarship]/Kankee

In fact, although without success, in 2001, the French court tried to use its domestic court to prosecute a head of state; the court indicted Qaddafi, who at the time was arguably the Head of State of Libya, for the bombing of the UTA ariliner.83 The victims of the bombing and an NGO made a complaint to indict Qaddafi to the Chambers Court, as allowed under the French system. 84 The Court eventually granted immunity to Qaddafi and dismissed the indictment because it did not regard terrorism as an international crime.85 This reasoning suggests that the Court might have applied an exception to the head of state immunity if the underlying crime constituted one of the core international crimes as stated in the ICC statute.86 Therefore, although not much state practice exists, enough evidence shows that a head of state should not be able to claim immunity when prosecuted for core international crimes, such as genocide, crimes against humanity and war crimes. III. Domestic Courts Provide the Best Platforms for Victims to Seek Access to Justice in Prosecuting a Head of State, Rather Than International Tribunals Difficulties exist in bringing cases before the international tribunals, such as the ICC. One of the problems is that prosecution starts only well after the commission of the international crime. 87 In contrary, domestic courts have the ability to respond to human rights crisis more quickly because they do not need any UN involvement in establish a new international tribunal, such as ICTY and ICTR. In addition, the procedural and jurisdictional requirements under the international tribunals make it difficult for the victims to have an access to justice, and thereby making domestic courts a more attractive option to seek justice. A. The domestic courts respond to hold crimes accountable more quickly than international tribunals The ICC issued an arrest warrant against Al-Bashir, President of Sudan, in 2009 and in 2010, even though the alleged crime was committed in 2003.88 Similarly, it took five years for the ICC to issue an arrest warrant against Jean-Pierre Bemba Gombo, President and Commander in Chief of the Mouvement de liberation du Congo (MLC) for war crimes and crimes against humanity committed from 2002 to 2003 in Central African Republic.89 Furthermore, the ICC issued an arrest warrant against Abdel Raheem Muhammad Hussein, current Minister of National Defence in Sudan in 2012 for crimes allegedly committed from 2002 to 2003.90 Although the ICC was responsive in issuing arrest warrants against Saif Al-Islam Gaddafi, de Facto Libyan Prime Minister, and Abdullah Al-Senussi, Colonel in the Libyan Armed Forces and current head of the Military Intelligence for crimes allegedly committed in 2010,91 generally the ICC does not promptly hold perpetrators accountable for international crimes. In comparison, in 2000 Belgium issued an indictment of Yerodia, at the time sitting Minister for Foreign Affairs of Congo, for his involvement in publicly encouraging the Congolese to kill Tutsis in 1998.92 Although not many state courts have prosecuted heads of states, considering the slowness of the ICC’s procedure in issuing arrest warrants against state officials for international crimes, we have a necessity in utilizing domestic courts in order to prosecute responsible heads of states. Even with the development of international tribunals, domestic courts have an important role in prosecuting international crimes.93 For example, when Belgium enacted universal jurisdiction statute, which allowed “victims to file complaints… for atrocities committed abroad,” 94 victims filed various complaints against heads of states. 95 In addition, a state court, although his own state, prosecuted Alberto Fujimori, former Peruvian President for atrocities he committed during his incumbency.96 These examples show that domestic courts are equipped with prosecuting heads of state, although this does not reject the existence of international tribunals. International courts are suitable platforms to prosecute heads of states or other state officials because risks with prosecuting a head of state in domestic courts, mentioned below in Part IV, are minimized. Also, the judges serving for the international tribunals include those who have expertise in international law. Therefore, they apply the international law more appropriately than judges in domestic courts do. Nevertheless, we should use domestic courts more often to prosecute heads of states, as Lord Millet in Pinochet case predicts,97 because of accessibility and responsiveness. B. International tribunals’ underlying requirements to bring cases make the domestic courts more attractive because of its simpler structure In order for the ICC to have jurisdiction, the states must be parties to the Rome Statute. 98 As of now, about 60% of the UN member states are state parties to the Rome Statute.99 However, many states including the U.S., India, and China are not parties to the Rome Statute yet.100 Therefore, the ICC has geographically limited jurisdictions as well as other limitations. The ICC obtains jurisdiction over cases when states are unwilling or unable to prosecute the perpetrator of international crimes.101 The UN Security Council may also refer cases under its Chapter VII power.102 However, the requirement of complementarity suggests that the ICC defers to the criminal proceedings in the domestic courts.103 In addition, ad hoc international tribunals, such as ICTY and ICTR, are criticized as costly and time consuming because of its “cumbersome bureaucratic structure.” 104 Furthermore, in establishing such an ad hoc tribunal, if conducted through the Security Council’s Chapter VII power, political issues will be deeply involved because of the permanent members’ veto powers.105 All the requirements with the ICC jurisdiction as well as difficulty in establishing ad hoc tribunals necessitates the international community to rely on domestic courts in order to prosecute responsible heads of states for international crimes. Therefore, in prosecuting heads of states for international crimes, the international community should not use only the international tribunals, but utilize state courts because they have the ability to respond to cases more quickly and have simpler jurisdictional requirements than the international tribunals. IV. Possible Risks in Removing the Distinction between Functional and Personal Immunity for International Crimes, thereby Making It Possible to Prosecute the Incumbent Head of State

#### Increasing weapons monitoring measures reduces US complicity in other countries’ war crimes

DAWN 23 [Democracy for the Arab World Now, nonprofit organization regarding US Mideast policy, 10-15-2023, "U.S.: Monitor and Restrict Use of U.S. Weapons by Israel to Avoid Complicity in War Crimes", DAWN, https://dawnmena.org/u-s-monitor-and-restrict-use-of-u-s-weapons-by-israel-to-avoid-complicity-in-war-crimes/]/Kankee

U.S. law requires the United States to monitor and ensure the weapons and munitions it provides to Israel and ensure they are not used to commit war crimes in Gaza, Democracy for the Arab World Now (DAWN) reminded Secretary of State Antony Blinken and Secretary of Defense Lloyd J. Austin III in a letter sent Friday, October 13, 2023. Failure to comply with end-use monitoring requirements not only breaches U.S. laws but also could expose U.S. officials to prosecution by the International Criminal Court (ICC) for aiding and abetting war crimes, DAWN warned. In a separate letter to ICC Prosecutor Karim Khan on Friday, DAWN asked the Prosecutor urgently to issue a public statement reminding the parties to the conflict of the ongoing investigation there and send an investigative team to the Gaza region of Palestine to document and investigate potential crimes under the Rome Statute. "If U.S. officials don't care about Palestinian civilians facing atrocities using U.S. weapons, perhaps they will care a bit more about their own individual criminal liability for aiding Israel in carrying out these atrocities," said Sarah Leah Whitson, executive director of DAWN. "The American people never signed up to help Israel commit war crimes against defenseless civilians with taxpayer funded bombs and artillery." The Arms Export Control Act (AECA) and the Foreign Assistance Act (FAA) mandate that the U.S. Department of State and Department of Defense establish end-use monitoring protocols for arms transfers. These measures aim to ensure that the weapons are used responsibly and in compliance with international law. Despite these legal requirements, the U.S. has historically been lax in enforcing these laws regarding arms provided to Israel. Members of Congress have recently called for strengthened end-use monitoring and financial tracking of U.S. aid to Israel. Over $3.3 billion dollars in weapons transfers and weapons financing to Israel remain opaque, with limited information and monitoring. In addition, the Biden administration's new Civilian Harm Incident Response Guidance (CHIRG) program requires U.S. officials to investigate "civilian harm by partner governments suspected of using U.S. weapons and recommend actions that could include suspension of arms sales." DAWN urged Secretary Blinken to investigate the civilian harms of Israel's use of U.S. arms and munitions in Gaza under the CHIRG program and to confirm that such monitoring is already taking place. U.S. officials could face individual criminal liability for aiding and abetting Israel with weapons used in the commission of crimes against humanity and war crimes under the Rome Statute, in light of the pending ICC investigation in Palestine, which covers all crimes committed since June 13, 2014. Article 25(3)(b) of the Rome Statute clearly states that "providing the means for [the] commission" of a crime within the jurisdiction of the court, which Gaza is, shall be criminally responsible and liable for punishment in the ICC. Although the U.S. is not a party to the Rome Statute or a state party of the court, U.S. nationals would nevertheless be subject to the jurisdiction of the court where the court has jurisdiction and is conducting an investigation, such as Gaza. Evidence that the U.S. has monitored the use of its weapons by Israel, verified they have not been used in criminal attacks on Gaza, and suspended new arms transfers in the face of evidence of misuse of its weapons could serve as a defense to criminal charges against U.S. officials by the ICC. Although the ICC formally announced its investigation into crimes in Palestine in March 2021, it has never sent an official investigatory mission to Palestine or Israel. DAWN urged the ICC Prosecutor Khan to urgently remind the parties to the conflict of his ongoing investigation into Palestine to deter the commission of crimes and to send an investigative team there to document any crimes.

### Contention 5: Unilateral CP (UNCLOS)

#### The United States ought to:

#### Threaten to militarily enforce rulings and norms enshrined in the UN Convention on the Law of the Sea, using force upon repeated violations

#### Substantially increase naval spending in the South China Sea

#### Increase cooperation and capability building measures with Southeast Asian allies, including Republic of the Philippines and Japan

#### Ratification doesn’t matter – only force reliable causes China to follow UNCLOS, not the law itself

Roy 22 [Denny Roy, Senior Fellow at the East-West Center, 9-10-2022, "With U.S. Support, UNCLOS Helps Defend Southeast Asia", National Interest, https://nationalinterest.org/feature/us-support-unclos-helps-defend-southeast-asia-204654]/Kankee

Should Beijing attain international acquiescence to these acts of encroachment, China will have taken a large step toward sub-regional hegemony. And bolder Chinese assertions of ownership would likely follow, possibly including selective restrictions on the commercial shipping of countries out of favor with Beijing that rely on the sea lanes passing through the South China Sea. The provisions laid out in UNCLOS are a bulwark against that outcome. Even with U.S. support for UNCLOS, the treaty’s ability to restrain PRC ambitions has been limited. Without U.S. support, however, UNCLOS would be no more than a collection of rules and principles from which Beijing would selectively quote bits that happen to align with the PRC’s agenda, while disregarding the rest. The United States has an unmatched capability to counter Chinese encroachment in the South China Sea by organizing security cooperation in the sub-region, conducting military exercises, and carrying out “freedom of navigation” operations that demonstrate rejection of unlawful PRC claims through transits by U.S. Navy vessels. Unusually forceful U.S. signaling might have dissuaded Beijing from building a military base on disputed Scarborough Shoal, for example. The most persuasive evidence that Beijing sees U.S. support for UNCLOS as a substantial impediment to PRC plans for a Southeast Asian sphere of influence is Beijing’s reaction to that support. PRC officials and government-controlled media have consistently asserted that the United States has no standing to invoke UNCLOS because Washington has not ratified the treaty. Some non-PRC observers, as well, have unfortunately repeated the argument that Washington is “hypocritical” or “lacks credibility” when it calls for adhering to UNCLOS. This argument would be valid only if the United States did not itself follow UNCLOS rules. But although the U.S. Congress has not ratified the treaty, the U.S. government recognizes UNCLOS as part of customary international law and obeys it accordingly. As Gregory B. Poling points out, “for every American involved in maritime affairs, whether naval, commercial, or scientific, UNCLOS is effectively the law of the land.” Moreover, it is highly doubtful that, as some claim, the United States ratifying UNCLOS would to any significant degree smooth over Sino-U.S. tensions in the region. Washington would still be, from China’s point of view, an adversary opposing Beijing’s preferences. Even without the non-ratification argument, Beijing would continue to assert that the United States lacks standing in the South China Sea dispute because Washington is not a claimant. PRC commentators characterize U.S. involvement in the South China Sea disputes as “stirring up trouble.” More accurately, the United States provides backing for smaller claimants in the territorial disputes that have the Law of the Sea on their side, giving them an alternative to submitting to PRC intimidation. In his remarks on Sept. 3, Chinese vice foreign minister Xie Feng gave three reasons why the United States “is in no position whatsoever to cite UNCLOS to accuse others.” First, Xie said, the United States has refused to ratify UNCLOS because of its unwillingness to accept certain of the treaty’s obligations, such as sharing resources from the seabed with developing countries. That is partly true, but irrelevant because, again, the United States follows the UNCLOS guidelines that apply to the South China Sea territorial disputes and on which Washington has called China out. Second, Xie said Washington upholds UNCLOS “out of ulterior motives,” namely to use it “as a tool to smear, contain and suppress other countries.” Chinese diplomats routinely characterize U.S. policy toward China as “containment”—ignoring the massive flow of U.S. wealth and technology into China—and reflexively dismiss any criticism of PRC behavior as a “smear,” a manifestation of the victim mentality cultivated by the Chinese Communist Party. Finally, Xie asserted that America is itself in violation of international law “by flexing its military muscle to challenge other countries’ claims.” This argument turns reality on its head. U.S. freedom of navigation transits are legal under UNCLOS guidelines and pointedly challenge Chinese claims that would unlawfully restrict what UNCLOS permits. The United States similarly pushes back against PRC encroachment in the Taiwan Strait in contravention of UNCLOS guidelines. Beijing claims that the entire Taiwan Strait is covered by territorial seas (out to a limit of twelve nautical miles from the coast) and an EEZ. UNCLOS allows an EEZ of up to 200 miles, but also stipulates that all states enjoy freedom of navigation and overflight (including by military ships and aircraft) within a coastal state’s EEZ provided there is no poaching of resources. Beijing not only objects to UNCLOS-approved passages by U.S. ships and aircraft through and over the Taiwan Strait outside of territorial waters, but furthermore, the PRC itself sends uninvited military vessels into the EEZs of other countries such as the United States, Japan, and Australia. A body of international law that has widespread acceptance—164 countries have ratified UNCLOS—can have a constraining effect on PRC behavior. Beijing often ignores the Law of the Sea, most egregiously the landmark 2016 Permanent Court of Arbitration decision that went against China. But Beijing also wants to be known as a law-abiding government. Hence China claims it “earnestly observes the Convention in a rigid and responsible manner.” With this potential leverage, UNCLOS is a natural rallying point for the United States, which wants to maintain a liberal regional order, and Southeast Asian countries trying to preserve their autonomy.

#### Deterrence is key – China is revisionist and ignores international agreements

Weiss and Beckley 24 [Simon Weiss, researcher that holds a bachelor’s degree in international relations from Tufts University, and Michael Beckley, associate professor of political science at Tufts University, nonresident senior fellow at the American Enterprise Institute, and Asia director at the Foreign Policy Research Institute, 7-23-2024, "Countering Chinese Aggression in the South China Sea", War on the Rocks, https://warontherocks.com/2024/07/countering-chinese-aggression-in-the-south-china-sea/]/Kankee

Recent skirmishes near Second Thomas Shoal, an obscure reef about 100 miles west of the Philippines’ Palawan Island, have brought this issue into sharp focus. The Philippines maintains a precarious military presence there, using a rusty shipwreck as a makeshift base for a handful of marines. An international court ruled in 2016 that the area lies within the Philippines’ exclusive economic zone. But China rejected the ruling and has repeatedly attempted to block resupply missions to the outpost by blinding Philippine crew members with high-powered lasers, ramming supply ships, and blasting them with water cannons. These aggressive acts, and dozens of others going back to 2012, have not been primarily defensive reactions to foreign provocations, as China claims. Instead, they appear to be part of a premeditated assault on the soft underbelly of the U.S. alliance system, an attempt to undermine the credibility of U.S. security guarantees throughout the region by bludgeoning Philippine forces with impunity. The Rodrigo Duterte administration (2016–2022) tried to shelve its territorial disputes with Beijing at various times and threatened to scuttle the U.S.-Philippine alliance. Yet Chinese military coercion toward the Philippines actually increased during Duterte’s term in office and was more intense than the coercion China directed at Vietnam — despite the fact that Hanoi aggressively expanded its military presence in the South China Sea. China also has harassed the Philippines more frequently than Japan, implying that China’s preferred target is a weak and floundering U.S. alliance rather than a strong one. In sum, a comprehensive account of Chinese military coercion since 2012 suggests that Beijing’s behavior should be confronted rather than accommodated to avoid further escalation. A History of Violence China engaged in military coercion, ranging from seizing civilian vessels in contested waters to occupying new territory with military force, at least 132 times from 2012 to 2022 — a frequency roughly four times greater than previously estimated by scholars and an order of magnitude greater than any other country in the region. China has begun a new physical confrontation with its neighbors once per month on average, using all manner of hostile acts, including firing warning shots near foreign vessels or blocking their passage. China also paired this harassment with a dramatic expansion of its military presence across the South China Sea, including the construction of seven military bases atop artificial islands. China claims it is simply defending its territory against foreign encroachments, engaging in what some Western analysts have called “reactive assertiveness.” In this view, which seemed plausible to some Sinologists in the early 2010s, China’s top leaders generally desire to avoid hostilities and employ coercion mainly in response to provocations from neighboring countries and the United States. The implication is that China might remain at peace, if other countries would cease their threatening and expansionist behavior. The new data, however, suggests that this view is outdated, if it were ever true. Since at least 2012, China’s behavior in the South China Sea and East China Sea could be more accurately described as unprovoked aggression. Only 12 percent of China’s coercive acts were preceded by any sort of perceived hostile foreign move, such as when then Speaker of the House Nancy Pelosi visited Taiwan in August of 2022. The remaining 88 percent of Chinese coercive acts were opportunistic, employed against vulnerable targets at times and in places of China’s choosing. More often than not, that place was the Philippines’ exclusive economic zone, a fact that underscores the grand geopolitical ambitions behind China’s fierce contestation of uninhabited rocks. Targeting the Philippines A decrepit ship in the Spratly Islands might seem an unlikely place for the world’s two most powerful countries to face off. But the United States has extended security guarantees to Philippine forces, aircraft, and public vessels operating in the South China Sea, presumably including the BRP Sierra Madre, which the Philippines deliberately ran aground on Second Thomas Shoal in 1999 — and which China has recently attempted to blockade. What might otherwise be a local territorial dispute has become a test of whether the United States will defend its allies, and for Beijing that seems to be the point. Coercing the Philippines enables China to confront the United States with a dilemma: defend a weak and shaky ally over its territorial claims or stand aside as China expands its control of the South China Sea and undermines U.S. alliance commitments. China could wipe out the two frigates and handful of corvettes that comprise the Philippine Navy in a single skirmish, so there is little risk for Beijing in shoving Philippine forces around — and potentially much to gain. The U.S.-Philippine alliance is a vital component of the U.S. defense perimeter in Asia, providing U.S. forces with their only major bases within unrefueled combat range of the Taiwan Strait and South China Sea, besides the two vulnerable bases on Okinawa, Japan that China has targeted with dozens of missiles. Yet the U.S.-Philippine alliance has often been tenuous since the Cold War, and Beijing has good reason to question how vigorously the United States would defend Filipino possessions in the South China Sea. “Would you go to war over Scarborough Shoals?” the chairman of the Joint Chiefs of Staff was overheard saying in 2016. Every time China batters Philippine forces unopposed, it shows observers worldwide that America’s answer is “no.” In addition, the Philippines is a symbolically important target for China. In 2016, Manila took Beijing to the Permanent Court of Arbitration in the Hague and won, with the tribunal ruling that China’s South China Sea claims were null and void. In response, China declared that it would not be bound by the rulings of a “puppet” court half a world away. Ejecting Filipino forces from their isolated South China Sea outposts enables China to back up that declaration in dramatic fashion and demonstrate resolve to consolidate its territorial claims throughout the region. Perhaps for these reasons, China seems to be singling out the Philippines for special abuse. The contrast with Vietnam is striking. Over the past decade, Vietnam has aggressively contested Chinese territorial claims, openly challenging the legitimacy of China’s self-proclaimed Nine-Dash Line, such as by sending armed naval assets to counter the Chinese Coast Guard during the 2014 oil-rig standoff. Yet the Philippines has faced far more Chinese coercion since 2012 measured both by the duration and intensity of the confrontations. The Philippines is the only country in the region to have had territory permanently seized by China during this period, as occurred following the Scarborough Shoal incident in 2012. Dozens of Philippine fishing vessels have been sunk, robbed, or turned away from their traditional fishing grounds, thousands of Chinese flagged maritime-militia vessels have illegally operated in waters belonging to the Philippines, and nearly every military mission conducted by the Philippine navy has been met by resistance from Chinese forces. The Philippines also has experienced more than twice the amount of Chinese coercion as has Japan — China’s hated historical enemy — and most of China’s confrontations with Japan in recent years have been non-kinetic, involving, for example, Chinese military flyovers of Japanese airspace rather than the ship-ramming, territorial seizure, and other violent punishment that Beijing has meted out to Manila. Japan has strengthened its military forces and alliance with the United States in recent years and is much more militarily powerful than the Philippines. Those factors may explain why Beijing has focused more of its animus on Manila than Tokyo. Whereas the Philippines sought to appease China during the 2010s, Japan increased its joint military exercises with the United States, expanded the rotational presence of U.S. forces in Japan, and enhanced their integrated air and missile defense systems — all while reviving the Quadrilateral Security Dialogue as a not-so-subtle anti-China alliance. These steps signaled to Beijing that aggressive actions, such as the frequent confrontations between Chinese and Japanese forces near the Senkaku Islands in the early 2010s, will inspire a robust strategic response from Tokyo. Duterte’s Failed Appeasement China’s targeting of the Philippines is especially notable because Manila tried to placate China, off and on, from 2016 to 2022. Duterte chose not to enforce the 2016 arbitration ruling on the South China Sea, opting instead for bilateral engagement and joint development discussions with China. His administration prioritized economic cooperation, securing billions in investment pledges for infrastructure projects by linking his “Build, Build, Build” program with China’s Belt and Road Initiative. Duterte made multiple visits to China, emphasizing collaboration and downplaying territorial disputes. He frequently praised China’s support, once stating, “I simply love Xi Jinping,” and highlighted the benefits of Chinese investment for the Philippines. Simultaneously, Duterte’s stance towards the United States was characterized by frequent criticism and actions that strained bilateral relations. He insulted then-President Barack Obama with derogatory remarks, calling him a “son of a whore,” and expressed a desire for the U.S. to “go to hell.” Duterte also threatened to terminate the Visiting Forces Agreement, which governs the presence of U.S. troops in the Philippines, declaring, “Bye-bye, America” and hinting at seeking arms from Russia and China instead. While he ultimately suspended and then reinstated the agreement, the threat highlighted his intent to distance the Philippines from its longstanding military ally. Duterte also reduced the scope of joint military exercises with the United States, sought to diversify military procurement by exploring arms purchases from China and Russia, and suspended joint patrols in the South China Sea. Despite Duterte’s rhetoric and actions favoring China, his policy of appeasement failed to reduce hostilities. In fact, Beijing instead dialed up its coercion of the Philippines during his administration, increasing the yearly rate of incursions into the Philippines’ exclusive economic zone. In addition, this time saw the emergence of new areas of contestation as China deployed ships around the Second Thomas Shoal, Whitsun Reef, Sabina Shoal, and Thitu Island — all of which are located within the Philippines exclusive economic zone — and regularly harassed Filipino fisherman. Duterte’s failed gambit shouldn’t have come as a surprise. In 2012, the United States attempted to mollify China on behalf of the Philippines by brokering an agreement for both countries to withdraw their forces from a contested area near the Scarborough Shoal. The Philippines respected the arrangement and removed its ships from the area. But the Chinese navy quickly returned, and has maintained de facto sovereignty over it ever since. Scholars found that due to this lackluster response, the Chinese government determined that the United States was unlikely to follow up on its redlines towards these uninhabited territories and saw it as a green light to expand operations across the South China Sea. Implications China’s actions in the South China Sea seem to weaken U.S. alliances by targeting the most vulnerable links, primarily the Philippines. The empirical record since 2012 suggests that avoiding confrontations and appeasing China does not guarantee a reduction in hostilities and may simply invite more coercion. By contrast, strengthening military capabilities and alliance ties can potentially deter further Chinese encroachments, as the bolstering of the U.S.-Japanese alliance seems to have done in the East China Sea. Currently, the U.S.-Philippine alliance is in the worst of all positions: provocative enough to arouse China’s ire, but too weak to deter China’s rampant use of maritime coercion. Since 2022, Manila and Washington have started to rectify their vulnerabilities by resuming military exercises, preparing additional bases for potential use by U.S. forces, and transferring military equipment from the United States to Philippine forces, including reconnaissance drones, coastal patrol vessels, and radar systems. The United States also has temporarily deployed a mid-range missile system in the northern Philippines for annual joint military exercises. Prominent U.S. think tanks are proposing ways to enhance the Philippines’ maritime domain awareness and coast guard capabilities — for example, by transferring advanced surveillance technologies, including unmanned systems, and non-lethal capabilities such as water cannons, laser dazzlers, and long-range acoustic devices — so that Manila can impose costs on Beijing’s aggressive tactics without requiring the United States to answer the difficult question of which peripheral territories it is willing to defend itself. Even if these efforts come to fruition, however, the U.S.-Philippine alliance will remain vulnerable because Manila’s military and coast guard are extremely weak, a problem that won’t be solved for years, if ever. Bolstering the alliance thus will require the United States to become more directly involved in confronting Chinese coercion in the South China Sea. The United States could, for example, convoy Philippine resupply missions to the BRP Sierra Madre at Second Thomas Shoal or simply use U.S. ships to resupply the base there. These efforts could be backed up by multinational patrols involving other regional allies such as Japan and Australia. Bullying the Philippines might not look so attractive to Xi if coercion consistently yielded a tightening ring of allied security cooperation. These steps obviously carry risks for U.S. forces. The agreement this past weekend, will purportedly allow the Philippines to temporarily conduct resupply missions to the BRP Sierra Madre without militarized interference, while China maintains its claim that the atoll is firmly within Chinese territorial water. As the text of this agreement has yet to be made public, we cannot firmly say how these gains were won, but it is possible that the recent strengthening of the U.S.-Philippines alliance, or even explicit offers from the United States to assist in defending the atoll have caused China to reconsider its aggressive stance. However, agreements with China built on détente have historically failed to achieve their goals. If recent history is any guide, the best way to avoid a further escalation of the conflict in the South China Sea is to make clear that Beijing cannot conquer the Philippines’ exclusive economic zone at anything like an acceptable cost.

#### China exploits UNCLOS strategically to its own benefit and cares not for the law itself – Chinese critiques of US hypocrisy are moralistic grandstanding, not actual concerns about treaty integrity

Cody 22 [Stephen Cody, Assistant Professor of Law at Suffolk University Law School with a PhD and J.D. from UC Berkeley, 6-1-2022 Dark Law on the South China Sea,” Chicago Journal of International Law, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1823&context=cjil]/Kankee

However, these territorial rights and offshore boundaries often depend on the legal status of maritime features. An island, for example, can support the 12 nautical mile territorial sea and the 200 nautical mile EEZ for its country. But a feature achieves the legal status of an “island” only if, in its natural condition, it can sustain either a stable long-term community of people or an economic activity that is not dependent on outside resources or purely extractive in nature.31 This legal status distinction matters a great deal because artificial islands or other structures built on reefs do not satisfy the UNCLOS definition of an island or establish territorial seas. It has also led to national claims and counterclaims characterized by Tommy Koh, former President of UNCLOS III, as: “My rock is an island, and your island is only a rock.”32 For decades, China has violated maritime boundaries established by UNCLOS in the South China Sea.33 In 1988, China unlawfully occupied several reefs in the Spratly Islands. It has since built harbors and military buildings there and even added an airstrip and surface-to-air missile platforms.34 Several states— including Brunei, Malaysia, the Philippines, and Vietnam—continue to dispute Chinese claims to the Spratly Islands.35 Beyond territorial disputes, littoral states have expressed concerns about Chinese sea lane restrictions, military maneuvers, and use of maritime militia.36 Regional negotiations have established some baseline understandings and resulted in a code of conduct declaration (2002), guidelines for the implementation of the declaration (2011), a framework for the code of conduct (2017), and draft text (2018).37 However, these efforts have not produced a binding agreement. This may be partly due to Beijing’s backchannel economic statecraft and coercive diplomacy, particularly its reliance on bilateral agreements to sidestep UNCLOS compliance.38 Few states have directly challenged China under international law. The Philippines, however, initiated an arbitration against China over noncompliance with UNCLOS and other maritime conflicts. On July 12, 2016, the Permanent Court of Arbitration (PCA) announced a unanimous award in favor of the Philippines. 39 In a nearly 500-page ruling, the PCA dismissed as invalid China’s claims to historic rights by way of its nine-dash line.40 The ruling also found that China had violated the Philippines’ sovereign rights by interfering with fishing and resource exploration and aggravated other disputes through its dredging and construction of artificial islands. Finally, the PCA clarified the characteristics of “islands,” effectively eliminating China’s claim that its artificial islands generate legal entitlements under UNCLOS. The court declared that features in the Spratly Islands failed to generate a territorial claim for China.41 Still, the PCA acknowledged that it does not have the authority to establish territorial sovereign boundaries or maritime delimitation.42 Although the PCA award in the Philippines’ favor can be viewed as a victory of international law, the ruling also shows the weakness of UNCLOS enforcement against major powers. The PCA was able to move forward with China in absentia by inviting comment on specific substantive and procedural issues and exercising jurisdiction based on public statements, a position paper, and Chinese communications with tribunal officials. 43 In this way, the PCA established that a state’s refusal to participate does not necessarily bar UNCLOS proceedings.44 But China’s refusal to participate in the tribunal’s constitution or to submit pleadings demonstrates how powerful nation-states can selectively engage with international law. Even as it documented Chinese violations, the PCA award did little to dissuade Beijing from continuing island construction or from expanding Chinese military and maritime militia patrols. China continues to cite vague national security laws to legitimate South China Sea actions that violate UNCLOS and international law.

III. THE RISE OF INTERNATIONAL DARK LAW Authoritarian states often participate in international institutions and obey international law to facilitate their interstate interests. 45 But autocrats also brandish law to cloak illegality.46 Dark law describes the process by which legalistic autocrats exploit statutory vagueness and a lack of judicial review to take actions that are, in fact, counter to the rule of law.47 Dark law is a relational concept that describes the convergence of national security lawmaking, judicial deference, and autocratic politics. However, beyond masking autocratic illegality within a nation state, dark law can shape international law and establish configurations of legislative-judicial-political relations that aid the entrenchment of authoritarian international law. Dark law as an analytic category seeks to move beyond static conceptions of national security law and toward recognition of national security lawmaking as a series of dynamic relationships that unfold as part of transnational politics. In this sense, dark law and authoritarian international law draw attention to authoritarian logics and relationships that direct state power to enhance domestic social control and promote global models of authoritarianism. Autocratic leaders pragmatically cooperate with other states, in both democracies and nondemocracies, to achieve common goals and produce public goods unavailable through domestic channels.48 Authoritarian international law, like other forms of international law, relies on relationships between diplomats and other state officials to construct rules, principles, and norms. Through interpersonal interactions and exchanges in domestic forums and international organizations, authoritarian officials can create new kinds of relationships that shift transnational normative understandings and expectations.49 From a relational perspective, international law is the embodiment of interpersonal processes and interactions and is experienced through the constraints and directionality these social relations give to lawmaking and state action. Rather than view international law as a fixed body of substantive agreements and rules, relational approaches see it as historically contingent processes between state officials and other transnational actors. Networks of relations constitute, sustain, and transform the ‘morality’ of international law. Durable international law relations transcend specific social interactions to create enduring norms, political ideologies, state commitments, and customary practice. But, at the same time, individual actions in particular situations shape these evolving relational norms. Both immediate decisions of state officials and broader entanglements and interdependencies condition the development of international law. Authoritarian regimes can promote common interests, like reasserting norms of noninterference or redefining obligations under international law, and simultaneously develop new terms to facilitate unlawful or illiberal activities.50 For example, authoritarian leaders commonly repurpose human rights by placing emphasis on economic and cultural rights in order to weaken enforcement for violations of civil and political rights worldwide.51 Authoritarian regimes have other general traits as well. Autocrats rarely relinquish sovereignty or submit to third-party adjudication in international tribunals or arbitration courts.52 Also, because authoritarians focus primarily on political survival, international law will tend to be viewed as a mechanism to reinforce internal state control.53 However, even as authoritarians tactically and sometimes reluctantly engage with international law, this engagement constructs new layers of international law that can strengthen the stability of authoritarian regimes and enhance illiberalism. 54 Dark law and authoritarian international law offer complementary models of undemocratic legal change that are layered, dynamic, and historically contingent. They are also related concepts. Dark law enhances and entrenches authoritarian international law. Legalistic autocrats not only repurpose vague security laws to circumvent checks on their authority but also manage to reconstitute forms of international law through that process. Dark law reconstructs transnational relations and interactions in ways that reinforce authoritarian norms and strengthen illiberal institutions. National security lawmaking in authoritarian regimes often cultivates legal grey zones that transform the normative content of international law more generally.55 If democratic backsliding continues and the balance of power shifts to favor authoritarians, vague and overbroad security laws and weak or non-existent judicial review will converge to empower autocrats through dark law and authoritarian international law. IV. OCEANIC IMPUNITY China operates with virtual impunity on the South China Sea partly by employing dark law to challenge weak forms of international law.57 Maritime patrols authorized by law repeatedly target civilian fishing vessels and interfere with resupplies of food and water to foreign sailors and marines in violation of UNCLOS. 58 Chinese vessels even ram foreign ships to deter rival coastal states from exercising control over fishing grounds or strategic waterways.59 This all occurs without serious economic or political consequences for China, which continues to organize an expansive network of civilian fishing vessels to assist with its strongarm diplomacy, particularly against Japan, Vietnam, and the Philippines.60 These maritime civilian militia, sometimes called “the little blue men,” receive substantial support and training from the Chinese government and frequently coordinate their activities with the People’s Liberation Army Navy (PLAN).61 Often equipped with advanced communications and radar systems, the militia vessels enforce China’s unilateral fishing bans and provide logistical support to forces occupying artificial island outposts.62 These irregular maritime forces assist in the assertion of China’s sovereign control of disputed islands, reefs, and seas while avoiding direct military-to-military confrontations. 63 Generally, military rules of engagement prohibit the U.S. Navy and other foreign warships from pursuing counter-measures against these civilian vessels.64

### Contention 6: Circumvention (General)

#### Trump implodes UN organizations effectiveness AND US international law credibility – both kill aff solvency

Keaten 24 [Jamey Keaten, chief Associated Press reporter in Geneva, 11-15-2024, "The United Nations faces uncertainty as Trump returns to US presidency", AP News, https://apnews.com/article/united-nations-trump-wto-health-guterres-tedros-f2cf2b72f0efa4b66d12ce211a78a9e7]/Kankee

The United Nations and other international organizations are bracing for four more years of Donald Trump, who famously tweeted before becoming president the first time that the 193-member U.N. was “just a club for people to get together, talk and have a good time.” In his first term, Trump suspended funding for the U.N. health and family planning agencies, withdrew from its cultural organization and top human rights body, and jacked up tariffs on China and even longtime U.S. allies by flaunting the World Trade Organization’s rulebook. The United States is the biggest single donor to the United Nations, paying 22% of its regular budget. Trump’s take this time on the world body began taking shape this week with his choice of Republican Rep. Elise Stefanik of New York for U.S. ambassador to the U.N. Stefanik, the fourth-ranking House member, called last month for a “complete reassessment” of U.S. funding for the United Nations and urged a halt to support for its agency for Palestinian refugees, or UNRWA. President Joe Biden paused the funding after UNRWA fired several staffers in Gaza suspected of taking part in the Oct. 7, 2023, attack led by Hamas. Here’s a look at what Trump 2.0 could mean for global organizations: ‘A theater’ for a conservative agenda Speculation about Trump’s future policies has already become a parlor game among wags in Washington and beyond, and reading the signals on issues important to the U.N. isn’t always easy. For example, Trump once called climate change a hoax and has supported the fossil fuel industry but has sidled up to the environmentally minded Elon Musk. His first administration funded breakneck efforts to find a COVID-19 vaccine, but he has allied with anti-vaccine activist Robert F. Kennedy Jr. “The funny thing is that Trump does not really have a fixed view of the U.N.,” said Richard Gowan, U.N. director for the International Crisis Group think tank. Gowan expects that Trump won’t view the world body “as a place to transact serious political business but will instead exploit it as a theater to pursue a conservative global social agenda.” There are clues from his first term. Trump pulled the U.S. out of the 2015 Paris climate accord and is likely to do it again after President Joe Biden rejoined. Trump also had the U.S. leave the cultural and educational agency UNESCO and the U.N.-backed Human Rights Council, claiming they were biased against Israel. Biden went back to both before recently opting not to seek a second consecutive term on the council. Trump cut funding for the U.N. population agency for reproductive health services, claiming it was funding abortions. UNFPA says it doesn’t take a position on abortion rights, and the U.S. rejoined. He had no interest in multilateralism — countries working together to address global challenges — in his first term. U.N. Secretary-General Antonio Guterres calls it “the cornerstone” of the United Nations. A new ‘Cold War’ world? The world is a different place than when Trump bellowed “America First” while taking office in 2017: Wars have broken out in the Middle East, Ukraine and Sudan. North Korea’s nuclear arsenal has grown, and so have fears about Iran’s rapidly advancing atomic program. The U.N. Security Council — more deeply divided among its veto-wielding permanent members Britain, China, France, Russia and the U.S. — has made no progress in resolving those issues. Respect for international law in war zones and hotspots worldwide is in shreds. “It’s really back to Cold War days,” said John Bolton, a former national security adviser at Trump’s White House. He said Russia and China are “flying cover” for countries like Iran, which has stirred instability in the Middle East, and North Korea, which has helped Russia in its war in Ukraine. There’s little chance of deals on proliferation of weapons of mass destruction or resolving conflicts involving Russia or China at the council, he said. Bolton, a former U.S. ambassador to the U.N., expects Stefanik will have a “tougher time” because of the range of issues facing the Security Council. “What had been fairly sleepy during the first Trump term is not going to be sleepy at all in the second Trump term,” he said. The Security Council has been impotent on Ukraine since Russia’s February 2022 invasion because of Russia’s veto power. And it has failed to adopt a resolution with teeth demanding a cease-fire in Gaza because of U.S. support for Israel. The Crisis Group’s Gowan said Republicans in Congress are “furious” about U.N. criticisms of Israeli policies in Gaza and he expects them to urge Trump to “impose severe budget cuts on the U.N., and he will do so to satisfy his base.” Possible impact on U.N. work The day-to-day aid work of global institutions also faces uncertainty. In Geneva, home to many U.N. organizations focusing on issues like human rights, migration, telecommunications and weather, some diplomats advise wait-and-see caution and say Trump generally maintained humanitarian aid funding in his first term. Trade was a different matter. Trump bypassed World Trade Organization rules, imposing tariffs on steel and other goods from allies and rivals alike. Making good on his new threats, like imposing 60% tariffs on goods from China, could upend global trade. Other ideological standoffs could await, though the international architecture has some built-in protections and momentum. In a veiled reference to Trump’s victory at the U.N. climate conference in Azerbaijan, Guterres said the “clean energy revolution is here. No group, no business, no government can stop it.” Allison Chatrchyan, a climate change researcher at the AI-Climate Institute at Cornell University, said global progress in addressing climate change “has been plodding along slowly” thanks to the Paris accord and the U.N. convention on climate change, but Trump’s election “will certainly create a sonic wave through the system.” “It is highly likely that President Trump will again pull the United States out of the Paris agreement,” though it could only take place after a year under the treaty’s rules, wrote Chatrchyan in an email. “United States leadership, which is sorely needed, will dissipate.” During COVID-19, when millions of people worldwide were getting sick and dying, Trump lambasted the World Health Organization and suspended funding. Trump’s second term won’t necessarily resemble the first, said Gian Luca Burci, a former WHO legal counsel. “It may be more extreme, but it may be also more strategic because Trump has learned the system he didn’t really know in the first term.” If the U.S. leaves WHO, that “opens the whole Pandora’s box, — by stripping the agency of both funding and needed technical expertise — said Burci, a visiting professor of international law at Geneva’s Graduate Institute. “The whole organization is holding its breath — for many reasons.” But both Gowan and Bolton agree there is one U.N. event Trump is unlikely to miss: the annual gathering of world leaders at the General Assembly, where he has reveled in the global spotlight.

#### New UN ambassador blows up the UN

Larison 24 [Daniel Larison, regular columnist at Responsible Statecraft and a former senior editor at The American Conservative magazine with a Ph.D. in History from the University of Chicago, 11-11-2024, "Trump Taps Pro-War Neocon Elise Stefanik as UN Ambassador", Truthout, https://truthout.org/articles/trump-taps-pro-war-neocon-elise-stefanik-as-un-ambassador/]/Kankee

The nomination is one of the first major appointments Trump has made since winning the election last week. Stefanik has been a staunch Trump loyalist going back to his first term in office, and she has been one of the most vocal supporters of the war in Gaza over the last year. Different factions in the Republican Party have been competing over the direction of Trump’s foreign policy, and the choice of Stefanik appears to be a clear win for hardline hawks. Putting Stefanik at the UN seems to be Trump’s signal to the world that he doesn’t necessarily care how isolated the U.S. and Israel have become because of the wars in Gaza and Lebanon. First elected in 2014, Rep. Stefanik, 40, has been considered a rising star in the Republican Party. Before being elected to Congress, she worked at the hardline Foundation for Defense of Democracies think tank, and she worked at the extremely hawkish Foreign Policy Initiative that was co-founded by Bill Kristol and Robert Kagan. Then she gained national notice when she defended Trump during his first impeachment, after which she became one of his most reliable supporters. Trump’s decision to send her to the UN is clearly a reward for her years of loyalty. Stefanik has no background in international relations or diplomacy that would prepare her for representing the United States at the international body, but then the point of sending her is probably to pick fights with other states rather than trying to resolve them. Republican presidents have appointed hostile ambassadors to the United Nations before. Reagan gave the job to Jeane Kirkpatrick, George W. Bush chose John Bolton (but had to settle for making him a recess appointment), and Trump appointed Nikki Haley in his first term. If confirmed, Stefanik would likely follow her Republican predecessors in their dislike for the institution. Unlike Haley, however, Stefanik is not going to try running her own parallel foreign policy from New York. Stefanik will face few hurdles in being confirmed by the Senate. Republicans will control the chamber, and she is unlikely to face the sort of organized opposition that Bolton faced almost twenty years ago. As a member of Congress, Stefanik has been a harsh critic of the United Nations, smearing the institution as antisemitic whenever it has afforded Palestinians an opportunity to express their grievances or to bring pressure to bear against Israel in the General Assembly. She has denounced the Biden administration for its supposed failure to combat antisemitism at the UN. Stefanik was a leader of the campaign to smear antiwar college campus protesters as antisemitic, and she played a role in pressuring the presidents of Ivy League universities to crack down on the protests at their schools. She has also supported the cutoff of funding for the United Nations Relief and Works Agency (UNRWA), the agency that is essential to providing humanitarian assistance to Palestinian civilians in Gaza. Stefanik has distinguished herself as one of the most extremely anti-Palestinian members of Congress. Like Trump, Stefanik has been an opponent of the nuclear deal with Iran from its inception. She recently joined her Republican leadership colleagues in calling for a “return to a maximum pressure campaign against Iran.” She repeated the call for maximum pressure again this week. Ambassadors to the U.N. typically have little influence in shaping policy, but the choice of Stefanik is consistent with reporting that Trump plans to pursue a more aggressive Iran policy in the new term.The Stefanik nomination puts a damper on the news that Mike Pompeo and Nikki Haley won’t be part of the new administration. Trump may not be bringing back all of his old appointees, but he continues to surround himself with hardliners. To the extent that personnel is policy, that bodes ill for the new administration’s foreign policy.

#### Trump cuts UN funding, withdraws from agreements, and packs it with extremists

Goldberg 24 [Mark Leon Goldberg, Global Dispatches Podcast and Editor-in-Chief of UN Dispatch with a Master’s Degree in International Relations and National Security Studies from Georgetown University, 11-7-2024, "What a Second Trump Presidency Means for the UN", UN Dispatch, https://undispatch.com/what-a-second-trump-presidency-means-for-the-un/]/Kankee

The important thing to understand about Donald Trump’s approach to the United Nations is that he is not intrinsically hostile to it. In his first administration, he had several productive engagements with the UN, working through the Security Council on sanctions for North Korea and Iran, for instance. He also had a good working relationship with António Guterres, whom he invited to the White House. By all accounts, he rather enjoyed his annual addresses to the General Assembly and the pomp that surrounds UNGA each September. Neither is Trump particularly sympathetic to the UN. His administration took actions against the UN that are in line with the typical Republican approach to the institution. For example, Trump blocked American funding for the UN Population Fund, a move every Republican administration since Ronald Reagan has taken. He also suspended funding for UNRWA, the UN agency that supports Palestinian refugees (something Biden did as well), and supported American non-engagement with the UN Human Rights Council. These are all more or less standard Republican positions at this point. However, there were certain actions Trump took during his first administration that were completely aberrational in terms of how conventional Republicans have historically approached the UN — and exceedingly hostile. These moves can probably give us some insight and clues into how the United States’ relationship to the UN will evolve in the coming years. For the UN, one of the most immediate questions moving forward is how Trump might approach the World Health Organization. Previously, Donald Trump sought to withdraw the U.S. from the WHO in an overt attempt to deflect blame from his own mishandling of the COVID-19 pandemic. Now, a key question is whether Trump still holds this animosity toward the WHO, or if it was merely a product of the political climate in 2020. This remains an open question without a definitive answer. Trump may still bear that grudge, but we don’t know for certain. What we do know for sure is that he would likely seek to withdraw the U.S. again from the Paris Climate Agreement and the UN Global Compact on Migration. This seems almost inevitable at this point. However, regarding the Paris Agreement, there is a substantial waiting period between a withdrawal request and its implementation, so such a move might not have any immediate practical impact. Another significant way a second Trump administration could impact the UN is through personnel decisions, particularly concerning top UN leadership. Antonio Guterres’ second term as Secretary-General expires at the end of 2025, and the Security Council will need to choose his replacement. Normally, the U.S., UK, and France broadly agree on the type of candidate they want (if not the specific individual) and then negotiate with Russia and China. While the geopolitical landscape of 2025 remains uncertain, we do know that Trump would hold a veto. Trump would also influence the leadership of various UN agencies, such as UNICEF and the World Food Programme. In the latter part of his first term, Trump nominated candidates with views far outside the mainstream, including a candidate for the International Organization for Migration who had a history of racist and Islamophobic rhetoric. Although this candidate was ultimately rejected by a majority of IOM members, the episode illustrated Trump’s willingness to promote extremists for UN roles. The larger question moving forward is whether the U.S. might attempt to withdraw from the UN altogether. While this might sound far-fetched, consider that in June, the GOP-controlled House of Representatives passed a spending bill that eliminates funding for the UN’s regular budget, to which the U.S. contributes nearly 25%. Such a move would cripple the UN’s bureaucracy and severely hinder its ability to respond to global crises. If enacted, the U.S. would eventually lose its vote in the General Assembly, likely reducing its involvement to Security Council votes alone. While Trump is not inherently hostile to the UN, such a move is within the realm of possibility. Project 2025 explicitly threatens to cut UN funding if the UN does not bend to the will of the incoming administration. Given Trump’s unpredictable and often volatile approach to foreign policy in general, and the UN in particular, such an outcome cannot be ruled out. But, of course, neither is it a given.

#### Trumpian nationalism devalues international law

Victor 24 [David G. Victor, political scientist at the University of California, San Diego, 11-18-2024, "How the world will weather Trump’s withdrawal from global agreements", Nature, https://www.nature.com/articles/d41586-024-03755-x

After the Second World War, the United States was a chief backer of today’s rules-based international order. In commerce, that approach is reflected in the World Trade Organization. Other organizations promote international cooperation in sectors such as science, finance, investment, aviation, shipping and development assistance. International agreements are rarely enforced, but they work because governments and investors think it is more important to align their behaviours to the agreements’ rules than to skirt these norms. For decades, members of global trade regimes nearly always followed the rules — for instance, to avoid self-serving tariffs — because, with open markets, almost everyone gets bigger benefits than they would if nations just followed their narrow self-interests. Solar panels are inexpensive and ubiquitous today because innovations made anywhere have quickly been scaled up into new products that can be sold worldwide. But triumphs of globalization are contributing to its undoing, as supporters of open markets that are losing out are, like Trump, seeking to favour their local industries instead. Many countries’ support for global order is already wavering. And Trump’s presidency will put those political drivers on steroids. His proposal to impose stiff tariffs on all Chinese imports, for example, would drive up costs in the United States and reduce the ability of US firms to gain access to innovations, including those needed to cut industrial greenhouse-gas emissions. The dangers of these nationalist approaches can escalate quickly as governments and firms lose confidence that their interactions are governed by rules, not raw power and transaction. For similar reasons, the economic shocks of the 1920s and 1930s caused a global economic depression and eventually a war. The current climate is not yet the same, because the global economy is more diverse and ideas move more quickly and are harder to control than in the past. But history is beginning to rhyme. Threats similar to those in commerce also imperil other areas, such as the Paris climate agreement, in which cooperation is essential. Trump 1.0 pulled out of the Paris agreement (although his successor, President Joe Biden, rejoined it). Trump 2.0 will probably do so again, perhaps on Trump’s first day in power. Whether this exit breaks or merely bends the Paris agreement will depend on how the rest of the world responds. Countries that remain aligned with the Paris agreement must band together to show what ‘we are still in’ means in practice. Rather than giving thumping speeches, they should lay out concrete actions with observable outcomes. This time, a united front will be harder to achieve. The international climate-policy agenda is focused on topics, such as climate finance, that are already at risk of diplomatic deadlocks. Few donors are willing to pay into big climate funds; few nations have concrete plans detailing how best to use that funding or engage with private investors so that the impact of donor funds can be amplified. It will be easy to blame diplomatic failures on the US exit when the bigger problem is the lack of workable guidance for how these funds can be used effectively and how to increase involvement from private investors. The countries that support the Paris agreement should focus not on pointing fingers, but on how to deliver climate finance. Frankly, given the likely effects of Trump 2.0, a US exit from the Paris agreement could be beneficial — it would remove US diplomats from the meetings, preventing their political briefs and their nation’s refusal to cooperate with the rest of the world from sowing chaos. In the United States, political activists should greet the Trump presidency with ways to compromise across the ideological spectrum — for example, by emphasizing nuclear power, solar energy and carbon capture as technologies that might garner support across political divides. Forging coalitions can help to make US climate policies durable. Trump’s election also necessitates thinking about ways of international cooperation that emphasize actors beyond the federal government — in the individual states and the private sector — that can take outsized roles when Washington turns away from global agendas. Within days of the election, California governor Gavin Newsom called a special session of the state’s legislature to plan its countermoves. Other states will probably follow. What happens in climate policy will need to be replicated in other areas, including science. A pragmatic approach on climate change can provide a road map — and leave a potentially hostile administration on the sidelines until the political climate changes once again.

### Contention 7: Leader Exemption CP/DA (ICC)

#### The United States ought to partially ratify the Rome Statute of the International Criminal Court, excluding Article 27 with a reservation in favor of head of state sovereign immunity. Absent treaty acceptance, the United States ought to follow all other articles of the Rome Statute as a matter of customary international law accepting universal jurisdiction by the International Criminal Court over US citizens

#### Article 27 of the Rome Statute overrides the head of state sovereign immunity doctrine, threatening forceful arrests of a nation’s leaders by treaty parties

Makaza-Goed 21 [Dorothy Makaza-Goed, researcher with a PhD at the University of Hamburg, 2021, “Through the Contestation Looking-Glass: State Immunity and (Non)Compliance with the International Criminal Court,” Third World Approaches to International Law Review, https://twailr.com/wp-content/uploads/2022/04/3.-Makaza-Goede-Through-the-Contestation-Looking-Glass.pdf]/Kankee

1 Introduction The International Criminal Court’s (ICC) 2009 indictment of Omar Al Bashir while he was still the president of Sudan saw a turn of events that brought a renewed relevance to the compliance debate, specifically in International Criminal Law (ICL). After his arrest warrant was issued, he had travelled freely to numerous countries around the world including state parties to the Rome Statute.1 This triggered a number of noncompliance decisions against several, mostly African states, as the ICC sought to enforce those member states’ duties to cooperate with the Court in his arrest and surrender as per Article 86 of the Rome Statute. Despite the widely recognized customary international law (CIL) rule that affords immunity ratione personae (personal immunity, henceforth referred to as state immunity)2 to heads of state and government as well as ministers of foreign affairs and other high-ranking state officials.3 Article 27 of the Rome Statute pronounces the irrelevance of official capacity or any immunity connected to such persons when it comes to facing criminal accountability before the Court. The main purpose of state immunity is to ease the processes of international relations by allowing its holders, such as sitting heads of state, the ability to execute their official duties in foreign jurisdictions without any hindrances. The International Court of Justice (ICJ) Arrest Warrant Case went a long way in affirming immunity ratione personae and its absolute nature.4 And yet it has been submitted that the non-application of immunities entrenched by the Rome Statute is an exception from the CIL rule of immunities for holders from state parties to the convention.5 As in the present case, a problem arises when the Court requests the cooperation of a state with the arrest and surrender of a head of state, particularly one that is not party to the Rome Statute. This is because Article 98(1) of the Rome Statute provides that the Court may not place a state in a position that requires it to compromise its other IL obligations except if the third state waives immunity. There is inherent tension in the interaction between Article 27(2) and Article 98(1), which has even been explicitly acknowledged by the ICC.6 Although the ICJ authoritatively opined on immunities in the Arrest Warrant Case, it did not establish the ambit of the absolute nature of head of state immunities. This is mainly because it did not make a distinction between the authority of an international criminal court to issue an indictment and the non/existence of a duty on states to disregard CIL by arresting and surrendering an indictee from a nonstate party, whose state has not waived said immunity.7

#### The counterplan competes - UNCLOS/Rome disallow RUDS, requiring ratification to be packaged deals without conditions. The CP makes the US not fully a party to those treaties through selective ratification

Chung 16 [Eric Chung, Associate Chief Counsel at the U.S. Department of Commerce and lawyer with AB from Harvard University and a JD from Yale Law School, 10-2016, "The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations", Yale Law Journal, https://www.yalelawjournal.org/note/the-judicial-enforceability-and-legal-effects-of-treaty-reservations-understandings-and-declarations]/Kankee

\*Shorten card as needed; this card is ridiculously long to include sections mentioning Rome/UNCLOS

Introduction In 2014, as the U.S. Senate debated advice and consent to ratify the Convention on the Rights of Persons with Disabilities, the U.S. Supreme Court heard oral arguments in Bond v. United States,1 a peculiar case involving a domestic application of the International Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The Third Circuit had held that the prohibitions of the Convention, and of the accompanying Chemical Weapons Convention Implementation Act of 1998, applied to a domestic defendant who had tried to get revenge for an extramarital affair by spreading small amounts of toxic chemicals on the plaintiff’s property. Ultimately reversed by the Court later that year, the case nonetheless alarmed many who expected that the Chemical Weapons Convention could not possibly regulate local criminal activity. That the Disabilities Convention could be similarly construed was not lost on senators during hearings on that Convention.2 Bond reignited national interest in reservations, understandings, and declarations, or RUDs, despite not addressing such provisions directly. RUDs are often used by the U.S. Senate in an effort to prevent unintended consequences stemming from treaty ratification. Loosely defined, RUDs are attachments on international treaties made by a ratifying state that alter or clarify the legal effect of treaty provisions.3 In the United States, they are generally adopted by the Senate when it is giving its advice and consent to a treaty, and they must be included should the President decide to ratify the treaty. RUDs have allowed the United States to ratify treaties without assuming international obligations that might conflict with domestic obligations or otherwise place the government in a difficult legal or political position.4 Non-self-executing RUDs,5 including the one involved in Bond, keep international treaties and their standards from having domestic effects, including from being enforceable in domestic courts.6 For these reasons, the United States has both commonly and increasingly employed RUDs, as have many other states.7 The concern that treaties could have unintended domestic effects disquieted senators and other government officials who wondered to what extent they could rely on this practice for limiting the effects of treaties.8 For example, during a congressional panel on the Disabilities Convention, one senator inquired whether RUDs could be inadequate and unenforceable: Is there a way, in your opinion, to write RUDs, on the front end of a treaty, that would absolutely ensure that there is no way for this treaty to affect either the federalism issues that we have to deal with or to cause a court to look to the treaty to actually affect the individual lives of citizens here in the country? Is there a way of us coming together and writing RUDs in that way?9 While Bond fueled these worries, shared by many senators,10 they are not new. Rather, these concerns have persisted and resurfaced many times over the last few decades as government officials questioned the judicial enforceability of RUDs.11 Whether RUDs are enforceable raises deep questions regarding the effectiveness and robustness of treatymaking and its future. Depending on their enforceability, the use of RUDs implicates the entire constitutional system of treatymaking and whether and how the United States ratifies treaties.12 And in turn, if courts will enforce RUDs, should that change how they are drafted? What are the legal effects of using certain RUDs over others? These questions are of particular import domestically and internationally as treatymaking risks being substituted by alternatives such as congressional-executive agreements.13 As of now, treaties remain the most frequent, if not exclusive, instruments for agreements in a number of areas, including arms control, dispute settlement, and human rights.14 With them, RUDs remain central tools in the ratification process. As of June 2016, there were thirty-eight treaties pending before the Senate, including the Disabilities Convention and the United Nations Convention on the Law of the Sea (UNCLOS),15 and questions over the enforceability and effects of RUDs are paramount to whether these treaties could ultimately be ratified by the United States. Alternately, the invalidation of RUDs could be devastating. Not only would the United States face the type of domestic lawsuits presented in Bond, but it could also be forced into a variety of international disputes and into rescissions of its conditional consent.16 But so far, despite their significance, legal scholars and U.S. government officials assessing RUDs have mainly spoken past each other. Senators and presidential administrations have mostly worried about actual enforceability, while legal scholars have instead presumed that RUDs will be enforceable. These scholars often argue over the optimal level of RUD usage, and they primarily debate about whether the practice of RUDs is good law and good policy. These perspectives are important in their own right, but they are informed by and benefit from being joined together. Namely, before exploring the domestic and international effects of RUDs, and how the Senate and other government institutions could determine their optimal use, the scope of RUDs’ enforceability needs to be understood. Once that picture is clear, arguments over the proper scope of RUDs can be brought into focus. This Note embarks on that task. It explores two major questions. First, are RUDs enforceable in courts of law? Second, if RUDs are enforceable, what is their optimal use in the treaty ratification process? To answer these questions, this Note bases both its positive and normative components on a searching analysis of case law discussing the judicial enforceability of RUDs in both U.S. and international courts.17 The analysis includes forty-seven U.S. cases discussing RUDs as a general category and twenty-six U.S. cases discussing interpretative understandings and declarations, out of approximately 650 reviewed cases. The analysis also includes fourteen cases from international courts, out of approximately 300 reviewed cases, including cases from the International Court of Justice (ICJ), the UNCLOS tribunal and arbitral bodies, the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights. Ultimately, this Note finds that U.S. courts and international courts consistently enforce RUDs, except for international courts reviewing treaties that expressly prohibit their use. These findings should offer solace to those worried about the inadequacies of RUDs, and they provide a compelling reason for revisiting the concerns over their use. This Note argues that based on this case law, the real concerns for the United States and other states should be the legal effects of RUDs on an international order that seeks to encourage genuine and full treaty participation, rather than their ability to mitigate unintended domestic effects. Without a viable threat to the domestic validity of RUDs, this Note reasons that the United States and other states should refrain from overusing RUDs and consequently jeopardizing broader treaty formulation and compliance. The Note is organized in four major parts. Part I begins by providing background about the use of RUDs and traditional rationales both for and against their use. While some proponents have argued that RUDs allow for more states, including the United States, to participate in the ratification of multilateral treaties, others are more critical and argue that RUDs contribute to superficial ratifications. While legal scholars have documented the history, motivations, scope, and effects of RUDs, particularly as they relate to the Vienna Convention on the Law of Treaties (VCLT), the judicial enforceability of RUDs has not yet been comprehensively examined. The issue of enforceability is nonetheless an important piece of this normative debate because it provides a more realistic picture of what legal effects RUDs could have, if any at all. Parts II and III take up this question about enforceability. Part II describes how, in U.S. courts, RUDs are nearly always recognized as valid. U.S. courts have only questioned the validity of RUDs when they were not properly communicated to other state parties, when their text did not support an argued interpretation, or when they focused on issues of wholly domestic concern. A few judges have published dissents arguing against the validity of RUDs, but these opinions were not controlling. Part III, in turn, describes how, with few exceptions, international courts also usually defer to RUDs. The ICJ has indicated that it can invalidate a reservation as incompatible with the object and purpose of a treaty pursuant to Article 19 of the VCLT. Yet the ICJ has only invalidated a RUD where the treaty in question expressly prohibited such a RUD. Rules stipulated by a treaty may also shape how other courts review RUDs. The ECtHR, for instance, applies treaty rules to invalidate RUDs that are of a general character or fail to include a statement of the law concerned. Finally, Part IV draws lessons from this account of the judicial enforceability of RUDs and argues for certain treaty practices based on those lessons. First, the case analysis indicates that U.S. officials can take solace in the fact that RUDs will continue to have the force of law in domestic and international courts; every indication therefore seems to suggest that RUDs are here to stay. But some of the traditional concerns over RUDs could and should be revisited, including what RUDs signal about treaty formulation and compliance, and the risk that RUDs increasingly could be prohibited in treaties altogether. For that reason, this Note concludes that the real risk with respect to RUDs is not their insufficient drafting, but rather their overuse. Given little threat of the domestic invalidity of RUDs, the United States should not overuse RUDs and risk compromising broader treaty formulation and compliance among states. i. background on the use of and concerns over ruds The origins of RUDs and their important role in supporting the United States’ treaty ratification efforts date back to the early 1950s when U.S. Senator John Bricker proposed a constitutional amendment to make all treaties non-self-executing.18 When that amendment failed by one vote,19 senators turned to RUDs as an alternative means by which to ratify treaties while preserving sovereignty, federalism, and other apparent American concerns.20 The United States’ participation in human rights treaties, which only took off in the 1970s, has relied on the use of RUDs for these purposes ever since.21 But while U.S. senators have mainly sought to draft RUDs so that they will be unassailable in courts, legal scholars have mostly focused on theoretical discussions of their effects, particularly with respect to how RUDs will influence international treaty formulation and compliance.22 Some have supported the value of RUDs in allowing states, including the United States, to participate more actively in treatymaking.23 Along these lines, scholars have defended the practice of RUDs as a valid exercise of the Senate’s powers,24 and, more broadly, as a legitimate function of states that are serious about adopting treaty obligations.25 Furthermore, some scholars have suggested that RUDs may lead to more honest reflections of the positions of reserving states26 and can provide a starting point for engaging with and eventually internalizing particular norms.27 Critics meanwhile have condemned the practice of RUDs on both legal and functional grounds,28 accusing RUDs of leading to a “specious, meretricious, [and] hypocritical” process of ratification,29 through which the United States reaps the benefits of treaty participation while never assuming any obligations.30 More specifically, some have criticized RUDs as detracting from the United States’ moral commitments to human rights, including, for example, those contained in the International Covenant on Civil and Political Rights (ICCPR).31 Similarly, within the broader international community, RUDs have been criticized as abrogating the universal values and commitments signaled by human rights treaties32 and destroying any semblance of treaties as contracts.33 Furthermore, RUDs risk contravening the VCLT by violating Article 19’s prohibition against reservations that are “incompatible with the object and purpose of the treaty”34 and Article 27’s restriction on citing domestic law to avoid treaty obligations.35 Both proponents and critics of RUDs acknowledge that there is an unavoidable tradeoff between protecting the rights and consent of non-reserving states that anticipate compliance with treaties in their entirety and the rights and consent of reserving states that expect to have their RUDs honored, with the VCLT36 tilted toward protecting the rights of the latter.37 Yet before concluding where the law should stand on allowing or limiting RUDs, more needs to be known about what the law already provides about their enforceability. This is after all the major concern of senators deciding whether to ratify treaties with RUDs. In other words, whether RUDs are already limited in courts of law is a practical reality that has demanded the attention of government officials and should inform any normative consideration of their use. Remarkably, the legal literature does not contain a comprehensive answer to the persistent questions over the judicial enforceability of RUDs. In the limited instances where the issue has been considered, RUDs have generally been summarily presumed to be valid in courts of law.38 The positive account of RUDs has focused on exploring their possible rules and limitations based on the VCLT’s provisions on reservations or on the effect of one state’s objections on another state’s RUD.39 Several early works were devoted to studying the history, motivations, scope, and effects of RUDs across states and treaties, particularly by comparing and connecting them to the principles set forth in the VCLT.40 Others have explored how parties should be bound if RUDs are invalidated.41 But scholars studying these VCLT provisions and the broader law surrounding RUDs, which many consider to be unclear,42 do not provide consistent guidance as to how courts will treat RUDs. Additionally, the United States has not ratified the VCLT, and except among scholars who consider the VCLT customary international law, it is not clear if the VCLT binds the United States.43 As the Introduction suggests, an account of the depth and breadth of this enforceability is all the more pressing as it may influence the likelihood that the United States will ratify further treaties. More broadly, such an account may address the longstanding concerns of senators and other government officials and allow them to engage more fully with the question of the optimal scope of RUDs that has long been the focus of legal scholars. This Note endeavors to fill this gap by providing an original and searching account of how courts enforce, and do not enforce, RUDs. ii. the enforceability of ruds in u.s. courts Article II of the Constitution governs the treatymaking process in the United States.44 This process generally begins with the President’s administration negotiating the terms of a treaty with foreign states, followed by a signature and transmission to the Senate for its advice and consent.45 The Senate can provide its advice and consent by approving the treaty through a two-thirds vote and a resolution sending the treaty back to the President, or it can keep the treaty pending. As part of its advice and consent, the Senate can condition its approval by adopting RUDs in its approving resolution. The President can then either choose to ratify the treaty with the RUDs becoming a part of the United States’ agreement46 or refuse to ratify the treaty altogether.47 It is largely understood among states that in bilateral treaties, consent to the RUDs by the other state party is required before the RUDs can go into effect; in multilateral treaties, consent by each state party is generally not required unless the treaty appears to require it.48 While RUDs can take many forms, they can generally be characterized in one of three ways.49 Reservations qualify U.S. obligations without necessarily changing the treaty’s text.50 They are often used to except the United States from certain problematic treaty provisions, to avoid conflicts between treaty provisions and the U.S. Constitution, or to escape obligations where there are political or policy disagreements.51 Meanwhile, understandings clarify or elaborate provisions but do not change them.52 They are used to explain the United States’ interpretation of certain treaty terms and to clarify its consent to a particular provision.53 Finally, declarations express the Senate’s position on matters relating to issues raised by the treaty as a whole.54 A common declaration is one that declares the treaty to be non-self-executing or nonenforceable in U.S. courts as long as there is no implementing domestic legislation.55 For example, the Senate provided its advice and consent for the ICCPR while adopting several RUDs, including the following: a reservation that “the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws, permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age”;56 an understanding that the “Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant”;57 and a declaration that “the provisions of Articles 1 through 27 of the Covenant are not self-executing.”58 According to a quantitative analysis of RUDs documenting 200 years of the United States’ treatymaking up until 1996, the United States entered into 1,286 treaties pursuant to Article II, including 195 (or fifteen percent) with RUDs adopted during the Senate’s advice and consent process.59 A more recent analysis reviewing 400 multilateral treaties ratified between 1960 and 2009 suggests that the United States’ use of RUDs has increased and continues to increase over time.60 But even while RUDs have become a standard feature of modern treatymaking practice, their actual enforceability in courts has largely been presumed. Scholars have not looked in depth into the range of court cases reviewing the use of RUDs. In this Part, I analyze U.S. case law to determine the enforceability of RUDs in U.S. courts. To construct a comprehensive set of U.S. court cases directly engaging with the enforceability of RUDs, I conducted a search for all federal cases containing the term “RUDs” (a common term in public international law and among courts), which returned twenty-seven cases. I then conducted a second search using the search string “reservations, understandings, and declarations,” which returned 393 cases, which, upon review, included twenty unique cases that engaged with the question of the legal validity of RUDs. To capture cases that may not refer to this grouping, I conducted a third search using a more general search string in order to locate interpretative understandings and declarations and reviewed the most relevant 250 cases returned.61 The remainder of this Part describes the prevailing view in U.S. case law that RUDs are valid and enforceable in U.S. courts. It then discusses the few instances in which the validity of RUDs has been questioned. A. Valid and Enforceable RUDs in U.S. Courts In the cases reviewed, U.S. courts consistently recognize the validity and enforceability of RUDs and consider them to be legally binding as a condition of the Senate’s advice and consent.62 If the Senate conditions its approval of a treaty upon certain RUDs, the President can ratify the treaty only with those RUDs. This has been the longtime understanding of the constitutional arrangement.63 1. U.S. Supreme Court Case Law The U.S. Supreme Court has never expressly ruled on the validity of RUDs, but it has implicitly recognized their validity by enforcing them in a number of cases. Most prominently, in Sosa v. Alvarez-Machain, a Mexican national sued the Drug Enforcement Administration for an arbitrary arrest.64 Among several claims, the plaintiff argued that the arrest violated his rights under Article 9 of the ICCPR.65 The Court recognized the ICCPR’s non-self-executing declaration as dispositive for rejecting that claim, explaining that the Senate granted its advice and consent to the ICCPR with a reservation providing that the treaty “was not self-executing and so did not itself create obligations enforceable in the federal courts.”66 Expressly recognizing the existence of RUDs, the Court observed that “[s]everal times . . . the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the [ICCPR] declared that the substantive provisions of the document were not self-executing.”67 Furthermore, the Court held that although the United States was bound by the ICCPR, “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”68 The Court denied the argument that the Universal Declaration of Human Rights and the ICCPR could themselves constitute the relevant and applicable rules of international law.69 While not commenting on the validity and enforceability of RUDs in general, the Court recognized a specific non-self-executing declaration, a reservation with arguably some of the most significant legal effects among RUDs,70 as valid and enforceable. The Court has also weighed in at least twice on interpretative understandings and declarations, although apparently only in cases concerning bilateral treaties. In 1853, the Court held in Doe v. Braden that written declarations interpreting ambiguous language that are then ratified by the other party become a part of the treaty and are therefore obligatory.71 Almost a century later, the Court recognized a declaration “providing that nothing in the treaty should be construed to” have any meaning beyond what the qualification specified.72 Although the Court referred to the declaration as an amendment, the language suggests that the qualifier was in fact a RUD.73 These two cases provide the most persuasive authority that interpretative understandings and declarations constitute a part of the treaty and should therefore be enforced as part of the treaty obligation, at least insofar as the RUD has received bilateral assent. 2. District and Circuit Court Case Law Following the Supreme Court’s guidance in Sosa, lower courts have consistently upheld RUDs, often in even more direct terms. For example, lower courts have repeatedly upheld reservations and declarations stating that certain treaties or treaty provisions are non-self-executing, most prominently in cases involving the ICCPR.74 In Igartúa v. United States, for instance, the First Circuit expressly recited the holding in Sosa that recognized the ICCPR as non-self-executing given the Senate’s condition at the time of advice and consent.75 The Second Circuit was even more explicit, denying a claim under the ICCPR by reasoning that “[t]he only ratified treaty cited . . . by [the plaintiff], the ICCPR, came with attached RUDs declaring that the ICCPR is not self-executing. This declaration means that the provisions of the ICCPR do not create a private right of action nor separate form of relief enforceable in United States courts.”76 In addition to enforcing the non-self-executing declaration, lower courts have consistently upheld the reservation to the ICCPR that retains the right of the United States to impose capital punishment on juveniles under eighteen years of age, even though the ICCPR prohibits this practice.77 With regard to interpretative understandings and declarations, most case law comes from interpretations of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which has been implicated indirectly through litigation under the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).78 In Auguste v. Ridge, the Third Circuit applied the United States’ “understanding” that torture must include a specific intent element.79 The Second Circuit cited Auguste in reaching the same conclusion two years later.80 The Ninth Circuit has similarly upheld interpretations of Article 3’s “substantial grounds for believing that he would be in danger,” which is the risk threshold above which a state cannot force refugees or asylum seekers to return to the country they fled, to mean “if it is more likely than not that he would be tortured.”81 Such a definition is critical for determining whether a state has a legal obligation not to deport certain refugees or asylum seekers. While in each of these cases the courts were applying FARRA, the courts’ unquestioning treatment of the CAT’s understandings as legally dispositive of FARRA’s meaning suggests that the CAT’s understandings are indeed valid. Courts interpreting and enforcing other prominent multilateral treaties have also cited interpretative understandings and declarations in their decisions. Most of these cases do not expressly rely on the RUDs in their ultimate holdings, but a few have. The U.S. District Court for the Eastern District of New York, for example, held that the use of herbicides did not constitute genocide in part by referring to the U.S. interpretative understanding that specific intent is required for genocide to be committed under the Genocide Convention.82 Similarly, in 1928, the U.S. District Court for the District of Maryland recognized that an interpretative understanding did not have to be a reservation to be binding.83 The court found that bilateral assent to the interpretative understanding was sufficient.84 The court did not discuss what would happen if the interpretative understanding was only a unilateral understanding, as discussed next. B. Limitations of the Enforceability of RUDs in U.S. Courts RUDs are therefore almost always enforced by U.S. courts. But there have been a few discrete instances in which courts have questioned their use in specific contexts. The significance of these few cases should not be overstated, however, given that none of these cases invalidated a recognized RUD. The only opinions not giving effect to a RUD occurred where (1) the treaty condition was never communicated to other treaty parties or (2) the reservation only addressed matters of domestic concern (although the case on this point is not binding precedent, as it was vacated on other grounds). Two judges on the First Circuit have questioned the validity of RUDs practice as a whole, but only in dissenting opinions. First, lower courts have raised questions about treaty conditions that were not communicated to other parties and about subsequent interpretations not supported by the treaty’s text. For instance, the Federal Circuit and the Court of Federal Claims both reasoned in separate decisions that a “Technical Explanation” in a treaty could not be controlling where it appeared that only the United States had been privy to the documents.85 Furthermore, the Court of Federal Claims determined that it was unlikely that “at the time of Treaty ratification” the United States contemplated the situation that had since occurred.86 It therefore found that the government’s proposed interpretation could not be read into the treaty, thereby in effect finding the purported RUD invalid and unenforceable.87 Second, in Power Authority v. Federal Power Commission, the D.C. Circuit reviewed a purported RUD attached to a treaty with Canada.88 In that RUD, the United States reserved the right to develop its share of the Niagara River through an act of Congress and prohibited redevelopment projects until otherwise authorized through congressional enactment.89 The court did not give effect to the reservation, holding that a reservation needed to reach an issue of international concern.90 The Supreme Court ultimately vacated the judgment, remanding the decision “with directions to dismiss the petition on the ground that the cause is moot.”91 The D.C. Circuit’s decision is therefore not valid precedent, and other courts have not since followed its logic. However, though vacated, Power Authority mayprovide insight into the potential skepticism of courts toward a reservation that does not pertain to relations with other states or that otherwise alters the effect of the treaty with regard to any other party.92 The D.C. Circuit held that, in such instances, what appeared to be a reservation was not in fact a formal reservation, given that it addressed issues of wholly domestic concern.93 Finally, in Igartúa-de la Rosa v. United States,94 two dissenting judges argued that RUDs ought to be invalidated in light of the Supremacy Clause, which expressly establishes the priority of the Constitution, federal laws, and treaties made under the “Authority of the United States” over other laws and legal instruments.95 Judge Torruella wrote, “[T]he United States is not in compliance with the binding obligations it undertook by signing and ratifying the ICCPR. The majority does not and cannot refute this undeniable fact, and . . . the potentially non-self-executing nature of the ICCPR does not preclude our ability to make a declaration to that effect . . . .”96 Therefore, Judge Torruella would have found that the United States’ commitment to the treaty, as a supreme law, takes priority over any reservation withholding obligations under the treaty. Also dissenting, Judge Howard wrote that “separation of powers considerations prevent a court from relying exclusively on the Senate’s declaration . . . . The Supremacy Clause and Article III require a court to examine independently the intentions of the treatymakers to decide if a treaty, by its own force, creates individually enforceable rights.”97 Judge Torruella expressed the same viewpoint again five years later.98 These continue to be minority viewpoints and have not been endorsed in any binding decision by the First Circuit or any other U.S. court. Overall, the isolation of these views in the case law indicates the robustness of RUDs in U.S. courts. RUDs today are made public and communicated to other parties. Neither Power Authority nor the dissenting opinions in the First Circuit constitute binding law. The cases reviewed in this Section are therefore the exceptions, rather than the rule. U.S. courts can be expected to treat RUDs as valid and enforceable. iii. the enforceability of ruds in international courts The equivalents of RUDs, which are primarily discussed as a conglomerate in U.S. contexts, in international law are reservations and interpretative declarations. The International Law Commission’s (ILC) Guide to Practice on Reservations to Treaties provides helpful definitions that parallel those previously discussed in Part II. It defines a reservation as a unilateral statement . . . made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.99 Meanwhile, an interpretative declaration is a unilateral statement “made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.”100 For the purposes of distinguishing between these types, whether a statement is formally titled a reservation or a declaration is less important than how it operates. According to the ILC, “[t]he character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce,” which should be determined by interpreting the statement “in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.”101 Moreover, the abstract definitions might not prove particularly helpful, given that the guidance essentially involves a circular logic distinguishing the two terms using their own definitions. In this Part, I analyze international case law to determine the judicial enforceability of RUDs, namely reservations and interpretative declarations, in international courts. To locate international cases engaging with RUDs, I conducted searches using terms including “reservations,” “declarations,” and “interpretative declarations.”102 In total, approximately two dozen cases out of 300 cases reviewed were found to be relevant, and fourteen of those directly engaged with the question of RUDs.103 I considered advisory opinions where the principles discussed were directly relevant to RUDs, but I focused largely on judgments given their binding authority.104 The international case law demonstrates that courts have also generally enforced RUDs. At the same time, international courts have warned that RUDs could be invalidated where they fail the VCLT’s “object and purpose” test, and these courts have stopped short of enforcing certain RUDs where the relevant treaties expressly limited their use. The ICJ cases, which are arguably most prominent in discussing reservations and interpretative declarations, are discussed first, followed by cases from other international courts. Court decisions that directly engaged with the question of RUDs were included in the case review, although any case that involved RUDs was considered in the analysis. This Part concludes with a discussion of the legal effect of objections by treaty parties to RUDs adopted by other parties. A. International Court of Justice (ICJ) Jurisprudence According to Article 19 of the VCLT, reservations to treaties are permissible with a few exceptions: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) [t]he reservation is prohibited by the treaty; (b) [t]he treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) . . . the reservation is incompatible with the object and purpose of the treaty.105 The first two exceptions apply to specific treaty provisions, while the third is generally applicable to all treaties and involves a court determination.106 Applying the third exception, international courts typically ask whether reservations to treaties, where otherwise not prohibited, are compatible “with the object and purpose of the treaty.”107 If the reservation is compatible, it is presumably valid and should be upheld, and if it is not compatible, the reservation violates Article 19 and is presumably invalid. ICJ’s early advisory opinion on reservations to the Genocide Convention adopted this “object and purpose” compatibility test for determining the validity of RUDs and established procedures for objections that would later be codified in the VCLT.108 Since that opinion, the ICJ has established a number of principles on RUDs through binding judgments. In Fisheries Jurisdiction, the ICJ explained that it will interpret a reservation in a “natural and reasonable” way with regard to the intention of the reserving state when it ratified the treaty.109 In Border and Transborder Armed Actions, the ICJ illustrated that a reservation can be distinguished from an interpretative declaration. In that case, the ICJ cited a U.S. reservation to the Pact of Bogotá limiting the ICJ’s jurisdiction as an indication that the Pact otherwise gave the court compulsory jurisdiction over the case.110 Honduras, arguing that the Pact did not provide for compulsory jurisdiction, attempted to suggest that the U.S. reservation was merely an interpretative declaration and not reflective of the Pact’s legal effect absent the alleged declaration.111 The ICJ disagreed, holding that the United States’ express limitation on the court’s jurisdiction was intended as a reservation, was valid, and served as an indication that jurisdiction was otherwise compulsory.112 The ICJ has since applied the object and purpose test to uphold a number of reservations limiting jurisdiction of the court under the Genocide Convention. In Armed Activities, the ICJ held that Rwanda could make a reservation to Article IX of the Genocide Convention limiting the ICJ’s jurisdiction.113 The ICJ relied on two preceding cases, Yugoslavia v. Spain and Yugoslavia v. United States, in which the court had held as valid similar reservations by Spain and the United States.114 While these holdings provide robust case law on the validity and enforceability of reservations within the ICJ’s jurisprudence, some judges within the court have argued in dissents that reservations that are compatible with the object and purpose of a treaty may nonetheless be invalidated for other reasons. In his dissent to Armed Activities, for example, Judge Koroma argued that reservations that are incompatible with the raison d’être of a treaty should be invalid.115 Similarly, in Yugoslavia v. United States, Judge Kreća dissented to argue that jus cogens norms can and must override inconsistent reservations.116 Judge Kreća clarified that he believed no difference exists between reservations and understandings in such an inquiry.117 Generally, the ICJ has found that interpretative declarations are also valid, at least to the extent they were agreed upon by the other parties to the treaty. In the Ambatielos Case, the ICJ recognized an interpretative declaration as binding.118 The court reasoned that it could be understood either by the instrument of ratification or by necessary implication that the declaration must be considered provisions of the treaty.119 Judge Carneiro, writing an individual opinion in that case, referred explicitly to the declaration as an interpretative declaration and explained that it was a binding component of the treaty.120 But one other case suggests that interpretative declarations can be challenged, at least when they act as reservations and are prohibited by treaties. In Maritime Delimitation in the Black Sea, the ICJ cast aside an interpretative declaration.121 In that case, the ICJ was asked to consider a RUD adopted by Romania when it ratified the United Nations Convention on the Law of the Sea (UNCLOS), a treaty that prohibits most reservations but allows certain interpretative declarations as long as they do not purport to exclude or modify the legal effect of the convention.122 Romania had issued an interpretative declaration regarding Article 121,123 which establishes the definition of an island as “a naturally formed area of land, surrounded by water, which is above water at high tide” and distinguishes rocks that cannot sustain human habitation or economic life of their own in Article 121(3) as not having an exclusive economic zone or continental shelf.124 The interpretative declaration allowed for a more preferable delimiting boundary by not considering rocks as part of the delimitation of maritime spaces. In a highly unfavorable decision for Romania, the ICJ held that the declaration could not modify the legal effect of the UNCLOS provisions.125 At work in Black Sea and the invalidation of the alleged interpretative declaration were two related provisions of UNCLOS: a prohibition on reservations unless expressly permitted elsewhere in the treaty and the allowance of declarations or statements as long as they do not exclude or modify the legal effect of UNCLOS’s provisions. It can be inferred that the latter provision ensures that interpretative declarations will not simply masquerade as reservations; in this instance, the ICJ explicitly relied on the latter in dismissing Romania’s declaration, plausibly doing so because it regarded the interpretative declaration as an effort to evade that treaty’s prohibition on reservations. In any case, while interpretative declarations might be subject to greater scrutiny for enforceability than reservations, the Ambatielos Case is likely to be more representative of the legal effect of interpretative declarations when they are not otherwise limited. But Black Sea stands for the important principle that a treaty can restrict reservations and interpretative declarations and thereby make them unenforceable in international courts. B. Other International Court Jurisprudence With a few limited exceptions, other international courts have also found reservations to be valid. But again, in a similar vein to Black Sea, courts make exceptions when treaties include express limitations against certain types of reservations. The various human rights courts, for instance, provide insight into the use of reservations and declarations under the authority of specific human rights treaties with particular requirements.126 In the case law of these courts, reservations that appear to violate the internal rules of the relevant treaty, as well as understandings and declarations that appear to sidestep these limitations, are invalidated and rendered unenforceable. For example, consistent with Black Sea, an arbitral tribunal held that a Russian declaration excluding certain disputes from court jurisdiction could be recognized but was limited by the treaty’s express description of which declarations would be permissible.127 The European Court of Human Rights (ECtHR), a court with particularly express case law in this area, has invalidated reservations that do not conform to the requirements of the European Convention on Human Rights (ECHR). Article 64 of the ECHR prohibits “[r]eservations of a general character” and requires “a brief statement of the law concerned” for any reservation.128 The ECtHR Grand Chamber explained that the Article limits the ability of States to make reservations excluding areas of law from supervision by “Convention institutions,” explaining that such prohibitions are necessary to ensure equality and unity among parties to maintain and recognize human rights.129 Relying on this Article, the ECtHR has invalidated two Swiss reservations: one for not conforming to the requirement to append a brief statement of the law concerned,130 and one about the meaning of a fair trial for being a reservation of a general character.131 In both cases, the ECtHR held that Switzerland was still bound to the Convention. Meanwhile, the Inter-American Court of Human Rights (IACtHR) conducts a similar inquiry examining whether challenged reservations are compatible with the American Convention on Human Rights, which allows reservations that are in conformity with the VCLT.132 Accordingly, the IACtHR has invalidated reservations deemed to be incompatible with the Convention, although its inquiry appears to be less searching than ECtHR’s review.133 Scrutinized reservations appear to be those that are “general in scope, which completely subordinate[] the application of the American Convention to the internal legislation of [a state] as decided by its courts.”134 When assessing a reservation, the IACtHR has determined the reservation’s meaning based on its text, even when a state argues for a different understanding.135 The ECtHR and IACtHR have therefore endorsed the principle that treaties may place express limitations on reservations and interpretative declarations, thereby invalidating them at least when challenged before the specific courts tasked with enforcing those conventions. C. Formal Objections by a State to Another State’s RUDs Although not prominent in the case law, understanding RUDs in an international context also benefits from a brief mention of formal objections by a state to another state’s RUDs. In addition to establishing rules on when RUDs are permissible, the VCLT provides procedures for these objections. Article 20 establishes that, under certain conditions, consent by all parties to a given reservation is not always required for a treaty to enter into force, such as when the treaty expressly authorizes reservations. It notes that “[a] reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.”136 Furthermore, there is generally a twelve-month period for objecting to a reservation, after which other parties’ tacit acceptance to a reservation will be assumed.137 Article 21 lays out the conditions under which reservations and objections to reservations will have legal effect. When a state objects to another state’s reservation but otherwise does not object to the treaty entering into force, the provisions to which the reservation relates will not apply between the two State parties to the extent of the reservation.138 While rare, states do object to other states’ reservations. A small but not insignificant number of states have objected to U.S. reservations to multilateral treaties, including objections from three states to U.S. reservations to the CAT.139 The Netherlands, for instance, objected to the U.S. reservation to Article 16 of the CAT as incompatible with the CAT’s object and purpose and to the U.S. interpretation of “torture” under Article 1 as invalid.140 Similarly, eleven states objected to U.S. reservations to the ICCPR.141 Germany, for instance, objected to the U.S. reservation to Article 6, which allows capital punishment for those under the age of eighteen.142 There is no indication in the reviewed case law that any U.S. or international court has ever cited a documented objection by another state as a dispositive factor in invalidating a RUD. Litigants have raised other states’ objections to U.S. RUDs in U.S. courts,143 but these objections have not been treated as a basis for rejecting a RUD. The issue has not arisen for the United States in the international court cases reviewed, leaving unsettled exactly how much legal force these objections have. iv. revisiting the use of and concerns over ruds The case analysis presented in these preceding two Parts offers an important point of reference to the recurring debate and concerns introduced at the outset of this Note: RUDs are usually held to be valid and enforceable in courts of law. They are likely only to be vulnerable when international courts consider treaties that limit their use. These findings suggest that the dominant concern in United States treatymaking over the domestic legal effects of RUDs is in fact misguided. The overwhelming attention that has been paid to ensuring that RUDs will be enforceable to prevent unintended domestic consequences should instead be devoted to concerns over the international effects, ones that this case analysis suggests are rooted in preventing RUDs that undermine treaty obligations. Granted, the robustness of RUDs in U.S. courts indicates that they are not going anywhere any time soon; if they are enforceable, there is little reason to think that the United States, or other states, will stop using them. But these findings encourage reorienting the concerns over the effects of using RUDs and determining their optimal scope in the treatymaking process. More specifically, both legal scholars and government officials can now address one another’s concerns with the added benefit of a better understanding of actual RUDs enforceability, as provided by this Note’s case analysis. As this Part argues, legal scholars should consider and address the concerns over domestic legal effects of RUDs that the U.S. government has raised, as this case analysis attempted to initiate, and the U.S. government should consider the real concerns that legal scholars have raised about the international effects, informed by their consistent enforceability in domestic courts and the limited exceptions to enforceability in international courts. Section IV.A encourages recasting the U.S. perspective and priorities on RUDs, namely to focus on the international instead of the domestic effects of these instruments, and Section IV.B presents recommendations based on this reorientation. A. Recasting the U.S. Perspective and Priorities on RUDs In light of the preceding case analysis, U.S. senators and other government officials should take solace in the fact that RUDs have and will most likely continue to have the force of law, at least in U.S. courts and in most instances in international courts. If RUDs are enforceable, the United States and other states have little reason to stop using them. But that fact alone should not discourage those who are skeptical about the extensive use of RUDs. Rather, it is this awareness of the robust enforceability of RUDs that encourages a reexamination of the optimal scope of RUDs. The question is no longer whether RUDs are enforceable, but rather when RUDs are adopted, what is their ideal usage? More specifically, the questions raised by senators over the Disabilities Convention should be reformulated. Rather than question whether RUDs can be drafted to insulate the United States from certain treaty obligations—they can, and they do—we should ask whether RUDs will be sustainable in a treatymaking system that is increasingly wary of treaty ratification using RUDs. The effects of RUDs usage are both domestic and international, and yet they have not been considered in detail. This Section begins by exploring the domestic effects of RUDs’ enforceability and then pivots to the international effects, namely their undermining of the treatymaking process and the possible risk of the proliferation of no-reservation treaty provisions. 1. Reorienting from the Domestic Effects of RUDs U.S. senators have long been concerned about the possibility that treaty ratification could create domestic responsibilities and liabilities that impinge on the United States’ sovereignty and ability to determine its own obligations through domestic legislation. To that end, the use of RUDs to promote treaty ratification has been significant, especially in multilateral treaties, such as the various international human rights treaties that have been considered in the post-World War II era. In the 1950s, Senator Bricker proposed a constitutional amendment that would make “[a] treaty . . . effective in the United States only through legislation which would be valid in the absence of [a] treaty,” effectively placing a permanent RUD on all treaties that would render every one of them non-self-executing.144 The amendment eventually failed, but not without a significant cost to treaty ratification: acquiescing to the political forces backing the Bricker Amendment, the Eisenhower Administration essentially pledged to steer the United States away from human rights treaties.145 Since then, the most prominent multilateral treaties, including the CAT and the ICCPR, have only been ratified through RUDs, including non-self-executing declarations akin to that proposed in Senator Bricker’s amendment. The United States did not always focus exclusively on unintended domestic effects. For instance, when the Senate debated ratification of the Genocide Convention in the 1980s, some senators challenged a reservation that recognized the supremacy of the Constitution. The senators noted that there was no evidence that the Convention would conflict with the Constitution, that the Constitution in any case would be supreme over a treaty, that it was “disturbing to our allies who have undertaken an unqualified acceptance of the treaty’s obligations,” and that the “self-serving nature of the reservation suggested that the United States ‘was not ratifying the . . . Convention in good faith.’”146 The senators concluded: [The] reservation . . . will seriously compromise the political and moral prestige the United States can otherwise attain in the world community by unqualified ratification of the Genocide Convention. It will hand our adversaries a propaganda tool to use against the United States and invite other nations to attach similar self-judging reservations that could be used to undermine treaty commitments.147 Notwithstanding this criticism, the reservation ultimately passed the Senate by a vote of 83-11 on February 19, 1986.148 This focus on the international effects of RUDs has not won out. Since that contentious battle, the concerns over the possible unintended domestic effects of treaty ratification without RUDs continue to overshadow the concerns over their international effects. As the various ratified and non-ratified treaties discussed here illustrate, the United States has mostly confined itself to one of two approaches: (1) ratify a treaty with RUDs or (2) not ratify treaties at all. Neither is objectively preferable.149 Indeed, if one extreme is using RUDs for a much more conditional, arguably substance-less ratification, and the other extreme is restricting the practice of RUDs and inevitably limiting participation in multilateral treaties altogether,150 the United States has been at both extremes but rarely between them. Fueling the United States’ practices at the extremes appears to be a general lack of any real consideration of the effect that RUDs would have on the United States’ relations with other states and the wider international community. Senators have mostly concerned themselves with whether the treaty would have the domestic implications they seek (e.g., will the RUD be enforced?), thereby forgoing an analysis of the costs and benefits of using RUDs (e.g., could the United States be hindering commitments to human rights by providing such detached, conditional consent to international treaties?). But this Note’s case analysis suggests that the United States should be operating in the middle. Concerns over the unintended domestic effects of treaties are exaggerated. Domestic courts will enforce RUDs. They have done so consistently over the years, and there is no indication that they will cease to do so. The United States government should therefore be concerned with the international implications of placing reservations on treaty provisions, both for the sake of international appearance and the effects on the behavior of other states. It should consider the international court jurisprudence, which might shape the contours of treaty enforcement in international law. Moreover, the United States should take into account how the drafting of treaties could be changing over time. 2. Reorienting Toward the International Effects of RUDs In short, the more pressing concerns are the international effects of RUDs. Indeed, while certainly not the only country to use RUDs,151 the United States has been the target of intense criticism from the international community for its use of RUDs, particularly in human rights treaties.152 Again, a generous reading of the United States’ use of RUDs is that the United States aims for authenticity in its treatymaking process by only ratifying treaties in forms in which the United States would actually abide by them, while a less generous reading argues that the RUDs are a sign of arrogance.153 Some scholars suspect the latter to be more likely.154 The reality, accepted even by proponents of RUDs, is that RUDs at the very least influence perceptions that can have significant consequences in international relations.155 States may face backlash for their practices, and the aspiration of securing an international order that respects treaty commitments may falter. Indeed, various international movements have arisen out of frustration with the United States and other states’ practices of using RUDs. One prominent example is General Comment 24, which was promulgated by the United Nations Human Rights Committee (UNHRC) in 1994.156 Recognizing that forty-six states had entered 150 reservations to the ICCPR, the UNHRC expressed concern that the reservations’ “content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties.”157 In that comment and thereafter, the UNHRC assumed a duty to determine whether specific reservations to the ICCPR are permissible by reviewing them under the VCLT’s “object and purpose” test. While the comment was a forceful reaction to RUDs, the UNHRC does not have any enforcement authority for its decisions and therefore can only have a limited impact in curtailing the use of RUDs.158 A more direct, potentially fomenting international movement suggested by the case analysis is a pattern of treaty drafters expressly banning RUDs in part or altogether. While scholars have rarely discussed them,159 no-reservation clauses—and related treaty provisions limiting RUDs—first appeared on the U.S. Senate’s radar decades ago.160 Over the years, they elicited concerns in the United States,161 particularly in the area of environmental treaties,162 but they have mostly been underestimated. In the 1990s, three environmental treaties—the Basel Convention, the Environmental Protocol to the Antarctic Treaty, and the United Nations Framework Convention on Climate Change—all prohibited reservations, eliciting concerns from members of the Senate.163 Senators who provided advice and consent for these treaties emphasized their concern over no-reservation clauses,164 and they clarified that their approval should not be construed as precedent for consenting to such clauses in future agreements.165 If more treaties feature these no-reservation clauses, these past events suggest that the United States will increasingly find it difficult to sign onto other treaties, even those it finds particularly important. And it does appear that more treaties are featuring these no-reservation clauses.166 The Statute of the International Criminal Court, Comprehensive Nuclear-Test-Ban Treaty, Chemical Weapons Convention, and Anti-Personnel Mines Convention, along with a number of environmental treaties, including the Montreal Protocol, Kyoto Protocol, Rotterdam Convention, Stockholm Convention, and Cartagena Protocol, all ban reservations.167 Indeed, more recent treaties may be drafted using the language in UNCLOS, such as the Rome Statute of the International Criminal Court and the World Health Organization’s proposed Framework Convention for Tobacco Control.168 Some have explained that no-reservation clauses, including for UNCLOS, are meant to protect “package deals” where there are so many compromises that any reservation on particular clauses or the entire treaty could unhinge the agreement.169 Since they are written into the treaties themselves, they very well might take precedent over a RUD, as Black Sea and the cases from the ECtHR and IACtHR suggest. Indeed, one of the reasons the United States has not ratified UNCLOS is because of the provisions on deep seabed mining that could not be avoided through the use of RUDs.170 What could this portend for the United States? If states begin to find the United States’ use of RUDs in important treaties more inappropriate and its ratification less important, treaty drafters may be more likely to pass no-reservation provisions that limit the use of RUDs, thereby leaving the United States behind in the treatymaking process. In other words, if the United States unnecessarily concerns itself with the enforceability of its RUDs, other members of the international community could meanwhile continue to design RUDs-limiting treaties that risk foreclosing U.S. participation. Indeed, even as the United States ratifies fewer treaties, other states continue to sign and ratify contemporary multilateral treaties, with UNCLOS (168 parties)171 and the Disabilities Convention (167 parties)172 among them. Scholars and government officials have downplayed these concerns in a variety of ways. One common response is that many of these concerns of outward appearance are exaggerated because the United States helps draft treaties and already ends up following the general framework of many treaties even if it decides not to ratify them.173 There is indeed a significant debate over whether treaty ratification makes a difference in compliance and whether other methods may be more effective in leading to change.174 Regardless of where one stands on the efficacy of the treaty regime as a whole, the reality is that key areas of international law remain solely under the purview of treaties, and the United States has shown enough interest to continue treaty deliberations for many treaties. Its dance around certain treaties and their provisions at the ratification stage therefore undermines what appears to be its supposedly genuine commitment to many treaties’ principles. The robust domestic court jurisprudence discussed here indicates that this dance is unnecessary and self-defeating. Because the United States will in almost all circumstances be bound insofar as it intends to be for any ratified treaty, the benefits of formally joining the international community in supporting the treaty’s principles it already aims to follow is likely to outweigh the costs of not doing so.

#### Rigorous studies prove prosecution of leaders escalates conflicts and stifles peace deals

Prorok 17 [Alyssa K.  Prorok, Spring 2017, "The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination", Pro Quest, https://www.proquest.com/docview/1898588260/fulltextPDF?accountid=3611&parentSessionId=CYznjJKAinczM96QyKYefFPhHHj3L41V3oiwVoAJ420%3D&pq-origsite=primo]/Kankee

To address these limitations in existing research, I examine the impact of active ICC involvement on conflict termination, seeking to answer whether the ICC’s pursuit of justice facilitates civil conflict termination or has the perverse effect of prolonging conflict, making peace more difficult to achieve. To answer this question, I focus on rebel and state leaders’ incentives to avoid punishment during and after civil war. Criminal prosecution at the ICC represents a potential source of punishment that leaders hope to avoid. Once the ICC becomes actively involved in a conflict, leaders’ incentives may favor conflict continuation as a way to avoid capture, extradition, and trial. Importantly, this effect is likely conditional upon the threat of domestic punishment. As the risk of punishment at home increases, the conflict-prolonging impact of ICC involvement is expected to decrease. I test these expectations on a data set of civil conflict dyads between 2002 and 2013. Statistical results provide strong support for my expectations: ICC involvement significantly decreases the likelihood of conflict termination, particularly when the threat of domestic punishment is low. These results are robust to a variety of additional tests, including alternative specifications of key variables and tests to address potential selection effects and endogeneity. Overall, the findings indicate that when risks of domestic punishment are low the ICC’s pursuit of justice undermines peace by threatening leaders’ political survival and personal freedom. As one of the first analyses to examine ICC involvement rather than ratification, this article expands our understanding of the ICC’s role in international politics. It qualifies existing research finding that ratification facilitates conflict termination and improves states’ human rights practices,9 while complementing research demonstrating that the court can impede the peaceful surrender of autocrats and has little effect on their behavior.10 It also contributes to an emerging understanding that the ICC’s impact is complex and frequently conditional by exploring the interaction between domestic and international punishment.11 The article also contributes to burgeoning research on the role of leaders in civil conflict, identifying a source of punishment—ICC prosecution—that previous analyses have not examined.12 In addition, this project makes an important data contribution by generating an original data set on all instances of active involvement by the ICC. It addresses potential selection and endogeneity issues both theoretically and empirically, and in so doing, provides evidence to suggest that leaders are not likely deterred from engaging in conflict by the risk of future ICC prosecution, and that ICC involvement is not endogenous to the difficulty of conflict. Finally, this paper has important policy implications for the court, suggesting that it should carefully weigh the potential conflict-exacerbating effects of investigation before becoming involved in ongoing conflict situations. Literature Review On 17 July 1998, 120 states voted in favor of the Rome Statute establishing the International Criminal Court. This vote represented a watershed in the evolution of international justice because the ICC is the first permanent body of its kind and has unprecedented powers to pursue even sitting heads of state. In 2002, the Rome Statute entered into force after being ratified by sixty countries.13 Since then, the court has become an active player in international justice, with current investigations in nine countries, preliminary examinations in twelve others, and cases pending or completed against thirty-one individuals.14 Given the court’s institutional novelty and important role in international politics, it has garnered significant attention from legal scholars and political scientists alike. Existing research primarily addresses the development of the Rome Statute15 and its ratification in light of the fact that accepting ICC jurisdiction entails significant sovereignty costs.16 Relatively fewer studies address the court’s effectiveness or its impact on peace and conflict. Furthermore, what little work has been done has proven to be inconclusive. Theoretical work in the law literature, for example, is divided on whether the ICC can simultaneously facilitate peace and justice. Some legal scholars argue that international prosecution facilitates peace by deterring future atrocities,17 while others conclude that the court has limited deterrent capabilities.18 Still others claim that the ICC’s pursuit of justice may actually come at the price of peace,19 particularly given the Rome Statute’s purposeful ambiguity regarding the recognition of amnestyfor-peace deals.20 Existing empirical research has also proven to be inconclusive regarding the ICC’s impact. Some scholars identify benefits from ratification, showing that it facilitates peace in some warring states21 and improves human rights practices.22 However, others identify negative or null effects, finding that ratification prolongs some dictatorial regimes,23 and that international tribunals have no significant effect on postconflict respect for human rights.24 Emerging research on the court’s actions rather than ratification is similarly inconclusive. Research by Jo and Simmons finds that the court’s involvement can reduce atrocities under certain conditions, while studies by Broache and Hillebrecht show that the court’s impact on state and rebel behavior varies.25 Thus, existing research on the ICC lacks clear consensus. The only existing study to directly examine the ICC’s impact on conflict termination focuses exclusively on ratification rather than active involvement by the court and therefore cannot fully explain the ICC’s impact on peace.26 This is an important omission from the literature because the effect of active involvement likely differs from that of ratification. While ratification promotes peace in war-torn states, active ICC involvement can undermine conflict termination by increasing leaders’ expectations of punishment. In line with recent studies showing that the court’s impact is conditional, I further argue that the ICC’s impact is conditional upon a leader’s risk of domestic punishment.27 Theory Rebel and state leaders are assumed to be rational, self-interested actors who prefer to avoid punishment, including loss of political power and more severe sanctions.28 That leaders seek to maintain political power is well established in the international relations literature.29 Political power grants state leaders tremendous influence over state resources and domestic and foreign policy. The same is true for rebels: leadership grants the individual control over the group’s resources, provides a platform to shape demands, and carries with it the potential for state-level power should the group achieve victory.30 Equally pertinent in the context of civil war is the assumption that leaders want to avoid more severe forms of punishment, such as exile, assassination, and prosecution. Loss of political office is just one relatively mild consequence of failed policies.31 As rational actors, leaders are expected to take the threat of many forms of punishment into consideration when making strategic decisions during conflict.32 International criminal prosecution via the ICC is one potential source of punishment that, under certain conditions, influences leaders’ willingness and ability to terminate their conflicts. ICC Involvement and the Risk of Punishment Theories of criminal deterrence in the economics and criminology literatures identify three determinants of punishment’s impact: its certainty, severity, and celerity.33 Certainty refers to the probability that the individual is punished, severity deals with the nature of the punishment, and celerity refers to the immediacy of that punishment. Recent research suggests that certainty and, to a lesser extent, celerity are key to punishment’s effectiveness.34 This research provides insights into why ICC involvement is likely to affect leader behavior: punishment in the form of international criminal prosecution becomes both more certain and more immediate once the ICC is actively involved in a situation. The increased immediacy of punishment is straightforward: referring a situation to the court can be a lengthy process, so once an examination or investigation is under way, punishment becomes a much less remote possibility. The certainty of punishment also increases as a result of ICC involvement. Prior to the court initiating an examination, leaders have few cues to help them predict whether the court will prosecute. First, the court lacks the resources necessary to investigate the majority of crimes falling under its jurisdiction. It has received several thousand communications pursuant to Article 15, but has moved to the investigation stage in only a handful of cases because of the vast monetary resources and personnel hours required.35 Thus, initiating a conflict or committing atrocities may not significantly increase the certainty of prosecution.36 Second, the ICC’s jurisdiction is potentially quite broad: the court can initiate preliminary examinations based upon state referral, UN Security Council (UNSC) resolution, or its proprio motu authority (Article 15), which allows the Office of the Prosecutor (OTP) to initiate investigations on its own initiative.37 Importantly, this means that ICC prosecution is not limited to individuals from ratifier states, and the most obvious indicator of future prosecution—ratification of the Rome Statute—is only weakly linked to the certainty of punishment. On the other hand, once the OTP initiates an examination or investigation, the certainty of punishment increases. Of the nine situations that have proceeded to the investigation stage, all but one have resulted in arrest warrants. Further, in only three cases has the court begun an examination and decided not to proceed to investigation. Thus, when the court becomes actively involved in a situation, leaders will be much more certain of the ICC’s intent to prosecute. The Conflict-Exacerbating Effect of ICC Involvement How do the increased certainty and celerity of punishment resulting from ICC involvement influence leaders’ war-termination decisions? Ending the conflict and associated human rights abuses, which once may have seemed a viable strategy to avoid ICC attention, is no longer an effective way to prevent prosecution since the court will not simply end an ongoing examination/investigation because the killing stops. Instead, leaders facing ICC prosecution may view continuing the conflict in the hope of avoiding punishment as their best option.38 To understand why this is the case, consider the ways in which civil wars commonly end and how ICC involvement alters incentives for each outcome. First, ICC involvement reduces the possibilities for peaceful settlement.39 The OTP focuses its prosecutions on high-ranking officials, the very individuals whose cooperation is essential for securing settlement deals.40 By threatening key leaders’ personal and political fortunes, ICC prosecution makes it more difficult for these individuals to make credible commitments to peace. Specifically, it undermines settlement by making the process of negotiating more difficult and the terms of settlement less favorable for peace. ICC involvement complicates negotiations because leaders facing possible prosecution have incentives to stay entrenched in strongholds and avoid direct contact with their opponents and other outsiders who might act as the court’s enforcers. This is because leaving secure bases to attend negotiations increases the risk of capture and transfer to the Hague. Domestic opponents may use the court as a way to punish an adversary when they lack the will or resources to prosecute themselves41 or when domestic punishment options are limited.42 Therefore, ICC involvement incentivizes leaders to avoid negotiations because attending talks increases their vulnerability to capture and prosecution. In Uganda, for example, Joseph Kony failed to show up to the signing of the Juba Peace Accords in April 2008, at least in part out of fear that he would be taken into custody at the Hague should he attend the signing ceremony.43 The ICC case remained a stumbling block throughout negotiations between the Ugandan government and the Lord’s Resistance Army (LRA), with Kony repeatedly insisting that ICC charges be dropped as a precondition for settlement.44 Similarly, the “threat of prosecution by the international tribunal in the Hague made it practically impossible for NATO to reach an early deal with Milosevic, thereby lengthening the war and the suffering in the Balkans in the summer of 1999.”45 In both cases, leaders’ fear of international prosecution undermined their ability to commit to peace, which hindered settlement attempts and extended conflict.46 ICC involvement also undermines leaders’ ability to credibly commit by making the terms of settlement less favorable for peace. Specifically, it takes amnesty off the table.47 Settlement offers that include amnesties can facilitate settlement by ensuring that key leaders avoid jail time (or worse) for their crimes. The Rome Statute, however, is silent when it comes to domestic amnesties and other transitional justice mechanisms.48 While some legal scholars argue that there are certain routes by which the court could recognize amnesty-for-peace deals,49 others more rigidly interpret the Rome Statute, arguing that the ICC is unlikely to recognize such deals, particularly if they pardon elites.50 In practice, the OTP appears to have settled on a strict interpretation of the Rome Statute. OTP statements in response to Uganda’s President Yoweri Museveni’s amnesty offer to top LRA leadership in 2006, for example, indicate that the court would not have withdrawn charges had the amnesty deal gone through.51 More recently, the chief prosecutor’s position on domestic amnesties complicated the Colombian peace process. Speaking in Bogota in November 2013, Moreno Ocampo (first prosecutor of the ICC) stated “the agreements that were possible with the M-19 (guerrillas demobilized in 1991) and offered to the FARC in Caguan (failed attempt at peace between 1998 and 2002) are not legally possible today.”52 This suggests that leaders facing ICC charges cannot expect the court to honor domestic amnesties included in settlement deals. Importantly, this affects both state and rebel leaders: state leaders who might have stepped down and rebels who might have given up the fight will be less likely to do so knowing that the court does not respect domestic amnesty. As a result, both rebel and state leaders will be less willing to commit to peace deals that they would have otherwise accepted, and conflict will drag on. In addition to altering incentives for settlement, ICC involvement influences leaders’ incentives for victory. Because the court cannot execute warrants itself, it depends upon state parties to arrest and surrender wanted persons. Sovereignty norms, however, provide some protection to sitting state leaders: while venturing outside sovereign borders puts state leaders at risk, remaining entrenched at home leaves them relatively secure against ICC prosecution. As Goldsmith and Krasner note, “the Milosevics, Mullah Omars, and Pol Pots of the world … tend to hide behind national borders, where they are hard to reach.”53 Further, domestic actors often lack the ability to remove a sitting leader who enjoys the protection of the state’s security apparatus.54 Therefore, holding state-level power renders a leader relatively secure against ICC prosecution.55 Along these lines, Sudan’s Omar Al Bashir cancelled plans to step down from power in 2009, reversing course after the ICC issued an arrest warrant for the embattled Sudanese president.56 Bashir’s decision to stay in power was likely motivated by fear that stepping down would allow his political opponents to turn him over to the ICC for prosecution. The fact that holding state power is the most secure position for leaders wanted by the court has implications for rebel and state incentives for victory. First, it generates strong incentives for rebel leaders to try to win the war quickly because they are less likely to be turned over to the ICC if they can take control of the government. On the other hand, state leaders’ resolve will be largely unaffected by ICC involvement. As long as the state leader can avoid losing power, his risk of ICC prosecution remains relatively unchanged whether he achieves victory or the war continues since he enjoys the protection of sovereignty norms either way. As a result, rebels will fight harder while the state is likely to put forth a similar amount of effort to win. This makes state victory, in particular, less likely because increased effort by the rebels will help them stave off defeat. While rebel victory may be slightly more likely given increased rebel resolve, the power differential between state and rebel forces (rebels are weaker than the state 95 percent of the time) ensures that rebel victory remains a remote possibility, despite increased rebel effort. Overall, therefore, ICC involvement is expected to decrease the likelihood of military victory, relative to the conflict’s continuation.57 Finally, ICC involvement has implications for the likelihood of low activity outcomes as well. Low activity termination occurs when fighting diminishes in frequency and intensity so that the conflict becomes inactive without formal agreement or a clear victor. As discussed earlier, when the ICC gets involved, rebels have incentives to fight harder to try to take the state and gain the protection that state-level power provides. Importantly, this results in more intense fighting, which reduces the likelihood that conflict ends through low activity. ICC involvement also motivates leaders to maintain an environment of violence and insecurity to ensure that the OTP cannot build a strong case against them. The OTP’s efforts to investigate will be hampered when the country is unsafe because investigators will be unable to collect evidence on the ground. Thus, prolonging conflict is an effective way for leaders to undermine the OTP’s ability to collect sufficient evidence to start a case. Ultimately, ICC involvement prolongs civil war by threatening the political survival and personal freedom of state and rebel leaders. At-risk leaders will avoid negotiations and settlements that leave them vulnerable to prosecution, while increased incentives for victory will lengthen conflict by helping rebels avoid defeat and prolonging active fighting. H1: Active ICC involvement decreases the likelihood of civil conflict termination.

#### Uganda proves the threat of prosecution prevents conflict resolution – it becomes a bargaining chip and hampers negotiation abilities. ICC involvement is a spoiler, increasing the risks of war under a “prosecutions-at all-costs” mentality

Clark 18 [Phil Clark, educator at the school of Oriental and African Studies at University of London, 10-24-2018, “Distant Justice The Impact of the International Criminal Court on African Politics,” Cambridge University Press, https://www.cambridge.org/core/books/distant-justice/FD4410B6160CD17836297D9503A219DD]/Kankee

Peace Negotiations in Uganda This section explores the impact of the ICC on four peace-related phases in northern Uganda: the 2004–5 peace talks led by Betty Bigombe; the general atmosphere of violence in northern Uganda in 2005; the kickstarting of the Juba talks in 2006; and the Juba negotiations themselves from 2006 to 2008. This section argues that the ICC contributed to a broader set of factors that pushed the LRA to the Juba talks but ultimately undermined all of these peace efforts. Once the Juba negotiations got underway, the ICC was a consistent stumbling block that, along with other issues, precipitated the collapse of the talks. As either a catalyst or impediment to peace negotiations, the ICC was an enabling – though never the decisive – factor. Nevertheless, a better grasp by the Court of key political and social dynamics surrounding Juba and greater flexibility about the scope of the ICC’s prosecutions – neither of which the ICC’s distance discourse permits – would have greatly aided a negotiated solution to the conflict between the government and the LRA. After the Barlonyo massacre in February 2004, Bigombe left her World Bank job in Washington DC to launch a series of negotiations with the LRA leadership – principally with Kony’s deputy Vincent Otti – between March 2004 and April 2005. This mirrored Bigombe’s negotiations with the LRA in 1993 and 1994 when she famously walked unguarded into the bush to meet Kony and his commanders.68 By May 2005, however, Bigombe was holed up at the Acholi Inn in Gulu, with the LRA refusing to take her calls and the prospects for peace seemingly dashed. Unbeknown to Bigombe, the LRA had begun meeting representatives of the Sudan People’s Liberation Movement/ Army (SPLM/A), which now controlled all of southern Sudan. This led to a meeting between Kony and Riek Machar, Vice President of the government of southern Sudan, in May 2006 that paved the way for the Juba talks.69 Bigombe and various Acholi civil society leaders argued that the threat of ICC prosecution jeopardised peace talks between her mediation team and the LRA commanders and would deter combatants from returning from the bush under the amnesty provision.70 ‘The peace process is currently on the shelf, stalled’, Bigombe said in March 2006. I’m in daily contact with Otti...Otti expects my mediation to continue...Ocampo expects mass surrender of the LRA and the war will end in three months but this is impossible. We need to involve Kony and Otti in all discussions...Otti called me two weeks ago, angry, saying, ‘Do you still want to talk?...If tomorrow Kony says I’ll talk, what flexibility will there be from the ICC?’ The current rigidity of the ICC complicates this process so much. Otti asked if he could talk to Ocampo through me. But he also said, ‘I know the cells are already ready’, so this is a big problem.71 Lars Erik Skaansar, the UN envoy to the northern Uganda peace process, whose team supported Bigombe throughout the 2004–5 negotiations, echoed her views: The main effect of the ICC warrants is that Kony is much more reluctant to call Bigombe. Otti is still in regular contact but not Kony. Initially Bigombe told Otti he could still use the amnesty but that train has gone...After the ICC, the UN peace team can’t meet the LRA. The peace team approached Ocampo about the arrest warrants. The Rome Statute says that justice can be put on hold for the sake of peace processes. Ocampo made a taped broadcast on [Mega FM] in the north. He changed his wording on the advice of the peace team, a meeting I participated in. He said, ‘We support the UN and its peace efforts but we also have the support of the international community.’ Ocampo promised to cooperate with the peace team but he has never been here.72 Reflecting these concerns, the ARLPI sent delegations to The Hague in March and April 2005 to lobby against ICC investigations.73 The ICC countered these claims, arguing that the Bigombe peace talks had stalled long before the issuance of the warrants and that new initiatives were necessary to achieve peace and security. Ocampo stated that the dramatic change in LRA tactics in mid- to late 2005, particularly the movement of large numbers of LRA combatants, including Kony and Otti, into north-eastern DRC, stemmed from the threat of ICC prosecution and showed the ICC’s inherent contribution to lasting peace.74 The reality probably lies somewhere between Bigombe’s and Ocampo’s depictions. By the time the ICC unsealed arrest warrants for the LRA commanders in October 2005, Bigombe’s negotiations had already faltered, due mainly to the signing of the Comprehensive Peace Agreement (CPA) between the SPLM and the Sudanese government in January 2005. One key outcome of the CPA was to catalyse a joint SPLA, UPDF and Sudanese army counter-insurgency against the LRA, whose main bases were in southern Sudan. This forced the LRA into Garamba National Park in north-eastern DRC and greatly disrupted Bigombe’s communications with Otti and other LRA leaders.75 While the ICC arrest warrants were not the primary reason Bigombe’s talks broke down, Ocampo inaccurately ascribed the LRA’s exodus to the threat of ICC prosecution. Once the warrants were issued, it then became almost impossible for Bigombe to restart the negotiations despite maintaining regular contact with Otti. Several other factors undermined the Bigombe talks and carried into the Juba negotiations in 2006.76 The main impediment was the LRA’s distrust of Museveni and the Ugandan government. While Bigombe was trying to negotiate, the UPDF was busy attacking the LRA in southern Sudan, an act repeated at the beginning of the Juba process, which led to the killing of LRA commander and ICC suspect Raskia Lakwiya on 12 August 2006.77 Kolo, the LRA’s chief negotiator in the Bigombe talks who surrendered to the UPDF in February 2005, said, ‘Even on the amnesty issue, the LRA doesn’t trust the government...How can we trust Museveni when the government keeps attacking us?’ 78 The Bigombe process was also severely hampered by divisions among international actors over whether to support peace talks, military action against the LRA or the ICC. Father Carlos Rodriguez from the Gulu Catholic Diocese and the ARLPI said, ‘There needs to be big pressure on Sudan but there’s little chance of influence there because currently the international community is reluctant. The US was involved in the early days of the peace process with Betty Bigombe but less so now. Later Norway, the Netherlands, the UK got involved and that’s continuing somewhat.’ 79 Magnhild Vasset, Resident Representative of the Norwegian Refugee Council (NRC), echoed these views regarding the US position: ‘The US plays a double role here. They’re involved in peace but they also support the UPDF [military campaign against the LRA]. You have these US marines staying at the Acholi Inn [in Gulu]. Meanwhile [US-funded] NUPI [the Northern Ugandan Peace Initiative] holds seminar after seminar about building peace.’ 80 Another key peace-related debate in northern Uganda concerns whether the ICC arrest warrants incited a violent backlash by the LRA and worsened the overall humanitarian situation in late 2005. This calls into question the ICC’s asserted role of prosecuting atrocity suspects to help end conflict. Civil society and other interviewees in early 2006, especially in Acholiland, argued that the ICC actively encouraged the government’s military campaign in the north by advocating the armed capture of the LRA leadership. They cited the fact that, within a week of the opening of the ICC’s case in Uganda, the government announced that it would re-enter Sudan to find and arrest the LRA commanders.81 Acholi political, cultural and religious leaders protested vehemently against the issuance of the LRA warrants. Kolo, the returned LRA commander, said, ‘The ICC coming here to stop the LRA is like trying to beat a snake with a piece of paper. It doesn’t kill the snake but just makes it wilder.’ 82 Fears of increased LRA activity were confirmed by several rebel attacks on NGO personnel in northern Uganda. This coincided with the government’s ‘decongestion’ programme in late 2005, which moved tens of thousands of IDPs from bigger to smaller camps, severely disrupting camp life but without substantially improving people’s living conditions.83 In late October and early November 2005, three international aid workers were killed in two LRA ambushes near the Sudan–Uganda border.84 ‘There’s no question the ICC arrest warrants have jeopardised our security here’, said Vasset from the NRC in Gulu: LRA activity peaked in 2003 and 2004 but in early and mid-2005 things quietened down. Then there were the October attacks on the NGOs. This changed the whole perception of the security situation. There is no question this was related to the ICC arrest warrants. Suddenly it’s become difficult to access the camps. We need escorts and many NGOs are reconsidering their presence here. MSF [Médecins sans Frontières] for example is considering leaving. Kitgum and Pader have quietened down but Gulu has worsened considerably. And of course there were the UN peacekeeper [murders by the LRA in Garamba National Park in January 2006], which frightened many people here. I was away in December and January and when I came back I could see all of these changes...CSOPNU [Civil Society Organisations for Peace in Northern Uganda] has been highly concerned about the ICC going public. Many groups here saw a link between the October attacks and the ICC announcements.85 Ocampo argued – with some justification – that, while the LRA had attacked some foreign NGO personnel, violence against civilians in northern Uganda had generally decreased after the issuance of the ICC warrants.86 It is not clear, though, that a decrease in LRA attacks during this period resulted directly from the ICC’s investigations. A key catalyst in this regard was undoubtedly the Sudanese government’s reduced assistance to the LRA, as a result of the signing of the CPA between Khartoum and the government of southern Sudan and international pressure on Khartoum to ensure greater stability around the Sudan–Uganda border.87 In sum, during this period, the ICC intervention led to the LRA targeting international NGO workers – to send a message to the international community about the arrest warrants – but the ICC was only a peripheral factor in the general environment of decreased violence against northern Ugandan civilians. A major issue in the contestation over the Juba talks between 2006 and 2008 has been the impact of the ICC in pushing the LRA to negotiate for peace. Various senior ICC officials and academic commentators have argued that without the threat of ICC prosecution, the LRA would never have considered negotiating with the Ugandan government.88 This argument is unconvincing in two key respects. As highlighted above, the signing of the CPA, which greatly weakened the LRA by threatening its bases in southern Sudan, occurred nine months before the ICC issued arrest warrants for the LRA leadership. While some LRA attacks continued in late 2005, the group’s scope for violence was clearly curtailed by the CPA and the subsequent joint counter-insurgency against the rebels. As Ron Atkinson argues, the signing of the CPA pushed the LRA toward peace talks by forcing the Sudanese government to halt its support for the LRA, dispersing the LRA from its bases and incentivising the newly autonomous government of southern Sudan to deal with ‘foreign forces’ including the LRA. This provided the grounds for the clandestine talks between the SPLM/A and the LRA mentioned above, which were central to the start of the Juba negotiations in 2006.89 The ICC arrest warrants may have provided an additional incentive for the LRA to negotiate. However, to frame the ICC as the only – or even the main – catalyst in this regard belies a series of more fundamental regional political developments months before the ICC arrest warrants. There is also a certain disingenuousness in Ocampo’s and other ICC officials’ argument that the warrants forced the LRA to negotiate at Juba, given that they vehemently opposed any attempts by the LRA to find a negotiated solution to the threat of ICC arrest. The ICC cannot justifiably take credit for catalysing the Juba talks when it subsequently challenged the basis on which the LRA supposedly joined the process. Concerning the Juba talks themselves, debates have centred on whether blame for the collapse of the negotiations should ultimately rest with the ICC. Such a perspective is widespread among many northern Ugandan civil society and community-level actors as well as in the commentary on the Juba talks.90 The ICC acknowledged these concerns over its impact and announced in December 2006 that it would launch a review into the matter, although it is unclear whether the review was ever conducted as no findings were ever publicised.91 The Juba talks officially began on 14 July 2006 and were structured around five agenda items: a cessation to hostilities; comprehensive political solutions to the conflict; accountability and reconciliation; DDR; and a permanent ceasefire. Hopes were raised with the signing of a cessation to hostilities agreement on 26 August 2006, which was renewed seven times throughout the duration of the talks.92 From the outset, foremost among the LRA’s demands was the withdrawal of the ICC arrest warrants against its commanders, allowing them to take up the government’s amnesty, participate in cleansing and reintegration rituals in northern Uganda and, according to some observers, secure exile in southern Sudan or elsewhere.93 The LRA’s demand proved highly controversial, and the ICC stated shortly after that it would not withdraw the arrest warrants.94 Meanwhile, the government – which had initially backed the LRA’s request – then claimed to support the ICC’s refusal to grant it.95 In response to the government’s and the ICC’s stance, in November 2006 Kony called three northern Ugandan political leaders – Norbert Mao, Walter Ochora and Alphonse Owiny-Dollo – to Garamba National Park to brief him on legal and political matters stemming from the ICC intervention. The three leaders travelled with Jan Egeland, UN head of humanitarian affairs. The day before leaving for Garamba, Owiny-Dollo, former Minister of State for the reconstruction of northern Uganda, told the author, We’ve been called to Congo because Kony is seriously considering his options. Does he remain in the wilds of Congo or seek refuge elsewhere, for example in Sudan? Does he send his troops home and remain mobile or try to stay where he is now?...Kony is well aware of the situation with the ICC but he needs advice on the details. Our advice will be that there will be no easy removal of the ICC warrants.96 Owiny-Dollo reported after the meetings that Kony was willing to stand trial in Uganda if it meant the ICC would remove the warrants. ‘Kony made it clear that the ICC is biased, it has heard only one side of the story and now he says he is willing to stand trial in Uganda’, Owiny-Dollo said. ‘He mentioned Luzira and Lugore prisons which means he is ready to face anything.’ 97 The LRA announced in February 2007 that it would send a delegation of lawyers to The Hague to meet Ocampo and petition directly for the removal of the ICC arrest warrants.98 The Juba negotiations stalled between December 2006 and April 2007 after the LRA walked out, demanding a change of venue and mediator.99 Once the talks resumed – with Riek Machar remaining as mediator but now supported by former President of Mozambique, Joachim Chissano, who was appointed UN special envoy to the northern Ugandan conflict in December 2006 – the next year brought a flurry of activity. This included the signing of the comprehensive political solutions agreement on 2 May 2007, providing a roadmap for addressing the root causes of the LRA rebellion; the accountability and reconciliation agreement signed on 29 June 2007, with an implementation protocol signed on 19 February 2008; the agreement on a permanent ceasefire signed on 23 February 2008; and the agreement on DDR signed on 29 February 2008. The final peace agreement which brought together all of the aforementioned agreements, however, was never signed, meaning these protocols could never be fully implemented.100 Blaming the ICC solely for the breakdown in the Juba talks belies the fact that the negotiations lasted two full years and led to the agreements on these highly contentious issues, all while the ICC warrants hung over the LRA leadership. This equally counters the claim by Mark Kersten and others that the government and the LRA never took the talks seriously.101 The ICC’s intervention did nevertheless weaken the Juba process from the outset. A structural effect of the ICC warrants was the fact that none of the five LRA commanders charged by the Court – including Otti who had displayed an openness to negotiation during the previous process with Bigombe102 – could lead the rebel delegation in Juba. Of the fifteen LRA delegates sent to Juba, only two, Col. Lubwe Bwone and Lt. Col. Santo Alit, were active commanders and had been present at failed LRA–government peace talks in 2004, thus bringing critical experience to the Juba process. A source of constant frustration for the mediation and advisory team to the talks was uncertainty over whether the LRA delegation spoke legitimately on behalf of the leadership in the bush and had the authority to enact the agreements signed in Juba, including the cessation to hostilities.103 Regular changes to the leadership of the LRA delegation in Juba exacerbated this dynamic, as the did the murder of Otti – reportedly at the hands of Kony in early November 2007 – as he had maintained regular contact with the delegation.104 The ICC warrants also fundamentally shaped the tenor and substance of the Juba negotiations. During and after the two-year process, the LRA said repeatedly that it would neither sign the remaining sections of the final agreement nor countenance laying down its arms and demobilising its forces until the ICC warrants were withdrawn.105 Particularly in the early stages of the talks, the issue of the arrest warrants was a major distraction to the five-point agenda. The first eighteen months of the talks, especially on the third agenda item of accountability and reconciliation, were dominated by discussions over modalities for removing the warrants or at least pausing the ICC investigations for one year renewable under Article 16 of the Rome Statute.106 A major complicating factor in the early stages of the talks was both the Ugandan government’s and the LRA delegation’s weak grasp of the Statute and what was considered permissible under international law. The government of southern Sudan and UN mediation team, principally its chief legal advisor, Barney Afako, spent considerable time educating both sides on the international legal parameters of the negotiations, including the limitations imposed by the fact that the ICC had already issued arrest warrants for the LRA leadership.107 Sandrine Perrot reports that even within the mediation team and among the various donors supporting the Juba process, there was substantial disagreement and confusion over how to balance the demands of the Rome Statute and the Ugandan Amnesty Act.108 Meanwhile, the ICC intervened routinely, often acerbically, in the negotiations with a series of public statements, supported by various UN agencies and international human rights organisations, stating that the ICC arrest warrants must be enacted.109 These international interventions had two principal effects: first, to raise the temperature of the negotiations, framing various LRA proposals solely as attempts to extricate its leadership from the ICC warrants; and, second, to pressure all of the parties in Juba to narrow the parameters of substantive discussion. This amounted to significant over-reach by the ICC and its supporters and tainted the atmosphere and content of the Juba talks.110 The barbed statements by the ICC Prosecutor and other senior Court officials – particularly as the third agenda item was being discussed in 2007 – complicated the mediators’ task.111 At a diplomatic briefing in October 2007, Ocampo described the entire Juba process as an attempt by the LRA to regroup and rearm while the world was distracted. ‘The criminals have threatened to resume violence if the arrest warrants are not withdrawn’, he said. ‘They are setting conditions. It is blackmail. The international community has to ensure protection of those exposed to those threats...Those warrants must be executed. There is no excuse. There is no tension between peace and justice in Uganda: arrest the sought criminals today and you will have peace and justice tomorrow. Victims deserve both.’ 112 After Ocampo’s briefing, the Ugandan state-owned newspaper, the New Vision, reported that the government supported Ocampo’s criticisms: Internal affairs minister, Dr. Ruhakana Rugunda, the leader of the Government delegation at the Juba talks, said Ocampo’s statements were in order because he was carrying out the mandate of the ICC, to which Uganda is a member. The lifting of the arrest warrants would only be dealt with after the signing of a peace agreement, accountability has been carried out and impunity dealt with. [Only then] will the Government ask the ICC to review the indictments, [Rugunda] said.113 The variability of the Ugandan government’s position on amnesty and prosecutions created further distrust among the LRA delegation.114 On several occasions, Museveni announced that, if the LRA leaders would surrender, he would withdraw Uganda’s referral to the ICC and the leaders would receive amnesties and pass through reconciliation rituals.115 Following a visit to The Hague in July 2006 by Ugandan Minister for Security, Amama Mbabazi, however, Ocampo reported, ‘The Government of Uganda did not ask for any withdrawal of the warrants of arrest. The arrest warrants remain in effect. It is the view of the Office of the Prosecutor and the Government of Uganda that justice and peace have worked together thus far and can continue to work together.’ 116 The view that the state could unilaterally withdraw its referral to the ICC persisted, especially in Ugandan government and civil society circles. States, however, do not possess such capabilities. If a government withdraws its referral, the Prosecutor can still employ his or her proprio motu powers under Article 15 of the Rome Statute to proceed with investigations. Finally, the ICC arrest warrants curtailed various options during the Juba process, especially concerning the third agenda item on accountability and reconciliation. As discussed above, the UN and other international actors with access to the Juba negotiators stressed consistently that the Amnesty Act could not legally apply to the LRA commanders. The Ugandan government claimed two months before the start of the Juba talks that the amendment to the Act denied amnesty to the LRA commanders or any other high-ranking suspects of international criminals. The May 2006 amendment to the Act, however, simply states, ‘Notwithstanding the provisions of section 2 of the Act a person shall not be eligible for the grant of amnesty if he or she is declared not eligible by the Minister [of Internal Affairs] by the statutory instrument made with the approval of Parliament.’ 117 This provision is much less restrictive than the changes proposed in an Amnesty Amendment Bill tabled in 2003 and gives the Minister of Internal Affairs the authority to deny amnesty to particular named suspects. At no point during or after the Juba process, however, did the Minister do this concerning the LRA or any other rebel leaders.118 The insistence by the government and various international actors that the Amnesty Act did not apply to the LRA leaders charged by the ICC caused anger among the LRA delegation and the Acholi civil society leadership that travelled to Juba.119 Reflecting this, Machar’s guidelines for government and LRA popular consultations on the accountability and reconciliation agenda item emphasised the need to consult widely on possible changes to the Amnesty Act and the links between traditional and formal justice mechanisms.120 Afako also reported that the supposed prohibition against the amnesty stymied the discussions and gave the LRA delegation, their supporters and some members of the mediation team a sense that ‘we did not own this process, that it was being curtailed by outside parties’. 121 While the ICD of the Ugandan High Court, which emerged as a key mechanism from the Juba negotiations, was intended to construct a national prosecutorial mechanism that cohered with the Rome Statute, the LRA delegation viewed it as an attempt to steamroll their concerns about both domestic and international prosecutions. Simon Simonse, Willemijn Verkoren and Gerd Junne, who were part of the Pax Christi team that helped bring the government and LRA delegations to the negotiating table, argue that as the Juba process became more internationalised and legalistic – which they attribute both to the ICC and Chissano’s mediation – the accountability and reconciliation options narrowed. They argue in particular that this excluded a range of mechanisms considered more legitimate by everyday northern Ugandans, particularly community-based rituals.122 Through the four phases of peace-related processes just outlined, the ICC contributed to the weakening of the Bigombe-led and Juba negotiations. While the Court was never the principal actor in decreasing violence or undermining peace processes, it stymied attempts to resolve peacefully the conflict between the LRA and the government. Consistent with the distance discourse, the ICC was rarely moved to consider its impact on peace negotiations, viewing itself as superior to such domestic efforts and regardless compatible with the broader pursuit of peace. The Court’s capacity to evaluate fully its negative or positive impact on peace was also limited by its lack of deep contextual knowledge and the unwavering support of the ICC’s epistemic community of international lawyers and international human rights organisations for the Court’s prosecutions-at all-costs approach. Peace Negotiations in the DRC

#### ICC prosecution of Putin threatens Russian regime change, state failure, and nuclear war while perpetuating the Ukrainian war

Finucane and Pomper 23 [Brian Finucane, Senior Adviser in the U.S. Program at the International Crisis Group, Nonresident Senior Fellow at the Reiss Center on Law and Security at NYU School of Law, and former Attorney Adviser in the Office of the Legal Adviser at the U.S. State Department, and Stephen Pomper, Chief of Policy at the International Crisis Group and former Special Assistant to the President and Senior Director for Multilateral Affairs and Human Rights at the National Security Council, and former Assistant Legal Adviser for Political-Military Affairs at the U.S. State Department, 7-12-2023, "Finucane and Pomper Reply, Foreign Affairs, https://www.foreignaffairs.com/responses/would-prosecuting-russia-prolong-war-ukraine]/Kankee

\*Note: this card is part of a larger article which includes a response (by Rebecca Hamilton) to another article, and a response to that response (by Brian Finucane and Stephen Pomper). The full article title is “Would Prosecuting Russia Prolong the War in Ukraine?”

Hamilton’s response walks through many of the standard arguments in favor of creating a new tribunal while the war continues to rage, but like much of the literature on this topic, it relies on unsupported claims. She also gives short shrift to the geopolitical context in which this and other international criminal justice efforts are pursued. At the core of Hamilton’s rebuttal is her contention that “the escalatory concerns [we] fear from an aggression tribunal already exist” because the International Criminal Court has already issued a warrant for Russian President Vladimir Putin’s arrest on war crimes charges and because the West provides military support to Ukraine. We strongly disagree with the claim that the ICC’s action somehow inoculates the West against the risks of establishing a new tribunal. For one thing, the ICC is an independent, formally apolitical actor with a mandate that extends well beyond the war in Ukraine. The United States (which is not an ICC member but supports some of the court’s efforts) and other Western countries can therefore separate themselves from its actions regarding Putin. That would not be the case should they move forward with the special tribunal that Hamilton and others envisage. The United States and its partners would need to launch a campaign to get the votes required at the UN General Assembly. A strong showing will be required for the court’s legitimacy and perhaps also to satisfy UN voting requirements. Assuming such a campaign succeeded (which is not guaranteed given how unpopular the idea is in the global South), both the court’s creation and its subsequent efforts could be seen by Moscow only as a U.S.-led drive toward regime change, since the tribunal’s foundational purpose would be to try Putin. Even if the United States proceeds down the path it currently prefers—creating a hybrid body in the Ukrainian judiciary—its fingerprints will be all over the court’s work, particularly if it lends judges and prosecutors to the court’s staff. Moreover, although it is certainly true that ICC warrants already create an obstacle to any peace-making efforts, setting up a new institution will surely complicate them further. Without a change of leadership in the Kremlin, it is virtually inconceivable that any deal with Russia could be reached without the criminal charges against Putin being dropped. Should that moment arrive, navigating the ICC warrants will be challenging enough. Negotiating the actions of a new international tribunal—operating under a separate legal framework and governed by its own institutional logic—would add further complexity, uncertainty, and delay. Nor are we persuaded by the analogy to supplying Ukraine with weapons. The United States has calibrated its military support for Ukraine to match its war aims, helping Kyiv position itself to achieve a just and sustainable peace while forgoing direct involvement and aid that Washington considers too dangerous in terms of potential escalation. But there is no way to reconcile, much less calibrate, the creation of a tribunal that presupposes Russian regime change with U.S. war aims, which very plainly disavow that goal. We agree with Hamilton regarding the dubious legitimacy of in absentia prosecutions, but the possibility of such trials is hardly as remote a possibility as she suggests. During a March visit to The Hague, Ukraine’s prosecutor general, Andriy Kostin, advocated for an aggression trial even if Russian leaders cannot be brought to court in person, saying, “It’s important to deliver a matter of justice of international crimes even if the perpetrators are not in the dock.” We also question Hamilton’s discussion of how prior international arrest warrants have functioned in practice. The handful of precedents she cites—such as Serbia and Sudan—are of limited relevance in predicting the consequences of threatening regime change against a country that boasts the world’s largest nuclear arsenal and is a permanent member of the UN Security Council. Moreover, although she is correct that former Sudanese President Omar al-Bashir found the ICC’s warrants noisome, he remained in power for ten years following the issuance of the first one and, to this day, has not been delivered to The Hague. Meanwhile, Sudan has descended into civil war. One can debate the impact of the ICC warrants on political developments in Sudan, but it is very difficult to have a constructive discussion about the tensions between peace and justice without focusing on the specific details of this and other conflicts, as opposed to relying on broad generalizations. The same goes for present-day Russia. Hamilton claims that an international arrest warrant “could translate into political gains for Putin’s domestic opponents.” Russian politics can be unpredictable, but there is little evidence that the ICC arrest warrant already issued has empowered a more democratic Russian opposition or is likely to do so. Indeed, as illustrated by the recent Wagner mutiny, one can envision a leadership change bringing more, rather than less, autocracy. The prospect of a Kremlin shakeup leading to chaos and state fragmentation—which, though highly remote, also came into focus during Wagner’s march on Moscow—is another scenario that seems quite undesirable given the country’s massive cache of nuclear weapons. We respectfully question the categorical assertion that “sustainable peace requires accountability.” In some instances—generally internal armed conflicts—this may be true. It is also the case that accountability is good in its own right. But when it comes to interstate wars, comprehensive accountability has been all too rare, yet this has not necessarily precluded the cessation of fighting and rapprochement between former adversaries. For example, it is hard to imagine that U.S. or Vietnamese performance in the Vietnam War would survive a judicial scrubbing for atrocities—and yet, for better or worse, reconciliation has proceeded without it. Our point is not to compare these very different conflicts, but to point to the mismatch between Hamilton’s claim about the relationship between peace and accountability and the reality of how some conflicts are resolved. Finally, we want to underscore the lack of global support for the idea of a tribunal, which implicates both its viability and potential legitimacy. Although Hamilton focuses on the problem of selective justice, concerns in countries in the global South about the proposed tribunal extend well beyond that. Many non-Western countries also take a dim view of pressure to pick a side in a conflict far from their shores by creating or supporting a carceral instrument directed at one of the parties, as well as the possibility that this could interfere with efforts to end a dangerous and economically damaging war. Indeed, one element of the peace proposal that a delegation of African leaders recently brought to Kyiv and Moscow was to suspend the ICC warrant for Putin’s arrest We support accountability for international crimes committed by Russia in Ukraine—including for the crime of aggression—if that becomes practicable and does not interfere with efforts to end a war that, because of the countries involved, quite literally poses a risk to all human life. We hope this becomes possible. But as Hamilton reminds us, peace and justice will not align themselves by magic. For exactly this reason, there is more work to do in securing peace before the most ambitious efforts at seeking justice can be responsibly pursued.

#### Putin prosecution destroys diplomacy and US-Russia relations, threating nuclear war

Finucane and Pomper 23 [Brian Finucane, Senior Adviser in the U.S. Program at the International Crisis Group, Nonresident Senior Fellow at the Reiss Center on Law and Security at NYU School of Law, and former Attorney Adviser in the Office of the Legal Adviser at the U.S. State Department, and Stephen Pomper, Chief of Policy at the International Crisis Group and former Special Assistant to the President and Senior Director for Multilateral Affairs and Human Rights at the National Security Council, and former Assistant Legal Adviser for Political-Military Affairs at the U.S. State Department, 5-8-2023, "Can Ukraine Get Justice Without Thwarting Peace?", Foreign Affairs, https://www.foreignaffairs.com/ukraine/russia-ukraine-justice-thwarting-peace]/Kankee

References such as this to the Nuremberg military tribunals, which took place after World War II to hold Nazi officials accountable for both aggression and atrocity crimes, are highly resonant, but also misleading. The Nuremberg trials, as well as their counterparts in the Far East, came at the end of a globe-spanning total war that finished with the Axis powers’ defeat, surrender, and occupation, as well as the capture of their leaders. The Allies used these trials to demonstrate their commitment to the rule of law and to expose the defendants’ depravity. Because the Allies were able to impose terms on Germany or Japan, they were also in a position to try their leaders and enforce the sentences the war court passed down. Russia’s unlawful war on Ukraine appears to be on a different trajectory. It is unclear how the conflict will end, but Russian surrender is not in the cards. One likely scenario is a negotiated deal; another is a frozen conflict. Moscow’s political leadership will remain almost certainly ensconced for the foreseeable future, and international actors will continue to need to work with them in forums such as the United Nations. Ukraine’s Western partners are trying to weaken Russia, but they are also trying to steer clear of a direct conflict, aware that any confrontation the Kremlin sees as posing an existential threat could bring the risk of escalation, including the use of nuclear weapons. Plans to stand up a new tribunal do not easily fit into this landscape. Seeking accountability for Russian President Vladimir Putin and other senior Kremlin officials now, while Russia and Ukraine remain locked in combat, is hard to reconcile with any realistic Western war aims. A big push to prosecute Russian leaders for starting the war signals a desire to remove Russia’s leadership, risks escalation, and would almost surely complicate diplomacy to bring the war to an end. If establishing such a court ultimately proves futile, it could also weaken rather than strengthen the international criminal justice project. Rather than barreling ahead and risking a full-on collision between the interests of peace and justice, Ukraine and its partners should pursue a sequenced approach in which accountability efforts are better harmonized with the goals of conflict resolution. A LOOPHOLE IN THE LAW There are very few examples of war-time leaders being tried on aggression charges, and fewer still of trials that took place while the leaders were still waging war. Most precedents date back to the post–World War II International Military Tribunal, which the victorious Allies created at Nuremberg to prosecute senior German leaders. The other most notable case comes from Nuremberg’s sister tribunal held in Tokyo, which was created to try Japanese officials. There have also been a handful of domestic trials, including those conducted in Ukraine following Russia’s 2014 occupation of Crimea, including one that resulted in the in absentia conviction of Ukraine’s former president, Victor Yanukovych. This sparse record is no accident. The powers driving the creation of the post–Cold War architecture for international criminal law—the United States chief among them—were ambivalent about lumping together the crime of aggression with so-called atrocity offenses (genocide, crimes against humanity, and war crimes). U.S. officials worried about the lack of clarity and consensus around what constitutes aggression. They also feared the exposure they might be creating for themselves and up their chains of command. The U.S. government fretted that these legal changes would hamper Washington’s ability to build coalitions to undertake operations such as NATO’s intervention in Kosovo in 1999, which lacked UN Security Council authorization and which was widely seen as unlawful. (The United States has hewed to the position that its actions in Kosovo were “legitimate,” but it has not argued that they were legal.) Senior U.S. officials were also concerned about the ICC being drawn into political thickets that would undercut its effectiveness. They foresaw that the threat of being prosecuted for aggression could impel leaders to fight to the last rather than negotiate for peace. Against this backdrop, the ICC Rome Statute did not cover the crime of aggression when it became effective in 2002. Instead, it bracketed the issue for a later date. When member states eventually did fill in the definitional gap at a conference in Kampala in 2010, the United States quietly insisted on including a loophole that prevented the court from exercising jurisdiction over a charge of aggression against nationals of countries that were not parties to the Rome Statute, a group that includes China, Russia, the United States, and several other significant military powers, such as India, Israel, and Turkey. Moreover, even with this level of protection secured for itself, Washington did not warm to the idea of aggression as an international crime. After the Kampala conference, U.S. officials lobbied ICC member states not to ratify the aggression amendment, hoping to forestall the moment when it would come into effect, and to narrow the scope of its applicability. Ultimately, despite U.S. efforts, the amendment took effect in 2017. But with the ICC already struggling with its caseload, and given political headwinds from the United States and elsewhere, at least some experts expected that the crime of aggression would move to the back of the international legal agenda for the foreseeable future. RUSSIA BREAKS THE RULES AND CHANGES THE GAME Russia’s invasion of Ukraine in February 2022 rocked the international law community. Appalled by Russia’s vast criminality—and seeing both an opportunity and an imperative to reinforce the global norm against illegal war—prominent Western scholars joined former officials (and some current ones) in calling for the creation of a judicial body that could close the international legal gap and punish Russia for its trespasses. These efforts were spurred on by vigorous Ukrainian advocacy. Arguments in support of an aggression tribunal ranged from the moral to the practical. Many have argued that prosecuting Russian officials would be necessary to deter future wars of aggression. Brown invoked the Nuremberg tribunal’s observation that aggression “is the supreme international crime” in that it is the parent of all criminality that happens in war. Law professor Oona Hathaway noted that pursuing Putin and his associates for war crimes and other atrocities (as the ICC is already doing) would fail to account for lives and property lost in actions that may technically be permissible under the laws of war. International lawyer Philippe Sands argued that prosecuting Putin before an international tribunal would further delegitimize him, possibly create an incentive for those in his inner circle to “peel off,” and perhaps offer Ukraine leverage in future negotiations. To date, expert discussion and media coverage have tended to focus mainly on different models for overcoming the technical barriers to prosecution, while glossing over the impracticality of these proposals. The technical issues are significant: although Ukraine’s domestic courts already have the authority to try Russians for aggression, they would almost certainly be required under international law to recognize immunities for Russia’s heads of state and government, as well as its foreign minister. Thus, a Ukrainian prosecution of Putin, at least while he is in office, would not be possible. And it’s unlikely that any prosecution on charges of aggression against Ukraine that excluded the key architect of the war would be seen as legitimate, especially since the Rome Statute definition of aggression applies only to those in a position to control or direct a state’s armed forces. Against this backdrop, Ukraine (together with some of its Eastern European partners and many experts) has pressed for the creation of an international tribunal by means of a UN General Assembly resolution. A tribunal backed by the General Assembly might stand a greater, though not certain, legal chance of being able to prosecute Russia’ top leaders. Unless they came into the tribunal's custody, however, it would have to do so in absentia. By contrast, many of Ukraine’s most important Western partners, initially led by Germany, have instead endorsed the creation of a “hybrid” court within the Ukrainian system that would draw on “international elements.” What this would entail remains vague: it might mean Ukraine’s Western backers lending advisers or financial support to Ukraine; establishing the court outside Ukraine, possibly in the Hague; or even the application of non-Ukrainian law in any prosecution by the tribunal. Germany has conceded that a hybrid tribunal would be unable to prosecute Putin while he remains in office, though such a court might at least prosecute some military leaders and Duma members who voted for the war. Given decades-old U.S. reservations about prosecuting the crime of aggression, it was unclear whether Washington would support any of these models. But in March, after extended deliberations within the Biden administration, the U.S. government announced that it was lining up behind an “internationalized national court” along the lines of the German approach. Weeks later, the G-7 endorsed this approach. Even though this represented a remarkable movement away from the traditional U.S. posture, the reaction from Kyiv was distinctly chilly. Andrii Smyrnov, the deputy head of Ukraine’s Presidential Office, suggested that a hybrid tribunal would be unconstitutional and expressed concern that it would demote the crime of aggression to a bilateral dispute rather than a matter of international concern. Other Ukrainian officials and frustrated scholars worried that an aggression court with no hope of prosecuting Russia’s top leader would not be worth its salt, and they criticized the United States for showing too little ambition at a historic moment. At his speech in The Hague, Zelensky flatly rejected the hybrid model, calling into question the viability of an approach that presupposes Ukrainian buy-in and cooperation. REAL WORLD WORRIES The technical challenges surrounding efforts to set up an aggression tribunal are significant, no matter which model is pursued. But the even bigger—and in our view more consequential—geopolitical costs and practical challenges of creating such a tribunal tend to be overlooked. A fuller reckoning would recognize that to establish an aggression tribunal at this moment in the war would be difficult to reconcile with both global attitudes and battlefield realities. First, states in the so-called global South have been decidedly cool to the idea of aggression prosecutions. With often fragile economies and their own national interests to look after, few want to be put in a position where they must choose between rival great powers squaring off in a war that is for them geographically remote. These countries are also conscious of the extent to which modern global criminal justice efforts have focused on countries such as theirs, particularly those that have been adversaries of the West. By contrast, they consider that Western powers and their partners have been ringfenced from facing accountability for their own abuses in places such as Afghanistan and Iraq. These concerns have started to surface at the UN. Late in 2022, Ukraine unsuccessfully floated a UN General Assembly resolution endorsing the idea of a tribunal and asking Secretary-General António Guterres to set out options for its creation. Some skeptical European officials predict such a proposal to establish a tribunal might get as few as 60 and perhaps no more than 90 votes—out of 193 member states—if a vote is held in the UN General Assembly. At a recent Brookings Institution event, Martin Kimani, Kenya’s ambassador to the UN who forcefully denounced irredentism and the unlawful use of force on the eve of Russia’s invasion, cautioned against “believing that legalism will deliver us from this major conflict and its escalation dangers.” For Western states eager to maintain the most united possible global front against Moscow, these words – from perhaps the United States’ closest partner in East Africa – merit careful consideration. A second basket of concerns is more practical. Simply put, proceedings that target Russia’s sitting leadership clash with Western objectives in a way that the post-World War II prosecutions of German leaders did not. Probably most worrying is what these efforts communicate to Moscow about the West’s designs for effecting regime change in Moscow, an end state that Western leaders have taken pains to say they do not seek. Creating a tribunal would signal to the Kremlin that its options are either to win and remain free or to lose and face prosecution, making the war’s stakes existential for leaders that control the world’s largest nuclear arsenal. (Arguably arrest warrants that the ICC has issued against Putin and one of his commissioners already do this; creating an aggression tribunal would unhelpfully reinforce that message.) Creating a judicial body to prosecute Russian leaders for the crime of aggression would also complicate future diplomacy. If and when negotiations to end the war get under way, Russia will almost certainly ask for a release from criminal liability as part of any settlement. It is unclear how Western countries would respond this request. The UN Security Council may have powers that would allow it to supersede international obligations relating to the tribunal, and Kyiv might be able drop charges or grant clemency in the case of a hybrid court, but political considerations could make it hard to wield these tools. Standing up a new aggression court could also gum up what little is left of East-West diplomacy on issues such as the Black Sea grain deal as well as priority areas distinct from the war, including humanitarian access in Syria, assistance in Afghanistan, and peacekeeping in Africa. The last area of concern is in the realm of principle. An ad hoc tribunal created to prosecute Russian officials would have no jurisdiction over crimes of aggression being committed outside Ukraine – giving a free pass to Western countries and their partners. This would only reinforce the view of Global South countries that the United States and its allies see international criminal justice institutions as a selective tool that applies only to their adversaries. MOSCOW IS UNLIKELY TO FALL

#### ICC prosecution causes power consolidation, oppression, and conflict perpetuation for dictators to avoid ICC consequences

Escribà-Folch and Wright 22 [Abel Escribà-Folch, Associate Professor of Political and Social Sciences, Universitat Pompeu Fabra, and Joe Wright, Professor of Political Science, Penn State, 3-18-2022, "Calling Putin a ‘war criminal’ could spark even more atrocities in Ukraine", Conversation, https://theconversation.com/calling-putin-a-war-criminal-could-spark-even-more-atrocities-in-ukraine-179737]/Kankee

International justice may backfire It is also possible that international efforts seeking to hold leaders responsible for human rights crimes could backfire. Leaders who face the prospect of punishment once a conflict ends have an incentive to prolong the fighting. And a leader who presides over atrocities has a strong incentive to avoid leaving office, even if that means using increasingly brutal methods – and committing more atrocities – to remain in power. When losing power is costly, leaders may be more likely to fight to the death, as Libyan dictator Moammar Gadhafi did after the ICC issued arrest warrants for him and other close relatives in 2011. In contrast, when losing power comes with credible domestic immunity from prosecution for ex-rulers, international justice campaigns may help mobilize domestic opposition to dictators. That can boost the chances of a peaceful transition from authoritarian rule – as was the case in some South American countries in the 1980s. However, the flip side of domestic immunity is that ex-rulers are not held accountable. Justice for Putin? An International Criminal Court indictment of Putin, or even an investigation, might backfire because of how he rules Russia. His style of government is called a “personalist dictatorship,” in which power is centralized in the leader and a small core of close associates, rather than in a supporting political party or the military. Our research shows that personalist rulers are more likely than other leaders to be violently ousted from power. That increases the chances they will be punished after losing power. Strongmen typically undermine the political institutions, such as a cohesive military or strong political party, through which they or their allies could retain influence after stepping down. Unable to protect themselves at home, deposed personalist dictators often seek protection in exile. However, a potential International Criminal Court prosecution makes it less likely any nation will promise to protect Putin in exile – so that method of ending the conflict may now be off the table – providing Putin with further incentives to tighten his grip on power. If Putin wants to avoid consequences for his actions, his most likely approach is to prolong the conflict, strive for victory – even a limited one – and ramp up political repression at home.

#### ICC indictments against leaders stifles negotiations and peaceful settlements by threatening dictators if they back down.

Carpenter 22 [Charli Carpenter, professor at the University of Massachusetts Amherst and director of Human Security Lab, 4-5-2022, "War Crimes Trials Aren’t Enough", Foreign Policy, https://foreignpolicy.com/2022/04/05/bucha-ukraine-war-crimes-trial-russia-icc/]/Kankee

Col. Gen. Ratko Mladic, the Bosnian Serb commander who carried out the Srebrenica massacre, was indicted, tried, and convicted by the International Criminal Tribunal for the former Yugoslavia (ICTY). His civilian counterpart who ordered such atrocities, Radovan Karadzic, evaded justice for 13 years but was finally caught, extradited, and tried. Even former Serbian President Slobodan Milosevic, who had bankrolled the Bosnian Serb genocide against Bosnian Muslims, was eventually deposed and turned over to The Hague, where he died disgraced while awaiting sentencing. But calls for war crimes trials while war crimes are ongoing can have two significant downsides. First, early indictments foreclose off-ramps, further backing authoritarian regimes into a politico-strategic corner. As the South African former judge Richard Goldstone has argued, trials during ongoing conflict can be counterproductive toward bringing about a cessation of hostilities. This, in turn, is problematic not only for peace prospects but also for civilians in war because, as political scientist Alexander Downes has shown, the longer wars continue, the more war crimes violations on all sides increase in likelihood and severity. Political scientists Jack Snyder and Leslie Vinjamuri have argued that amnesties, not trials, are often required to bring about peace: “Justice does not lead,” they write, “it follows.” Consider: If the ICC were to indict Russian President Vladimir Putin, the indictment itself would surely become a bargaining chip in any potential peace settlement. If the West stuck by its guns, insisting that the Russian people replace and extradite Putin in return for lifting sanctions, this would only raise the stakes for Putin in winning at any cost. It would make him less likely to cave, more likely to take drastic actions, and more paranoid domestically, tightening the noose around his own inner circle and the public. On the other hand, if the ICC were to give in, after issuing an indictment, to a Russian demand for immunity in return for peace, it undermines the entire purpose of international justice. This is why war crimes indictments are arguably best left until after a war is concluded. But there is a perhaps more insidious problem: Tribunals can get in the way of deterring war crimes by substituting them for genuine action. They can create the impression that the international community is holding an aggressor accountable while enabling the international community to avoid the hard choices that could actually save civilian lives and enforce the U.N. Charter. It is useful to recall the origins of the best known and perhaps most effective of all war crimes tribunals: the International Criminal Tribunal for the former Yugoslavia, which began in 1993 as an effort by Western countries to avoid intervening to stop genocide and crimes against humanity in the former Yugoslavia, a prospect for which there was little domestic support in the United States or Europe at the time due to the perceived debacle of U.S. intervention in Somalia around the same time. Political scientist Christopher Rudolph shows how the court represented a “palatable compromise” between the ethical desire to intervene and the political (and tactical) challenges of doing more to end the war. As Aryeh Neier, former head of Human Rights Watch, stated, “It was a way to do something about Bosnia that would have no political cost domestically.” The unavoidable truth is that the way to protect civilians from war crimes during ongoing war is not merely to threaten punishment for crimes sometime in the future but to put a stop to them now. And in Putin’s case, this stopping power can come only from military force, not solely from judges. Political scientist Jacqueline McAllister’s work shows war crimes tribunals themselves deter crimes in war only in very specific circumstances and don’t work well when the perpetrating regime in question is beholden to an illiberal constituency. Indictments, she argues, do serve another important purpose: to rally the international community against an aggressor in ways that provide the military might to help bring the perpetrator to the table. But her analysis of the role the ICTY indictment played in Kosovo was predicated on a situation where indictment was combined with the willingness to back up judicial processes with a show of military force. Consider: the Vietnam War’s My Lai massacre was not stopped by the threat of a war crimes trial; it was stopped when U.S. helicopter pilot warrant officer Hugh Thompson Jr. turned his guns on his fellow Americans, Lt. William Calley Jr. and his platoon, and threatened to open fire if they didn’t stop killing unarmed South Vietnamese civilians. He then provided an airlift to the survivors. The Bosnian War was not stopped when the U.N. Security Council created the ICTY; it was stopped (rather swiftly) when NATO established and enforced a no-fly zone. As for the crime of aggression, the 1990 Iraqi invasion of Kuwait was not reversed through the use of a war crimes court, real or imagined, but rather through a collective security operation to punish then-Iraqi President Saddam Hussein for invading and push his forces out of the country. Some will say escalation even of the defensive sort is too dangerous and the stakes are much higher in this case. Indeed they are: At stake is the entire rules-based liberal international order and with it, the idea that territorial aggrandizement through aggression is a thing of the past. As political scientists Alexander Montgomery and Amy Nelson write, persistently signaling that the United States is afraid to escalate has only emboldened and enabled Putin’s crimes. Other options exist. Article 5 of NATO’s charter may not apply, but the U.N. Charter’s Article 2 does, as does the right of states to undertake collective defense in an instance of aggression until and unless the U.N. Security Council can act. Similarly, the so-called Genocide Convention requires states to prevent acts that involve targeting and destroying a national group’s civilian population in whole or in part. Bucha arguably qualifies. But even if none of the above were true, more than 3 million refugees have already passed into NATO countries, threatening to destabilize them. The U.N. Security Council has rightly treated war crimes as a threat to international peace and security when they create refugee flows and viewed such flows, when intentionally manufactured through atrocity, as a violation of the territorial integrity norm, warranting a military response. Viewed this way, one could argue Russia has already breached NATO territory. Yes, it is scary to contemplate a shooting war with a nuclear power, but Russia wants a nuclear exchange no more than the West does. The United States cannot continue to allow its nuclear arsenal to deter itself from fighting: It should use the threat of its own unequaled military power to deter Russian crimes and provide Ukraine with the stick it needs. Moreover, escalation is already increasing with every massacre. Every millionth refugee that crosses into an already overstretched land, every passing news cycle that increases enmity, makes it easier for oligarchs to turn against Putin and further reduces his chances for an off-ramp. NATO should stop casting about aimlessly for that off-ramp and create one forthwith by calling Putin’s bluff, demonstrating that Russia can only lose by continuing the war and signaling that the incontrovertible evidence that civilians are being willfully massacred and raped—to say nothing of the millions of refugees whose movement is already compromising NATO borders—has crossed a line. Biden erred in signaling that a military attack on NATO territory was the only thing that would bring the West into the war. He can and should use the Bucha massacre and the refugee crisis as a rationale to adopt a more muscular position and force a settlement before things escalate further. An all-out NATO assault to drive Russia back and enforce the U.N. Charter could, at this point, quite reasonably be threatened if Russia does not withdraw. As a shot across the bow, NATO could begin by sending troops to secure western Ukraine, freeing up the Ukrainian defense forces to hold the east, and establish the requested no-fly-zone to protect Ukrainian skies and humanitarian access. Even more minimal initiatives would represent a step up from thoughts, prayers, and accusations of war crimes to actually begin saving lives: Even before the Bucha revelations, Montgomery and Nelson had suggested providing counterfire systems to Ukraine; aiding the evacuation of refugees; or organizing evacuations by sea in Mariupol, a Ukrainian port city. Options abound: Political will is required. It’s all too easy to threaten war crimes tribunals. The promise of a later trial is a small solace to the families of those dead in the streets.

#### Netanyahu prosecution harms Palestinian peace and independence efforts – it increases nationalism and stops abdications of power

Cohen 24 [Raphael S. Cohen, director of the Strategy and Doctrine Program of RAND Project AIR FORCE with a P.h.D. in government and an M.A. in security studies from Georgetown University, a M.A. in strategic studies from the U.S. Army War College and a B.A. in government from Harvard University, 6-10-2024, "One Step Forward for the ICC, One Giant Leap Backward for Peace", RAND, https://www.rand.org/pubs/commentary/2024/06/one-step-forward-for-the-icc-one-giant-leap-backward.html]/Kankee

True, the ICC warrants, should they be granted, would make it more difficult for either Netanyahu or Gallant to travel abroad, but that punitive measure needs to be weighed against the second-order effects of the indictments. Khan's announcement succeeded in doing what so far no one else has been able to do—unite a deeply fractured Israeli society behind Netanyahu. Although poll after poll suggests that most Israelis want Netanyahu gone, the Israeli public still managed to rally around him when it came to the ICC. Indeed, 106 of 120 members of the Knesset—from across the political spectrum—signed a letter condemning the ICC's move. Of the remaining three parties that did not sign on, the head of the Labor Party condemned the ICC move in a separate statement, leaving the Arab parties, Hadash-Ta'al and Ra'am, as the only outliers. Beyond strengthening Netanyahu's grip on power in the short term, the ICC's arrest warrant also risks changing his incentives for the worse over the long term. Netanyahu has been facing corruption charges in Israel since long before the October 7 attack. Now, with the prospect of fresh international charges, his best prospect for staying out of jail—at home and, now, abroad—will be staying in power, even if that means prolonging the war. If Netanyahu is indeed the core obstacle to peace—as many European, American, and Israeli politicians claim—then the key objective should be getting him to step down. And if that is the case, then the ICC's move was profoundly counterproductive. There are still other deleterious effects, beyond shaping Netanyahu's personal political fortunes. By lumping a democratically elected Israeli government together with an internationally recognized terrorist organization like Hamas, the ICC's move will likely reinforce the preexisting perception among Israelis that the world is out to get them and their sense that it is useless to try to placate the international community. These critics of the ICC note that the Saudi-led intervention in the Yemeni civil war also killed thousands of civilians in an intense bombing campaign, but it did not trigger ICC indictments. Nor, for that matter, has Bashar al-Assad's campaign against his own population, despite the fact that the Syrian civil war has killed—by the United Nations' own numbers—hundreds of thousands of people, including through the use of chemical weapons. And the list goes on from there. This seeming hypocrisy, in turn, will further cement Israel's turn rightward and make any future Israeli-Palestinian peace deal even harder to achieve. The push to indict Gallant is particularly harmful in this respect. While he is one architect of Israeli military operations in Gaza, he is also currently one of the loudest voices in Israeli politics pushing against a protracted Israeli occupation of the strip after the war, and supposedly one of Washington's key interlocutors in negotiating an end to the conflict. The fallout does not stop at Israel's borders. Europe has sought to position itself as an honest broker for a future Israeli-Palestinian peace deal, particularly as Washington is seen as being too close to the Israeli government. But much of Europe has signed the Rome Statute and so will need to abide by the ICC's wishes. As such, it will be hard for Brussels—or any European country—to play its aspirational role of peacemaker if Israeli leaders cannot travel there without fear of arrest and prosecution. At the same time, fewer European politicians will want to travel to Israel to have their photos taken shaking hands with men who are indicted war criminals, if only because the optics would complicate their own political fortunes. And so, the pool of potential peacemakers would dwindle. The effect of the ICC's actions on the United States is, if anything, worse. American conservatives have seen the court as illegitimate, a constraint on American power, and a potential weapon that can be used against U.S. policymakers and service members since its development. Predictably, Republicans blasted these latest ICC moves and threatened sanctions. But the move has affected Democrats as well. The Biden administration had been more open to supporting the ICC as it targeted Russian actions during the Ukraine war. Now, the Biden administration and many senior congressional Democrats are blasting the ICC's actions, ensuring that the United States will remain opposed to the ICC for some time to come. On an emotional level, it is understandable why so many people cheer on the ICC's move. Hamas's attack on October 7 and the war that followed have caused untold destruction and anguish. The ICC's push toward indictments seems like a first step in the direction of justice. But, for the moment, one central question needs to be placed above all others: What actions will ease the misery in Gaza and help bring this war to a close? In this respect, the ICC's move is unlikely to save lives, lead to any real justice, or build a more durable political modus vivendi after the war concludes. Perhaps that is why everyone from U.S. President Joe Biden to British Prime Minister Rishi Sunak to a bipartisan group of U.S. congressional leaders—many of them outspoken critics of Netanyahu and his conduct during the war—have decried the ICC's push to prosecute. The move might be one small step forward for some sort of symbolic justice, but it's going to be a giant leap backward from reaching a far more important goal—peace.

#### Netanyahu prosecution aids the Israeli far-right, emboldens terrorists, threatens Israeli alliances, and destroys peace negoations

Youvan 24 [Douglas C. Youvan, associate professor of chemistry at MIT with a Ph.D. degree in biophysics from UC Berkeley, 11-21-2024, “Cognitive Dissonance and Estrangement: The Impact of ICC Arrest Warrants on Israel and the Global Jewish Community,” Research Gate, https://www.researchgate.net/publication/386013098\_Cognitive\_Dissonance\_and\_Estrangement\_The\_Impact\_of\_ICC\_Arrest\_Warrants\_on\_Israel\_and\_the\_Global\_Jewish\_Community]/Kankee

4.3 Strengthened Nationalism The ICC arrest warrants may also fuel a surge in nationalist rhetoric, reinforcing a "siege mentality" among Israelis. This mentality, rooted in Israel’s history of conflict and isolation, frames the state as a besieged entity that must rely on its own strength and resilience to survive. Nationalist leaders are likely to use the ICC’s actions as evidence of international bias against Israel, rallying public support by emphasizing themes of sovereignty, self-defense, and Jewish unity. Such rhetoric often portrays Israel as the victim of a global conspiracy, where international institutions are seen as tools of antiSemitic or anti-Israel agendas. This narrative can be deeply resonant for many Israelis, particularly those who already feel estranged from the global community. A strengthened nationalist movement could have significant consequences for Israeli society and politics. Domestically, it may lead to a hardening of attitudes toward the Palestinians, with increased support for policies aimed at securing Israeli interests without regard for international opinion. This could include expanded settlement activity, stricter military measures, and reduced willingness to engage in peace negotiations. On the international stage, a surge in nationalism might isolate Israel further, as its leaders adopt a defiant stance against perceived external interference. While this could strengthen Israel’s resolve, it risks exacerbating tensions with allies and undermining efforts to build bridges with the global community. Summary The ICC arrest warrants pose a profound challenge to Israeli society, forcing it to grapple with questions of identity, morality, and international relations. While some Israelis may respond with introspection and calls for reform, others are likely to embrace a more defensive, nationalist posture. This divergence reflects the broader complexities of a society shaped by both pride in its achievements and the ever-present reality of existential threats. The ultimate impact of these warrants will depend on how Israeli leaders and citizens navigate these tensions, balancing the need for security with the imperatives of justice and accountability. 5. Global Implications 5.1 Geopolitical Repercussions The ICC arrest warrants for Israeli leaders carry significant geopolitical ramifications, particularly in their potential to strain Israel’s alliances with Western nations and alter the dynamics of Middle Eastern geopolitics. Israel’s close alliance with the United States and many European nations has historically been a cornerstone of its international standing. Western countries, particularly the U.S., have provided substantial military, economic, and diplomatic support, often shielding Israel from international criticism and sanctions. However, the ICC’s actions introduce a new layer of complexity to these relationships. Western nations that are signatories to the Rome Statute may face domestic and international pressure to comply with ICC mandates, including enforcing arrest warrants if Netanyahu or Gallant were to visit their territories. This creates a diplomatic dilemma, as failure to act could undermine their commitment to international law, while enforcement could jeopardize their relationship with Israel. In the Middle East, the warrants could embolden Israel’s adversaries, such as Iran, Hezbollah, and Hamas, who may interpret the ICC’s actions as validation of their criticisms of Israeli policies. These groups could leverage the warrants as propaganda tools, bolstering their narratives that Israel is a violator of international law. Simultaneously, moderate Arab nations that have normalized relations with Israel through agreements like the Abraham Accords may face renewed internal and external pressure to distance themselves from Israel, potentially stalling or reversing progress in regional cooperation. The warrants also have broader implications for global geopolitics, as they challenge the precedent of Western-aligned immunity in international justice. If the ICC pursues Israeli leaders, it may set a precedent for targeting other leaders from powerful or Western-supported nations, raising concerns among governments worldwide about the Court’s expanding reach. 5.2 International Perception of Justice The ICC’s decision to issue arrest warrants for Netanyahu and Gallant is likely to provoke intense debate over the Court’s impartiality and effectiveness. Critics of the ICC have long argued that it disproportionately targets leaders from weaker or politically isolated nations, particularly in Africa, while avoiding cases involving powerful states or their allies. The decision to pursue Israeli leaders could be seen as either a step toward greater impartiality or as a continuation of perceived bias, depending on one’s perspective. For supporters of the ICC, the warrants represent a bold assertion of the principle that no individual, regardless of their status or nationality, is above the law. By addressing alleged war crimes committed by leaders of a Western-aligned nation, the ICC may hope to enhance its credibility and demonstrate its commitment to universal justice. However, this move also risks reinforcing perceptions of bias against Israel, especially among its supporters who argue that the ICC disproportionately focuses on Israeli actions while ignoring violations by other nations and actors. Furthermore, the effectiveness of the ICC as an institution depends not only on its ability to issue warrants but also on its capacity to enforce them. If the warrants against Netanyahu and Gallant are ignored by Israel and its allies, or if they fail to result in prosecutions, the ICC risks undermining its own authority. This could reinforce the perception that the Court lacks the power to hold powerful nations or their leaders accountable, further eroding its legitimacy on the global stage. 5.3 Implications for Peace Efforts The ICC arrest warrants have complex and potentially contradictory implications for peace efforts between Israelis and Palestinians. On one hand, the warrants could heighten tensions and harden positions on both sides, making meaningful dialogue more difficult. For Israel, the warrants are likely to be interpreted as an attack on its sovereignty and legitimacy, leading to a more defensive and intransigent stance in negotiations. Israeli leaders may become less willing to make concessions, fearing that such moves could be interpreted as admissions of guilt or weakness. On the Palestinian side, the warrants may embolden hardliners who see the ICC’s actions as a vindication of their claims against Israel. This could reduce the incentives for compromise, as Palestinian factions may prioritize pursuing international legal action over engaging in direct negotiations. Moreover, the warrants could exacerbate divisions within Palestinian leadership, with some factions using them to justify continued resistance while others push for diplomacy. On the other hand, the warrants could serve as a wake-up call for both parties, highlighting the urgent need for accountability and resolution. By bringing international legal scrutiny to the forefront, the ICC’s actions might pressure both sides to address longstanding grievances and work toward a sustainable peace agreement. For the global community, the warrants could catalyze renewed efforts to mediate the conflict, emphasizing the importance of resolving the underlying issues that have fueled decades of violence and instability. Ultimately, the impact of the ICC warrants on peace efforts will depend on how they are perceived and leveraged by the parties involved. While they pose significant risks to the prospects for dialogue, they also have the potential to spur critical conversations about justice, accountability, and the path toward a lasting resolution. Summary The ICC arrest warrants for Netanyahu and Gallant have far-reaching implications for Israel, its allies, and the broader international community. They challenge longstanding geopolitical norms, raising questions about the balance between justice and diplomacy. While they may strain Israel’s relationships with Western nations and complicate regional dynamics, they also present an opportunity to confront the ethical and legal challenges at the heart of the Israeli-Palestinian conflict. Whether these warrants hinder or encourage peace efforts will depend on how they are interpreted and acted upon by all stakeholders involved. 6. A Path Forward

#### ICC prosecution of Israel kills ICC credibility and legitimizes terrorists

Oler 17 [Adam Oler, Assistant professor at the National War College, 1-1-2017, “THE LOOMING DEMISE OF THE ICC’S COMPLEMENTARITY PRINCIPLE: ISRAEL, U.S. INTERESTS, AND THE COURT’S FUTURE,” EMORY INTERNATIONAL LAW REVIEW, https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1010&context=eilr-recent-developments]/Kankee

E. The ICC’s Legitimacy Is Also at Stake In deciding whether to pursue a case against Israel, the ICC and its proponents ought to recall Justice Robert Jackson’s April 1945 warning that “[c]ourts try cases, but cases also try courts.”87 Jackson, a principal U.S. architect in establishing the International Military Tribunal (IMT) at Nuremberg, 88 cautioned that any such court “must not use the forms of judicial proceedings to carry out or rationalize previously unsettled political or military policy.”89 Quoting the Informal Inter-Allied Committee from which the IMT eventually emerged, Justice Jackson stressed, “Nothing seems to us more important, from the view of the prestige of the Court and of enabling it to play its proper part in the settlement of international disputes, than that its jurisdiction should be confined to matters which are really ‘justiciable,’ and that all possibility should be excluded of its being used to deal with cases which are really political in their nature and require to be dealt with by means of a political decision and not by reference to a court of law.” Words of wisdom, if any such were ever spoken.90 A solution to the Israeli-Palestinian dispute is a matter of politics and statecraft,91 not criminal litigation. The ICC is thus at a jurisprudential crossroads; to keep its cloak of legitimacy, it needs to remain meticulously apolitical. To her credit, the current Chief Prosecutor, Fatou Bensouda, is extremely cognizant of the ICC’s need to remain apolitical,92 and recognizes why this need is especially pressing with regard to Israel and Palestine.93 In light of Israel’s own efforts at accountability, opening a case against it will inevitably be seen as picking sides, and rightly so. There are multiple reasons why the Court cannot pursue an investigation into IDF actions during the Gaza War and still maintain its judicial neutrality. The ICC should recognize them, and terminate its preliminary enquiry. Otherwise, it risks torpedoing its legitimacy. Most critically, one of the parties in the prospective action against Israel is Hamas, an internationally recognized terrorist organization94 calling for the Jewish State’s annihilation.95 While the Palestinian Authority (PA) does not call for this annihilation, 96 Hamas does.97 Hamas was a belligerent in Gaza; the war’s Palestinian victims were, collectively at least, Hamas supporters.98 This distinction between Hamas and the PA is important because Hamas not only controls Gaza, but does so thanks to free elections.99 Legal proceedings targeting Israel at the ICC would inevitably further Hamas’ “eliminationist” agenda.100 While the PA may indeed be motivated by a genuine desire for justice, an ICC finding against the IDF ultimately advances Hamas’ war aims. This argument is neither academic nor theoretical. The record of trial would be replete with testimony, both through direct and cross examination, disclosing Hamas’ ultimate objective. The Court should never allow itself to be used for such purposes, either overtly or surreptitiously. Opening its docket to any party dedicated to the annihilation of another would inherently undermine the ICC’s legitimacy, if not its raison d’etre. As a prerequisite for action before the ICC, the Court should require alleged victims and their representatives to genuinely renounce calls for an opposing party’s extermination. Until then, the Court’s doors should remain closed to them. Second, what conduct actually constitutes an IHL violation is often an extremely complex question, one defying simple resolution.101 While the authors of the UNHRC Report may honestly disagree with the conclusions of Israeli investigators, answers in this arena are inherently prone to subjectivity.102 Many of the FFA Mechanism’s findings may be controversial, but they are also colorable.103 Consider the Battle of Shujaiya, mentioned earlier as a source of shock to U.S. officials because of its purported brutality.104 There is no question that the horrors of war visited across Gaza were dreadful. But after more thoroughly scrutinizing Israeli actions, senior U.S. (and other) military leaders, including the U.S. Chairman of the Joint Chiefs of Staff, ultimately praised the IDF for its exercise of restraint, precise targeting, and efforts to warn civilians ahead of air strikes.105 Two leading U.S. scholars on the subject of IHL recently concluded that: Israel’s positions on targeting law are consistent with mainstream contemporary state practice. While some of them may be controversial, they are generally reasonable and in great part closely aligned with those of the United States. In the few cases where Israeli practice or positions diverge from those of the United States (or the authors), they nonetheless remain within the bounds of the broader contours of the [Law of Armed Conflict].106 Whether the UNHRC would ever reach a similar conclusion is highly doubtful. But this is not the point. Rather, at issue is whether the ICC should substitute its own judgment for that of Israel’s investigators, especially when the underlying issues are so profoundly complex. By continuing its preliminary enquiry into the IDF, the ICC also rewards and incentivizes Hamas’ continued use of human shields,107 storage of weapons in schoolyards, and other atrocities. 108 Though illegal (and immoral), such actions are already part of Hamas’ operational methodology.109 If Hamas can remove IDF soldiers from the battlefield through ICC prosecutions, the enticement to violate IHL will increase manifestly. It will communicate to Hamas, and others, that using human shields can be strategically beneficial. Finally, ICC proponents should remember that one of the Court’s most important goals is to inspire and encourage States to investigate and prosecute war crimes domestically.110 If International Criminal Justice (ICJ) is to endure as a normalized legal concept, State institutions must remain preeminent.111 As ICJ pioneer M. Cherif Bassiouni noted in 2010, the principal achievements in this field will be made via the prosecution of international crimes through domestic criminal justice systems—not the ICC.112 The Court’s most effective method for ensuring that war-crime perpetrators are held accountable is to “enhance the prospects of domestication” of international criminal justice.113 In a fundamental sense, the ICC is achieving this goal vis-à-vis Israel. The IDF’s establishment of its FAA Mechanism, and the resulting investigations, reflect this. Even before the Gaza War ended, Israelis saw their new system as a method to prevent international enquiries, including those by the ICC.114 The new Israeli MAG, approved last summer by the minister of defense, was arguably selected in part because of his ability to address ICC-related challenges.115 Israel’s efforts in this regard are important, not just because of their domestic impact, but due to the precedent being set. If the ICC nonetheless chooses to second-guess Israel’s conclusions, and proceed with its own investigation, it will inevitably undercut the Israeli MAG specifically and the Israeli justice system in general. Neither Israel, nor any liberal democracy for that matter, will long place its trust in a domestic process that can be overruled subjectively by the ICC—especially when that State (like Israel) is not a party to the Rome Treaty. Far from incentivizing other States to hold their own perpetrators accountable, the ICC would be doing the opposite. CONCLUSION

#### US protection of Netanyahu threatens US hegemony and leadership

MEMO 24 [Middle East Monitor, 12-5-2024, "US use of 'Hague Invasion Act' to threaten ICC sparks backlash", https://www.middleeastmonitor.com/20241205-us-use-of-hague-invasion-act-to-threaten-icc-sparks-backlash/]/Kankee

US officials have sparked controversy by invoking the so-called “Hague Invasion Act” in response to the International Criminal Court’s (ICC) arrest warrants for Israeli Prime Minister, Benjamin Netanyahu, and his former Defence Minister, Yoav Gallant, Anadolu Agency reports. Matthew Hoh, Associate Director of the Eisenhower Media Network – a group of former US military, intelligence and national security officials that provides analysis of Washington’s foreign policy — criticised the threats for Anadolu, highlighting their implications for international law. Hoh reflected on the origins of the act and its renewed relevance following the decision by the ICC. The 2002 law, officially titled the “American Service-Members’ Protection Act,” was enacted during President George W. Bush’s administration to shield the US and its allied nationals from ICC prosecution. Known informally as the “Hague Invasion Act”, it authorises the US to use all means, including force, to protect its nationals from ICC jurisdiction. Hoh explained that the legislation was originally designed to block ICC investigations into potential US war crimes. The ICC’s past investigations into US personnel in Afghanistan drew similar threats, with the US imposing sanctions on the Court and its officials. He said the law resurfaced in the American Congress after the ICC issued arrest warrants for Netanyahu and Gallant. ‘Decision-makers within the US are doing to hasten the end of the US Empire’ Hoh criticised the US response as an overreach to protect Israel. “The US has, within its own law, the authorisation to use military force against institutions like the ICC,” he said. “Certainly this action […] contravenes the US’ own stated desires, its own slogans [..]. that it believes in such things as international law.” Hoh also noted the broader implications of the US’ confrontational approach toward the ICC. “By doing this, by reacting this way to the International Criminal Court and by requiring its allies to do so, it is giving more credence, more validity, more reason for alternative institutions, alternative mechanisms, alternative alliances to grow and expand against the American Empire,” he said. “Decision-makers within the US are doing to hasten the end of the US Empire.” Double standards in the US approach to the ICC have drawn further scrutiny. Hoh pointed out the stark contrast in US reactions to ICC warrants against Russian President, Vladimir Putin, and Netanyahu. “When the ICC issued arrest warrants for Vladimir Putin, the President of Russia, the Americans across the board, political class, media class, military class, so on and so forth, were excited about that development and they were very pleased to see the arrest warrants,” he said. When it comes to Israel, the response is different, he noted. Hoh said the West sees international law as a tool not to be used against those in power. He argued it is there to be used against those in the “developing world, those who do not have power, those who are not within the upper levels in the imperial world order.” He added that international law is meant to keep people other than “white people” in check, to keep nations out of power and under the subjugation of the existing world order.

#### ICC focus on head of state prosecution prolongs wars and threatens peace negotiations

Kotova 23 [Anastasiya Kotova, educator at Lund University, 2023, “Violence in International Criminal Law and Beyond,” Springer, https://link.springer.com/chapter/10.1007/978-94-6265-551-5\_3]/Kankee

3.2.2.2 ‘Contribution to Peace’ Narrative Another red thread that runs through the discourse on international criminal justice is its potential contribution to peace: it is purported that prosecuting individuals responsible for atrocities committed during an armed conflict will contribute to lasting peace and reconciliation,39 and, what is more, that criminal justice is an indispensable component in the post-conflict toolbox.40 The effect of criminal prosecutions on the establishment of peace and reconciliation, in the dearth of empirical data, appears to be more an act of faith than an established causal relation.41 This, however, did not preclude the participants of the Rome Conference from establishing a connection between prosecution of atrocity crimes and peace and security in the preamble of the ICC Statute.42 This connection has been further made explicit, for instance, by the first President of the Court, Judge Philippe Kirsch, according to whom the Court was created to put an end to impunity for the most serious international crimes, to contribute to the prevention of these crimes, to address the threat such crimes pose to peace and security, to bring justice to victims and to guarantee lasting respect for and the enforcement of international criminal justice.43 The continued insistence on criminal prosecutions being indispensable to the establishment of peace is particularly surprising in the light of the experience of several states, where the peace process was negatively affected by the ICC involvement, particularly Uganda and the Sudan.44 It would be unreasonable to imply that ICC arrest warrants against the high-ranking individuals involved in the armed conflicts in the two states were the principal cause of negotiations being stalled, given the complexity of the situations and the multiplicity of actors involved. It is nevertheless surprising that the then ICC Prosecutor Luis Moreno-Ocampo glossed over concerns from the local communities and other voices questioning the viability and timing of such arrest warrants.45 The two cases were, perhaps, the most acute practical representations of the ‘peace versus justice’ dilemma in the practice of the ICC, with which the fields of transitional justice and peace-building had been grappling for years. The dilemma lies in the fact that criminal prosecutions during an ongoing armed conflict can potentially prolong such conflict and compromise the achievement of peace, and while both bringing perpetrators of atrocity to accountability and ending hostilities are valid and desirable political goals, sometimes a tension emerges in pursuing them simultaneously.46 At the same time, it has been increasingly asserted by numerous voices in advocacy, academia and even in the field that any pathway to peace has to include criminal prosecutions and that impunity will always hang as the sword of Damocles over a fragile peace. However, following the ICC interventions, the peace versus justice debate appears to have withered away—or at least the Court itself acts as though it did, asserting that there can be no peace without justice. As Sarah Nouwen incisively suggests, the notion of peace that the Court adopts is a quite illusive one, oscillating between the so-called positive and negative peace, the absence of hostilities and genuine and lasting reconciliation. At times it insists that the criminal justice element is indispensable to ending hostilities (i.e., negative peace) by incapacitating the key figures in the conflict, but when the ICC’s intervention stands in the way of ending hostilities, positive peace suddenly becomes a priority, and the achievement of reconciliation, again, is only possible if there is no impunity, that is, if criminal justice is pursued.47 By insisting that an international judicial intervention is indispensable to peace, International Criminal Law similarly strengthens its hegemonic potential to shape the intersubjective understanding of other phenomena. 3.2.2.3 The ‘Most Serious Crimes’ Narrative

#### The ICC helps maintain dictatorships and stifles peace processes with militarized solutions – they prefer perpetual war over uncaptured criminals

Clark 18 [Phil Clark, educator at the school of Oriental and African Studies at University of London, 10-24-2018, “Distant Justice The Impact of the International Criminal Court on African Politics,” Cambridge University Press, https://www.cambridge.org/core/books/distant-justice/FD4410B6160CD17836297D9503A219DD]/Kankee

ICC Impact on State Responses to Armed Opponents in Uganda and the DRC The ICC has contributed to the militarisation of the Ugandan and Congolese governments’ responses to armed actors in the region. By making peace talks less feasible (an issue discussed in greater detail in Chapter 6) and encouraging the militarised capture and arrest of suspects, the Court has in effect legalised violent conflict and made armed behaviour by states more, rather than less, likely. Critical in this regard has been the confluence of the ICC, US military operations and campaigns by foreign NGOs, all of which have cooperated with regional governments and championed military responses. The ICC has actively courted the US government, which it believes is vital to the provision of security to investigators and assistance with evidence gathering and the transfer of suspects. ‘The US is an important player for us’, Ocampo said in 2006. ‘Their reach and their resources can certainly help us, especially in arresting suspects at large...We are regularly in contact with US officials.’ 121 In May 2009, Judge Sang-Hyun Song made his first visit to the US as ICC President. A leaked cable reported his meeting with Ambassador Rosemary DiCarlo, US Deputy Permanent Representative to the UN, and other US officials: President Song said that he welcomes the apparently improving relationship between the ICC and the United States, noting that previously the ICC President was ‘not allowed to visit’ the U.S. Mission to the United Nations...President Song [said] that he has already noticed a change of attitude on the part of the United States, including a very good recent meeting with War Crimes Ambassador Clint Williamson. President Song concluded by saying that he hoped that the working relationship between the ICC and the United States will continue to improve.122 The US is unlikely to ratify the Rome Statute any time soon, more so since the election of President Donald Trump. The US, however, will probably continue various forms of unofficial cooperation with the Court when these suit its interests. During Obama’s presidency, the US increasingly warmed to the ICC. Along with the US’s assistance in the transfers of Ntaganda and Ongwen and the provision of rewards for information leading to the arrest of international – including ICC – suspects, the US has also attended all ASP summits as an observer since 2008 and the ICC review conference in Kampala in 2010, as well as supporting the UN Security Council referral of the Libya situation to the ICC (as it had done regarding Darfur during the Bush administration123). In 2010, Stephen Rapp, the US Ambassador-atLarge for War Crimes Issues, said, ‘At the present...we will be considering ways in which we may be able to assist the ICC, consistent with our law, in investigations involving atrocities.’ 124 The ICC has also courted a wide range of international NGOs and civil society groups, including the US-based Invisible Children, the Enough Project and the Resolve LRA Crisis Initiative, all of which have close ties to the US State Department and have advocated a robust US military role in tackling the LRA and other armed groups in central Africa.125 Ocampo’s relationship with Invisible Children – best known for its Kony2012 internet advocacy campaign, which after its launch on 2 March 2012 was viewed more than 100 million times126 – is illustrative in this regard. In April 2012, Ocampo was the guest of honour at an Invisible Children fundraising event in Los Angeles, designed to introduce the organisation to Hollywood directors, actors and producers. At the event, he said, ‘I love Invisible Children. I love them. Their video is making a huge change in stopping Kony...Invisible Children will, I think, produce the arrest of Joseph Kony this year.’ 127 One week after the release of the Kony2012 video, the US House of Representatives supported a resolution condemning Kony and advocating an increased military response ‘to assist governments in the region to bring Joseph Kony to justice and end LRA atrocities’. 128 This resolution led to a ramping up of the US’s military efforts against the LRA, following the dispatch of 100 American military advisors in October 2011 to support regional governments, including those of Uganda and the DRC, in their fight against the LRA. This move was precipitated by the Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act signed by President Barack Obama in May 2010, legislation strongly supported by Invisible Children, as the group highlighted in the Kony2012 video.129 In 2012, the US also funded and trained the African Union Regional Task Force against the LRA, which included Ugandan and Congolese troops. An Enough Project report in October 2013 stated, ‘The efforts by US military advisors to train troops from the region show how a small US investment in a challenging environment can still pay dividends in promoting sustainable regional solutions and improving security.’ 130 In August 2015, Resolve published a report entitled, ‘The Kony Crossroads: President Obama’s Chance to Define his Legacy on the LRA Crisis’, calling for ‘renewed diplomatic and military initiatives’ to finally eradicate the LRA.131 The dispatch of the military advisors in 2011 was the latest move in long-standing military relationships between the US and the Ugandan and Congolese governments. Since the 1990s, Washington has viewed Museveni’s government as a key regional ally against the Sudanese government during Khartoum’s wars in southern Sudan and Darfur, the ‘terrorist’ threat of the LRA, and most recently al-Shabaab in Somalia.132 In December 2008, the US military supported the failed Operation Lightning Thunder by the UPDF against the LRA in Dungu, north-eastern DRC, which led to LRA revenge massacres against the local population at Christmas in both 2008 and 2009.133 Throughout, Washington’s political, military and economic aid to Uganda has propped up Museveni’s regime and strengthened the role of the armed forces in everyday politics.134 Since 2006, the US has also actively supported the Congolese army through the Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act, which included substantial funding for military training and equipment as part of a wider attempt at SSR.135 This legislation was first tabled by Obama, then a senator, in 2005 and signed into law by President George W. Bush in December 2006. In 2012, members of the 391st Commando Battalion of the FARDC, which two years earlier had undergone eight months’ training by US special forces, committed mass rapes and other serious crimes in the South Kivu town of Minova.136 FARDC contingents sent to Garamba National Park as part of the regional fight against the LRA were also accused of looting, smuggling and a range of other crimes against the civilian population.137 The ICC has openly supported the armed campaigns of the US, Ugandan and Congolese militaries138 and built strong relations with US-based civil society actors that have lobbied for increased military action against rebel groups in the region, particularly the LRA. Given that the ICC relies so heavily on national armies to capture, arrest and transfer suspects to The Hague, it has cooperated closely with these governments, even when their military activities have led to substantial civilian death tolls across the region. As we will see in Chapter 6, the ICC has expressed immense scepticism toward peace negotiations involving Ugandan and Congolese suspects whom it has charged – especially when those talks involve the offer of amnesty – but has strongly supported militarised responses to these suspects and their respective rebel movements. In short, the ICC has viewed ongoing armed conflict rather than peace talks as more useful for its own purposes. In doing so, the ICC has highlighted the implausibility of its distance philosophy. While the Court’s conception of political distance expresses a deep distrust of state power and the need to insulate itself from domestic politics, the Court’s quest for close cooperation with states and support for their military campaigns shows the weakness of the distance concept. The notion of distance also falters in its belief that the ICC can both supersede and improve the practice of domestic politics, given that the Court has helped entrench state actors who continue to commit widespread crimes against civilians. ICC Impact on National Elections in Uganda and the DRC Since the involvement of the ICC, state violations have continued in the context of national elections in Uganda and the DRC. Both countries held presidential and parliamentary elections in 2006 and 2011 while ICC investigations and prosecutions were underway. Uganda held presidential and parliamentary elections in February 2016, with delayed national elections in the DRC now slated for 2018 at the earliest.139 An overview of the Ugandan and Congolese governments’ electoral behaviour highlights three important political problems concerning the ICC. First, while these states have launched military campaigns against their armed opponents, they have adopted increasingly violent tactics against their political adversaries and opposition supporters before and during elections.140 While the ICC is not a direct cause of these violations, it has failed – contrary to the predictions of various actors within the Court and among its supporters141 – to deter criminal behaviour by states. Because of the ICC’s close relations with these governments, they have little to reason to fear investigation and prosecution for crimes committed during elections. This underlines the deep problems stemming from the ICC’s close cooperation with states that are responsible for regular and systematic crimes against their citizens. In Uganda, the build-up to, and results of, the presidential and parliamentary elections in February 2006 – the first multi-party vote in Uganda for twenty-six years – highlighted the deep divisions in Ugandan national life, particularly between the north and south. These elections came nearly eighteen months after the start of ICC investigations and four months after the unsealing of the arrest warrants against the LRA leaders. Human rights groups documented serious government violations against opposition candidates and supporters during the campaign and systematic electoral fraud, including the stuffing of ballot boxes and multiple registration of voters.142 The most serious example of the government’s heavy-handed tactics during the campaign involved charges brought in the civilian and military courts against Kizza Besigye, the Forum for Democratic Change (FDC) presidential candidate. Besigye went into exile in South Africa after losing the 2001 elections. Soon after his return to Uganda on 26 October 2005 – eleven days after the ICC issued arrest warrants for the LRA leaders – he was arrested and charged with rape and treason for allegedly attempting to establish a rebel force, the People’s Democratic Army (PDA), in the DRC.143 Similarly, the lead-up to the 2011 and 2016 presidential and parliamentary elections in Uganda was marred by rampant corruption and violence, including the murder, torture and arbitrary arrest of opposition leaders and supporters and independent journalists. During an FDC rally in June 2010, a kiboko (stick) squad mobilised by the government attacked Besigye and other FDC leaders.144 Three months after losing the presidential election to Museveni, Besigye was arrested in May 2011 for organising ‘walk to walk’ protests, which brought thousands of protesters onto the streets across the country.145 Besigye was again arrested in October 2015 and three times during the week of the February 2016 vote, while government-backed ‘crime preventers’ and local militias murdered and harassed opposition supporters at rallies throughout the election campaign.146 In the DRC, following the Sun City agreement in 2002, national elections were delayed five times until they were finally held in July 2006. Veteran politician Etienne Tshisekedi and his Union pour la Démocratie et le Progrès Social boycotted the elections because of delays in candidate and voter registration, which they argued were another attempt by Kabila’s PPRD to cling to power. While Kabila won the presidential vote after a run-off against Bemba, the PPRD failed to win an absolute majority in the National Assembly, forcing it to form an alliance with minor parties, including the Union des Démocrates Mobutistes, led by one of Mobutu’s sons, François. While the election campaign itself was relatively peaceful, due largely to MONUC’s security presence across the country, violence surrounded the lengthy waits for results between the first round of voting and the run-off. On the eve of the announcement of the run-off result, Kinshasa was paralysed for three days by fighting between Kabila’s and Bemba’s forces, including an attack on the MLC by Kabila’s republican guard outside Bemba’s residence as he met with foreign ambassadors and the leadership of MONUC.147 The post-election period produced further violence and instability. In January 2007, the Congolese army and police mounted a violent crackdown against a religious sect, Bundu dia Kongo, which protested the appointment of a pro-Kabila governor in Bas-Congo, leading to more than 100 civilian deaths.148 In March 2007, government troops and Bemba’s armed guards, who defied a government order to disband after the elections, fought each other in the streets of Kinshasa, killing around 600 civilians.149 This fighting weakened the opposition forces and led to the UN negotiating for Bemba to go into exile in Portugal three weeks later. A week after Bemba’s departure, the Congolese Attorney-General, Tshimanga Mukeba, announced that Bemba’s senatorial immunity had been removed. Less than a year later, on 24 May 2008 Bemba was arrested on a family visit to Brussels and transferred to the ICC on 3 July 2008 on charges relating to crimes committed in CAR. While international donors funded the 2006 elections, the DRC alone financed the 2011 vote as well as the elections originally scheduled for 2016, with less security support by MONUSCO in the latter cases. Both the 2011 and 2016 campaigns were characterised by violent crackdowns against opposition supporters which, in 2011, continued after the announcement of Kabila’s victory over Tshisekedi in the presidential vote, leading to the deaths of at least thirty opposition protesters in Kinshasa at the hands of the security forces.150 Similar levels of state violence followed widespread protests in late 2016 against the delay to the December election and the possibility that Kabila would change the constitution to run for a third presidential term.151 That election-related violence occurred in Uganda and the DRC throughout the period of ICC investigations shows the inability of the Court to regulate state behaviour. The Ugandan and Congolese governments had little fear of ICC prosecutions, given assurances by the ICC from the pre-referral negotiations onwards and their close cooperation with the Court. Second, the ICC’s refusal to prosecute government cases has left the incumbent Presidents, Museveni and Kabila, free to continue contesting elections despite their various human rights violations. In the case of the DRC, Kabila’s political position has been bolstered further by the ICC’s prosecution of Bemba, who was convicted of all charges in March 2016. The ICC’s targeting of Bemba and not Kabila has completely altered the national political landscape. Bemba was one of the few opposition figures capable of mobilising substantial support across the DRC. While most of his support centred on his home province of Equateur, he was the leading candidate throughout western DRC, including Kinshasa, during the 2006 elections. Among many Bemba supporters, the ICC’s custody of Bemba was simply an extension of his exile, which they perceived as an attempt by Kabila, with the support of the UN and other international actors, to sideline his main political rival. An MLC supporter in Kisangani said in 2008, The ICC is part of the foreigners’ game. Everyone knows the Europeans and the Americans prefer Kabila. They say they can do business with him, just as they did business with his father...Bemba threatened to spoil that so they had to eliminate him. The foreigners tried at the ballot box. They let Kabila get away with buying the vote. Then they tried to disarm [Bemba] and when that failed, they used the ICC.152 Third, the factors just explored have deepened national political divisions in both Uganda and the DRC. In the former, showing how isolated the north had become from the rest of the country and the depth of northern animosity toward the Ugandan government, in 2006 Museveni won less than 20 per cent of the vote in most northern constituencies, followed by a slight increase in the northern vote in 2011 and a return to almost 2006 levels by 2016.153 In 2006, National Resistance Movement (NRM) candidates were defeated across northern Uganda, signalling a major political shift. ‘The north sees itself as completely alienated’, said Norbert Mao of the Democratic Party, who won 77 per cent of the 2006 vote against the NRM’s incumbent Walter Ochora for the LC5 (Local Council) chairmanship of Gulu district, a post Ochora had held for a decade. Mao said, One senior politician has even talked about a northern cessation. The vote in the north was a vote of no confidence in Museveni’s policies, especially in relation to the [IDP] camps. Also, Museveni is bent on a military solution to the conflict and the people reject that...Look at the anti-Museveni vote in conflict areas. The map of the elections is a conflict map. The country is now deeply divided. Will Museveni interpret it correctly or dismiss it as he has in the past?154 A sub-chief in the Pabbo IDP camp said, ‘Museveni’s win in the elections was devastating. It was yet another trauma for my people. For them, it means another five years in the camps.’ 155 By focusing only on northern Uganda (and not conflicts in other parts of the country such as West Nile and Karamoja) and only on LRA crimes (and not those by the government), the ICC has reinforced a colonial era narrative, further entrenched by the government in recent decades, that northern Uganda is uncivilised and incapable of governing itself, in contrast to the civilised south.156 As Andrew Mawson, a long-time UN observer in Uganda, stated, The ICC thinks the LRA is the problem but the other issue is the government, which has been responsible for the [IDP] camps and the lack of protection there, as well as direct crimes by the government in the camps. The ICC seems to have no view on the government’s counter-insurgency...The Acholi also say the ICC is aligned with the southerners. They say, ‘We’re the number one victims of this conflict. We’ve been made the scapegoats and the government simply doesn’t care.’ 157 Similarly, in the DRC, the ICC approach to investigations and prosecutions has deepened long-standing divisions between the east and west of the country. Many Congolese from western provinces interpret the prosecution of Bemba as an attempt to block the shift of power from Kabila’s support base in Katanga and the eastern provinces more broadly. A widespread view in western DRC is that, while the transitional government after the Sun City accords provided a relatively even distribution of power across the country, Kabila (and his perceived foreign backers) would always seek to grab control, especially once the Sun City power-sharing arrangement ended with the 2006 elections. As a Bemba supporter in Kinshasa said four months before the elections, ‘The international community will never let a westerner dominate here. Our politics are always about the east. That’s where the wealth is. That’s where the conflict is.’ 158 Another common view expressed in interviews was that Bemba represented the legacy of Mobutu, as both hailed from Equateur and one of Bemba’s earliest battles with President Laurent Kabila, following the toppling of Mobutu, was the systematic exclusion of political actors from Equateur. One of Bemba’s three sisters is married to Nzanga Mobutu, the former dictator’s son. Bemba also elevated several senior Mobutu officials to prominent positions within the MLC, including the Secretary-General of the movement, François Muamba, who had been Minister of Economy and Industry under Mobutu.159 The ICC’s targeting of Bemba therefore taps into these divisive undercurrents in Congolese politics.160 Through the politicisation and instrumentalisation discussed above, the ICC has solidified the position of both Museveni and Kabila and entrenched long-standing national divisions in Uganda and the DRC. Despite violent tactics against their political opponents – often conducted by the same armed forces supported by the US and the ICC as the likeliest actors to capture and arrest suspects – Museveni and Kabila have avoided prosecution and continued contesting elections. In the most extreme case, the DRC, the ICC removed Bemba, Kabila’s main political rival, thus completely transforming the national political arena. Conclusion Museveni and Kabila have proven masterful at making themselves indispensable to international actors. Generally unquestioning international cooperation with the Ugandan and Congolese governments has allowed them to appear as agents of peace, security and justice while continuing, emboldened, to commit abuses against their citizens. Thus, they have used the ICC’s version of distanced justice to distance themselves from accountability for mass crimes. The claim by the ICC and its supporters that the Court deters criminal behaviour and therefore contributes to lasting peace rings hollow when state crimes are committed under its watchful eye. International military and judicial interventions in central Africa to date risk not only ignoring government atrocities but reinforcing them. As we will see in the following chapters, the extraversionary capacities of the Ugandan and Congolese governments to ‘pull the strings’ of the ICC have also undermined the Court’s relations with conflict-affected populations and domestic institutions designed to address atrocities. While various African elites have accused the ICC of neo-colonialist interference in African affairs (including Museveni who sought solidarity with other AU leaders in the wake of the Kenyatta and Ruto prosecutions in Kenya),161 the ICC’s shortcoming has rather been its failure to insulate itself from political manipulation by African states. This stems from the OTP’s state-cooperation-at-all-costs approach as well as the general distancing of the ICC from the domestic political sphere in Uganda and the DRC, eschewing country-specific experts and contextual knowledge in favour of generalist staff with technical, template approaches to investigations and prosecutions. As the Court has become ever more embroiled in domestic politics, it required a deeper understanding of national political dynamics. Rather than claim separateness from the political realm, it needed to become politically savvier. The ICC’s inability to grapple fully with domestic political complexities has had deeply damaging effects both for the Court and for the conduct of national politics in Uganda and the DRC. In Whose Name? The ICC’s Relations with Affected Communities

#### Avoiding state leader prosecution increases credibility with marginalized states angry with the ICC

Bachmann and Sowatey-Adjei 20 [Sascha-Dominik Dov Bachmann, Professor of Law and Justice at Canberra Law School, and Naa A. Sowatey-Adjei, Associate Member of the Institute of Human Resource Management Practitioners Ghana and currently works as a Research Assistant with ERATS, 2020, “THE AFRICAN UNION-ICC CONTROVERSY BEFORE THE ICJ: A WAY FORWARD TO STRENGTHEN INTERNATIONAL CRIMINAL JUSTICE?” Washington International Law Journal, https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1832&context=wilj]/Kankee

B. Origins of the AU-ICC Rift In the aftermath of the horrendous acts committed by the Nazis during the Holocaust, the world swore that never again would such horrific crimes be permitted to occur anywhere in the world.62 However, since the Holocaust, the world has witnessed the commission of further serious human rights violations and crimes such as crimes against humanity, war crimes, ethnic cleansing, and genocide. International Humanitarian Law has been violated in Africa, Latin America, the Middle East, and Eastern Europe, especially in the Balkans, 63 highlighting the shift from international to non-international armed conflict. There have also been unabated violations of human rights in Myanmar, Sudan, Eritrea, Equatorial Guinea, Cameroon, Libya, and Syria to cite just some examples. 64 This shows clearly that the world has learnt either little or nothing from the Holocaust, a failure to act and an omission which the former UNSG, Kofi Annan, castigated in his famous plea for the establishment of an International Criminal Court. 65 The establishment of the ICC in 2002 brought hope to many, especially African states, who expressed optimism that the perpetrators of genocide, various crimes against humanity and war crimes would finally be held responsible for their crimes.66 Some countries quickly referred cases to the ICC: Uganda, 67 Democratic Republic of Congo (“DRC”), 68 and the Central African Republic. 69 These referrals were relatively uncontroversial and showed the commitment of African states commitment to the development of human rights as well as combatting impunity.70 However, this seemingly goodwill relationship between Africa and the ICC began to turn sour when the ICC turned its focus on Africa’s political leaders and government officials, who under customary international law were considered to possess some form of immunity.71 This impasse between the AU and the ICC began with the arrest warrant issued by Belgium for the DRC’s then-minister for foreign affairs, Abdoulaye Yerodia Ndombasi, in 2000, which was not well taken by the African States.72 In 2008, Rose Kabuye, the Chief of Protocol to Rwandan President Paul Kagame, was arrested in Germany on a French arrest warrant for the 1994 destruction of the plane carrying the former president of Rwanda. This crime is thought to have triggered the Rwandan genocide.73 The charges were dropped in 2009.This incident was raised at the United Nations by President Kagame who asserted that the criminal proceedings constituted the exercise of universal jurisdiction by European states with the sole intention of shaming the political leaders of Africa.74 The impasse between the two institutions went on to another level with the referral (for investigation and even prosecution) by the United Nations Security Council to the ICC, the situation in Darfur, Sudan, under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Rome Statute. 75 When it became obvious that the then-President of Sudan, Omar Hassan Ahmed alBashir,, was to be investigated by the ICC, there was a concerted effort to stay the investigation by many in Africa and the Middle East because it was contrary to customary international law.76 Tensions between the African Union and the ICC grew to a higher level when the ICC issued an arrest warrant for Al-Bashir, despite calls for a stay of investigations. These calls were made firstly because he was a sitting head of state and secondly because he belonged to a state not a party to the Rome Statute.77 The arrest warrant issued by the Court over the Sudanese President became the focal point of the African Union’s concerns about its dissatisfaction with the approach used by both the UNSC and the ICC to tackle international criminal justice issues in Africa. 78 There were two fundamental and related questions that were asked by legal experts in the wake of the arrest warrant for Al-Bashir: 1) whether immunities granted as a matter of customary international law to a head of state may be waived by a treaty (in this case the Rome Statute), and 2) what was the impact of a referral by the UNSC as it pertains to the relationship between Articles 27 and 98(1) of the Rome Statute.79 In order to find a solution to the issue at hand, the African Union Peace and Security Council (“PSC”) then requested that the UNSC utilize its power provided for in the Rome Statute to defer the ICC process as this was to compromise any regional peace initiatives. 80 This was due to the fact that the Statute provides that: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.81 According to the African Union, this stay of investigation was requested in order not to “undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur” as well as alleviate the suffering caused by the conflict. 82 To add to this, there had been earlier efforts at mediation to help resolve the crisis in Darfur, and there were concerns by observers at that time that involving the ICC at that moment would further derail the efforts to maintain peace.83 The approach taken by the African Union at that time can be described as a logical approach, bearing in mind that this was the first time the UNSC was using its power under Article 13 of the Rome Statute to activate the jurisdiction of the Court to investigate a situation within the territory of a state that was not party to the Statute.84 Many African leaders spoke up against the ICC’s alleged persecution of Al-Bashir, which was deemed to be contrary to the customary international law principle of Head of State immunity as a manifestation of the principle of sovereign equality under Article 2(4) UN Charter. This dissent was highlighted in a remark made by the late former Malawian President Bingu wa Mutharika, then-chairperson of the African Union, at the July 2010 AU Summit: To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years . . . there is a general concern in Africa that the issuance of a warrant of arrest for . . . al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter. Maybe there are other ways of addressing this problem.85 Notwithstanding, the UNSC failed to grant the deferral request, which was considered a legal matter and as a result of that, the African Union felt slighted by the action of the UNSC.86 The growing dissent in Africa was further compounded by the subsequent referral of Libya by the UNSC to the Court in 2011. Here again, an African Union’s request for deferral was not granted.87 The African Union was ostentiously disappointed with the politics of referrals and alleged that the UNSC had been selective in its choice of referring cases which involved African states.88 This was because the same power of deferral stated in the Rome Statue was used to protect peace keeping officers in Sudan from prosecution for any breach of international norms as a result of pressure from the United States.89 The African Union then took a defiant stance and issued a decision that African states would not cooperate in the arrest and surrender of Al-Bashir.90 What used to be a troubled relationship with the ICC had by this time become so toxic that the African Union commenced a non-cooperation policy towards the ICC. Since then, the Court has been criticized for pursuing a racist agenda against Africans and possessing an investigative system that is flawed and that also suffers from undue delays.91 Fatou Bensouda, the current Chief Prosecutor and an African hailing from the Gambia, has refuted these allegations, arguing that the African Union is bent on protecting the perpetrators of these heinous crimes.92 The intensity of the debate surrounding the impasse between African Union and ICC has worsened over the years and has negatively impacted the relationship between these two organizations and has the potential to be detrimental to the international legal order because most African states, as well as other states, have reservations about the legitimacy of the ICC’s work and mission. 93 Also, this impasse has placed some African states that are signatories to the ICC in a difficult situation regarding their obligations to both the African Union and the ICC. States that are party to the Statute are under obligation to cooperate fully with the ICC in the investigation and prosecution of crimes that are within the jurisdiction of the Court.94 However, the Constitutive Act of the African Union on the other hand warns that sanctions will be imposed on any member state that does not comply with decisions of the African Union. 95 The anti-ICC stance taken by the African Union has further added to the disappointment of victims of violent crimes in seeing justice being denied. The impasse seems to further reinforce public opinion that such egregious crimes against humanity on the continent are to continue with impunity, a sentiment which should definitely not be the case.96 C. Past Unsuccessful Attempts to Resolve the Impasse

#### Head of state immunity is core ilaw – ignoring it escalates conflicts

MGIMO 24 [Moscow State Institute of International Relations, 05-08-2024, "Problems of legality of the International Criminal Court (opinion of the International Law Advisory Board under the Ministry of Foreign Affairs of the Russian Federation)", Ministry of Foreign Affairs of the Russian Federation, https://mid.ru/en/foreign\_policy/legal\_problems\_of\_international\_cooperation/1949021/]/Kankee

\*Note: there is a reason this card is the last one included in the brief – it is not because it is a good card

ICC and Immunities of State Officials According to the Judgment of the International Court of Justice of February 14, 2002, in the Arrest Warrant Case (Democratic Republic of the Congo v. Belgium), “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”[25]. That position is widely supported by publicists[26] and members of the UN International Law Commission[27]. As regards State Parties to the Rome Statute, the provisions of Article 27, paragraph 2, apply according to which “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. Therefore, State Parties to the Statute came to agreement that for the purposes of exercising the criminal jurisdiction of the ICC immunities do not apply as between them. In other words, some kind of collective waiver of the immunity of State Parties’ officials in favour of the ICC jurisdiction exists by virtue of the treaty. Meanwhile, according to Article 98, paragraph 1, of the Rome Statute “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”. These provisions apply, in particular, to requests for assistance concering surrender of an official of a State non-party to the Statute. In 2019, the Appeals Division of the ICC groundlessly asserted in its Judgment in the case of Sudanese President Al-Bashir (appeal filed by Jordan)[28] the absence of a rule of customary international law prescribing that the Heads of State enjoy immunity from jurisdiction of international courts. According to the Judgment, such courts “when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole”[29]. In the meantime, only ICC Member States could waive their officials’ immunities in relations among themselves and with the Court by becoming a party to a treaty (namely, Rome Statute). As concerns States that are not parties to the Statute, the general international law norms on immunities of State officials apply in whole to relations among them as well as to relations between them and ICC Member States. It is sometimes asserted that immunity from international criminal jurisdiction is not an international custom[30]. They argue that as no permanent international criminal institutions existed before 1990s, neither general practice nor opinio juris could be established which would form such a custom. That argument should be rejected. The fact that each State Party to the Rome Statute is bound by the international law norms governing immunities of State officials is indisputable. These norms define the limits of exercise of criminal jurisdiction by any such State. They correspond to the rights of other States to have their State officials’ immunity from foreign criminal jurisdiction respected. Therefore, several States, and even a considerable number of States, may not conclude a treaty circumventing these norms and infringing upon the rights of third States mentioned above. Another argument commonly referred to is the practice of the Nuremberg and Tokyo Military Tribunals established at the end of the Second World War as well as the International Criminal Tribunals for the former Yugoslavia and Rwanda which did not apply immunities of State officials[31]. This evidence should be considered inconclusive as well. Neither Germany nor Japan advanced the issue of immunity of their State officials, which they could not even have done, their sovereign rights being exercised by the victorious powers[32]. As for the International Criminal Tribunals for the former Yugoslavia and Rwanda, those were created by virtue of the UN Security Council resolutions, respect of the obligatory provisions of which prevails upon other international law obligations of States according to Article 103 of the UN Charter. To conclude, ICC arguments in the Al-Bashir case are nothing but an attempt of the Court to arbitrarily and unilaterally extend the scope of its competence while limiting the sovereign rights of States non-parties to the Rome Statute. Such an approach contradicts the principle pacta tertiis nec nocent nec prosunt enshrined in Article 34 of the 1969 Vienna Convention on the Law of the Treaties, according to which a treaty may not create either obligations or rights for a third State without its consent. In this case, principles of the law of international organisations are infringed as well, in particular the principles of speciality and unacceptability of ultra vires acts by international organisations[33]. The Appeals Chamber’s assertion about the absence of international customary norm vesting State officials with immunity from criminal prosecution by international jurisdictions cannot be supported by either State practice or opinio juris. It is not surprising that it sparked vivid objections within the expert community[34]. On March 17, 2023, the ICC announced the issuance by the Pre-Trial Chamber of arrest warrants against the President of the Russian Federation and the Presidential Commissioner for Children’s Rights. The text of the warrants has been undisclosed “in order to protect victims and witnesses and also to safeguard the investigation”[35]. Official representatives of the Russian Federation have qualified the warrants as legally void[36]. On the contrary, some States’ and international organisations’ officials “commended” issuance thereof[37]. Moreover, some of them declared willingness to enforce the warrants[38]. Adding to the absurdity of the accusations giving rise to the warrants issued (the evacuation of children from the frontline being unfoundedly alleged to constitute “unlawful deportation”), the decision was issued in violation of the generally recognised principles and norms of international law governing immunities of State officials including the absolute immunity of the current Head of State from foreign criminal jurisdiction. The legal consequence of issuance of the ICC warrant consists in obliging State Parties to the Rome Statute to arrest the individual in respect of whom the warrant was issued. However, in case of individuals enjoying immunity as officials of a State non-party to the Rome Statute which does not cooperate with the ICC, the issuance of warrant results in violation of Article 98 of the Rome Statute and is, therefore, unlawful. The attempts to enforce the warrants thus issued shall be unlawful as well. It is important to emphasize that the ICC does not possess a coercive apparatus of its own. Hence, the arrest warrants can only be enforced through measures taken by law enforcement authorities of States. These measures constitute a form of exercise by the executing State of its own jurisdiction. As demonstrated above, the fact that the warrants were issued by the ICC, not by national law enforcement authorities, does not exempt the State from obligation to respect immunities of foreign State officials. Given the above analysis, an attempt of any State to enforce the “warrant for arrest” of March 17, 2023, would constitute an internationally wrongful act giving rise to international responsibility. ICC role in conflict settlement The States creating the ICC were guided by the idea that prosecution of individuals responsible for the most serious international crimes by an international jurisdiction would facilitate conflict settlement and post-conflict reconciliation. Thus, the Rome Statute enshrines a procedure of cooperation between the Court and the UN Security Council as the main international body responsible for the maintenance of international peace and security. UN SC may refer to the Court any situation for investigation as well as suspend an investigation initiated. Therefore, the ICC was designed as an element of conflict settlement system under the auspices of the United Nations. In practice, the results of ICC activities as a peace maintaining body are, to say the least, controversial[39]. For instance, not only was the prosecution of the then-President of Sudan Omar Al-Bashir (the “Situation in Darfur” was referred to the Court by the UN SC in 2005) conducted in violation of international law norms governing the immunity of State officials, but it also compromised the efforts of mediators aimed at conflict resolution within the region. In particular, Arab League officials asserted that the decision of the ICC creates “a dangerous precedent” in the system of international relations and may negatively impact the situation in Sudan as well as in the region in general[40]. When Jordan appealed one of ICC decisions regarding Mr Al-Bashir, Arab League submitted to the Court detailed arguments supporting Jordan’s application and declared that the goals of international justice “cannot be achieved at any cost. The fight against impunity must take place within the framework of international law, including the rules that aim to guarantee orderly relations between States”[41]. It is significant that no single State enforced the arrest warrant against Mr Al-Bashir. One cannot help suggesting that African States were guided by the understanding that, on the one hand, Al-Bashir enjoyed immunity and, on the other hand, that the ICC prosecution was counter-productive. To conclude, the role of the Court in the “Darfur case” cannot be called a success either from the standpoint of administration of justice or from that of national reconciliation. On the contrary, the measures taken by the ICC de facto escalated the tensions in East Africa[42] and led to a long-term discord between the Court and the African Union. Another example of the Court's acting without taking into account the actual context of political settlement was the investigation into the situation in Kenya. In 2013, Uhuru Kenyatta, who was under charges of the Court (connected with the internal political crisis of 2007-2008), was elected President of the country. As a result, the ICC found itself in the position of a body trying, by prosecuting an individual, to promote a resolution of a situation that in fact had already been resolved through compromises between political forces and votes of the citizens. The investigation was closed in 2015 because of insufficient evidence. As a result, the long-term work of the ICC in Kenya did not lead to results either in terms of directly implementing criminal justice (in the case involving a total of 8 people not a single sentence was passed), or in terms of facilitating the resolution of the internal political conflict. The abovementioned examples (the list could be continued) indicate that the ICC, instead of serving as a means of peaceful settlement of disputes, often becomes a source of new conflicts or problems. In general, the fact that for a long time after the commencement of its work in 2002 the Court handled exclusively African cases (situations in the Democratic Republic of the Congo, Central African Republic, Uganda, Sudan, Kenya, Libya, Côte d'Ivoire, Mali) triggered the development by the African Union of an advisory “Withdrawal Strategy from the ICC”, which was approved by its highest authority, the Assembly of the Union[43]. Unfounded criminal prosecution of persons