

2019

They Hate U.S. for Our War Crimes: An Argument for U.S. Ratification of the Rome Statute in Light of the Post-Human Rights Era, 53 UIC J. MARSHALL. L. REV. 1011 (2019)

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THEY HATE U.S. FOR OUR WAR CRIMES:
AN ARGUMENT FOR U.S. RATIFICATION
OF THE ROME STATUTE IN LIGHT OF THE
POST-HUMAN RIGHTS ERA

MICHAEL DRAKE*

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Abstract

“For the powerful, crimes are those that others commit.”

—Noam Chomsky

Recently, a number of human rights scholars and activists have begun to sound an alarm: despite the ever-growing mechanisms of enforcement, human rights conditions continue to deteriorate throughout the world. A number of proposed solutions to this realization have been offered. The chief among them appears to be, at this time, to double down on existing strategies. This Comment argues that strategy is insufficient—the human rights movement needs to be revamped. Specifically, a major problem with the human rights movements in Western countries is the use of human rights to justify selective, armed intervention; or, in the case of America, U.S. imperialism. From an American perspective, the best starting point in addressing declining human rights conditions

internationally would be ratification of the Rome Statute—thus, holding U.S. war criminals responsible for their crimes.

I. INTRODUCTION

In January 2019, Christoph Flügge resigned from his position as a permanent judge on the International Criminal Tribunal for the Former Yugoslavia,¹ a position he held since 2008.² Flügge stated his decision was due to “shocking” political interference by the United States and Turkey.³ According to Flügge, Turkey intervened with a Turkish judge that sat on a United Nations (“U.N.”) court.⁴ The U.S., on the other hand, threatened Flügge and other international judges over the prospect of an investigation into the conduct of U.S. soldiers in Afghanistan.⁵

Flügge’s resignation is illustrative of a growing discussion. A little over a year prior to Flügge stepping down, in April 2018, *Foreign Policy Magazine’s* cover featured a dove—an often-invoked symbol of the human rights movement—shot through the breast with arrows.⁶ The cover posed a question to its readers: “The End of Human Rights?”⁷ That same month, the *New York Times* published an article by well-known human rights revisionist Samuel Moyn in which he outlined some shortcomings of the human rights movement.⁸

Foreign Policy Magazine and Moyn are not alone, a number of scholars have claimed we have entered the “post-human rights era.”⁹ Makau Mutua, a driving force behind the post-human rights

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1. For the tasks and purposes of the International Criminal Tribunal for the Former Yugoslavia, see S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993). *See also*, *About the ICTY*, UNITED NATIONS, www.icty.org/en/about (last visited Feb. 3, 2019) (providing background information on the International Criminal Tribunal for the Former Yugoslavia).

2. Daniel Boffey, *UN Court Judge Quits the Hague Citing Political Interference*, GUARDIAN (Jan. 28, 2019), www.theguardian.com/law/2019/jan/28/international-criminal-court-icc-judge-christoph-flugge-quits-citing-political-interference-trump-administration-turkey.

3. Patrick Eckerd, *Senior UN Judge Resigns Citing ‘Shocking’ Interference from White House and Turkey*, JURIST (Jan. 29, 2019), www.jurist.org/news/2019/01/senior-un-judge-resigns-citing-shocking-interference-form-white-house-and-turkey/.

4. *Id.*

5. *Id.*

6. David Rieff, *The End of Human Rights?*, FOREIGN POL’Y (Apr. 9, 2018), www.foreignpolicy.com/2018/04/09/the-end-of-human-rights-genocide-united-nations-r2p-terrorism/.

7. *Id.*

8. Samuel Moyn, *How the Human Rights Movement Failed*, N.Y. TIMES (Apr. 23, 2018), www.nytimes.com/2018/04/23/opinion/human-rights-movement-failed.html.

9. *E.g.*, Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 284 (2017) (citing Makau Mutua, *Is the Age of Human Rights*

era discussion,¹⁰ argues that “human rights have lost their moral force.”¹¹ According to Mutua, this moral decay is caused by a number of factors.¹² Chief among them is the tendency of Western countries to invoke human rights against their former colonies as part of a civilizing mission in order to “deliver primitive peoples into the Age of Europe.”¹³ The unwillingness of Western countries to live up to human rights standards themselves exacerbates this problem.¹⁴

In recognizing that problem, as well as the global decline in human rights conditions,¹⁵ this Comment argues that pushing for U.S. ratification of the Rome Statute must be a primary goal of American human rights activists. In making that point, Part II of this Comment will begin by contrasting the treatment of an alleged American war criminal with convicted African war criminals. Next, it will provide the history and a basic overview of the Rome Statute and the court it created, the International Criminal Court (“ICC”). Finally, it will provide a summary of the post-human rights era analysis and cover some solutions proposed by notable human rights scholars.

Next, Part III of this Comment will argue that the ratification of the Rome Statute should be a primary concern for American human rights activists. This argument is broken down into two parts: First, it argues that ratification of the Rome Statute would address a few of the most notable critiques raised by human rights

Over?, in ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 450-58 (Sophia A. McClennen & Alexandra Schultheis Moore eds., 2016)) (explaining that “[t]he terms ‘decline’ and the ‘post-human rights era,’ do not mean we are at the end of human rights obligations themselves (indeed, they are multiplying), but instead that we have seen the end of an era: what Makau Mutua has termed the ‘age of human rights’ or what Louis Henkin called the ‘Age of Rights’ in international law.”).

10. See Klaus D. Beiter, *Is the Age of Human Rights Really Over? The Right to Education in Africa—Domestication, Human Rights-Based Development, and Extraterritorial State Obligations*, 49 GEO. J. INT’L L. 9, 10 (2017) (citing Makau Mutua, *Is the Age of Human Rights Over?*, in ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 450-58 (Sophia A. McClennen & Alexandra Schultheis Moore eds., 2016)) (stating that Makau Mutua, “[o]ne of the most prolific African human rights scholars” has suggested that the “age of human rights is over”).

11. *Id.*

12. *Id.* at 11.

13. *Id.* (quoting Makau Mutua, *Is the Age of Human Rights Over?*, in ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 455 (Sophia A. McClennen & Alexandra Schultheis Moore eds., 2016)).

14. *Id.* (highlighting Mutua’s point that “human rights have been abused as part of a civilizing mission of the West against former colonies to ‘deliver primitive peoples into the Age of Europe’”).

15. Wuerth, *supra* note 9, at 286 (explaining that “[i]n the past decade, internationally protected civil and political rights have suffered a downturn as measured by a number of states experiencing a decline in rights protection. The number of countries in which human rights are at ‘extreme risk’ has increased from twenty in 2008 to thirty-five in 2015”).

scholars. Second, it shows that U.S. leaders who oppose ratification do so in the interest of self-preservation. Therefore, U.S. ratification would be a gesture of good faith that would, ideally, lead other non-member states to ratify the Rome Statute. Finally, Part IV proposes the need to radically politicize the human rights movement in the U.S. as the only way to achieve ratification of the Rome Statute.

Prior to beginning analysis, it should be noted that this Comment is not proposing ratification as a complete solution to the declining human rights conditions internationally. Rather, it is one small—albeit important—piece in a larger effort. The human rights movement is an international movement. However, ratifying the Rome Statute would be an important step to show the world that the U.S. is not, as Christoph Flügge stated, “above the law.”¹⁶ Getting there, though, requires a drastic, radical overhaul of the U.S.-based human rights movement—and the U.S. political structure.

II. BACKGROUND

A. Continental Disparities

1. *The International Process in Africa*

In 1999, four years of intense fighting kicked off in the Ituri district of the Democratic Republic of the Congo.¹⁷ Part of the larger Congo War, the fighting in Ituri was divided along tribal lines, fueled by long-standing tensions between Hema and Lendu peoples.¹⁸ From 1999-2003, at least 60,000 people were killed in the fighting.¹⁹ Between 2002 and 2003, an estimated 5,000 civilians were killed in the Ituri district, part of an estimated 3.3 million civilian deaths throughout the Congo.²⁰ In 2005, Thomas Lubanga, a militia leader during the Ituri fighting, was arrested by U.N. peacekeepers.²¹ Later, Lubanga was the defendant in the first ICC

16. Justin Wise, *Top UN Judge Resigns Citing ‘Shocking’ Interference From Trump Admin, Turkey*, THE HILL (Jan. 29, 2019), www.thehill.com/policy/international/427407-top-un-judge-resigns-over-shocking-interference-from-trump-admin-turkey.

17. Adam Hochschild, *The Trial of Thomas Lubanga*, ATLANTIC (Dec. 2009), www.theatlantic.com/magazine/archive/2009/12/the-trial-of-thomas-lubanga/307762/.

18. *Id.*

19. *Id.*

20. *Covered in Blood: Ethnically Targeted Violence in Northern DRC*, HUM. RTS. WATCH, (July 7, 2004), www.hrw.org/report/2003/07/07/covered-blood/ethnically-targeted-violence-northern-drc.

21. Joseph Winter, *DR Congo Warlord Thomas Lubanga Sentenced to 14 Years*, BBC (July 10, 2012), www.bbc.com/news/world-africa-18779726.

trial.²² Lubanga was not alone. In the interest of impartiality,²³ the ICC also charged, and later sentenced, a wartime adversary of Lubanga—Germain Katanga.²⁴

After seven years, and an appellate decision overturning an order to release,²⁵ Lubanga was found guilty of recruiting child soldiers.²⁶ The ICC sentenced Lubanga to twelve years, with credit for time served.²⁷ The case against Lubanga was widely criticized for its slow pace.²⁸ There, the ICC had delivered 275 written decisions and orders and 347 oral decisions.²⁹ Later, Germain Katanga was sentenced to fourteen years,³⁰ after the ICC found Katanga guilty, as an accessory, to one count of crime against humanity and four counts of war crimes.³¹

The process of charging, arresting, trying, and sentencing these two men was not timely.³² Nor was it free of controversy.³³ While these cases were the first tried by the ICC, it cannot be said that they were smoothly run. However, while acknowledging the charged African bias of the ICC,³⁴ within two years of committing

22. Hochschild, *supra* note 17.

23. *Id.*

24. Marlise Simons, *Hague Court Sentences Congolese Warlord to 12 Years for Role in Tribal Massacre*, N.Y. TIMES (May 23, 2014), www.nytimes.com/2014/05/24/world/africa/hague-court-sentences-congolese-warlord-to-12-years.html.

25. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Prosecution's Appeal against Trial Chamber I's oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect (July 23, 2010).

26. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment of Trial Chamber I (Mar. 14, 2012).

27. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence of Trial Chamber I (July 10, 2012).

28. *See, e.g.*, Hochschild, *supra* note 17 (stating that “[l]ike all too many international bodies, the ICC moves at a molasses pace”).

29. Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO J. INT'L & COMP. L. 235, 239 n. 17 (2013) (citing Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06).

30. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07-3484, Decision on Sentence of Trial Chamber II (May 23, 2014).

31. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment of Trial Chamber II (Mar. 7, 2014); *see also Crimes Against Humanity*, UNITED NATIONS, www.un.org/en/genocideprevention/crimes-against-humanity.shtml (last visited Nov. 3, 2019) (providing an overview of crimes against humanity); *War Crimes*, UNITED NATIONS, www.un.org/en/genocideprevention/war-crimes.shtml (last visited Nov. 3, 2019) (providing an overview of war crimes).

32. *See* Isanga, *supra* note 29 (providing the amount of oral and written decisions in the Lubanga prosecution).

33. *See, e.g.*, Hochschild, *supra* note 17 (providing commentary on persons defending Lubanga: “Lubanga did not conscript forcibly,’ another boy says. ‘We went voluntarily. I myself went voluntarily. It was to defend my community. Why is he being judged for this?’”).

34. *See, e.g.*, Courtenay Griffiths, *The International Criminal Court Is Hurting Africa*, TELEGRAPH (July 3, 2012), www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/9373188/The-International-Criminal-Court-is-hurting-Africa.html (arguing that the ICC is being used as a

crimes against humanity, both men were arrested, and the international community learned of their crimes—told by persons other than the accused. That is not the case with leaders in the U.S.

2. *The National Process in the United States of America*

In May 2002, Jose Padilla arrived at O'Hare International Airport.³⁵ Padilla, an American citizen, was returning from Pakistan via Switzerland.³⁶ According to then-Attorney General John Ashcroft, Padilla was suspected of planning to detonate a radioactive bomb in a U.S. city—although he was never charged with such.³⁷ After his arrest, Padilla was labelled an “enemy combatant” and held in a South Carolina military prison from June 2002 until January 2006.³⁸

For the first two years of his detainment, Padilla was denied contact with anyone outside of the prison—including his family and attorney.³⁹ In addition, Padilla was subject to inhumane treatment: “His jailers made death threats, shackled him for hours, forced him into painful stress positions, subjected him to noxious fumes that hurt his eyes and nose and deafening noises at all hours, denied him care for serious illness and more.”⁴⁰ In response to his treatment, Padilla and his mother filed suit—in U.S. federal court—against John Yoo, in his individual capacity.⁴¹ Padilla was seeking damages of one dollar.⁴²

John Yoo is a former Deputy Attorney General to former President George W. Bush,⁴³ the current Emanuel Heller Professor of Law at University of California Berkley Law School,⁴⁴ and a war criminal.⁴⁵ In *Padilla v. Yoo*, the Ninth Circuit held that John Yoo

tool for political power in Africa by Western powers as well as competing African politicians).

35. James Vicini, *Top Court Rejects Padilla Torture Lawsuit Appeal*, REUTERS (June 11, 2012), www.reuters.com/article/us-usa-security-padilla-idUSBRE85A0X920120611.

36. *Id.*

37. *Id.*

38. *Id.*

39. Editorial, *'Beyond Debate'*, N.Y. TIMES (May 3, 2012), www.nytimes.com/2012/05/04/opinion/beyond-debate.html.

40. *Id.*

41. *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012).

42. Editorial, *supra* note 39.

43. Glenn Greenwald, *John Yoo's War Crimes*, SALON (Apr. 2, 2008), www.salon.com/2008/04/02/yoo_2/.

44. *John Yoo*, U.C. BERKELEY L. SCH., www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/ (last visited Nov. 12, 2018).

45. This is, of course, up for debate because, unlike Lubanga and Katanga, John Yoo was never tried for such. Glenn Greenwald takes the position that John Yoo is a war criminal. Greenwald, *supra* note 43. Greenwald's argument hinges on a memorandum John Yoo wrote while acting as Deputy Attorney General, in which Yoo asserted that the Constitution allows the executive branch to bypass laws against torture in the name of national security. *Id.*

According to Greenwald, “John Yoo’s memorandum, as intended, directly lead to—caused—a whole series of war crimes at both Guantanamo and in Iraq.” *Id.* Yale Professor Jack Balkin shares Greenwald’s views:

Lawyers can make really bad legal arguments that argue for very unjust things in perfectly legal sounding language. I hope nobody is surprised by this fact. It is very commonplace. Today we are talking about lawyers making arguments defending the legality of torture. In the past lawyers have used legal sounding arguments to defend slavery, the genocide of Native Americans, rape (both spousal and non-spousal), Jim Crow, police brutality, denials of habeas corpus, destruction or seizure of property, and compulsory sterilization.

Jack Balkin, *The Legality of Evil: The Torture Memos and the Living Constitution*, BLOGSPOT (Apr. 2, 2008), balkin.blogspot.com/2008/04/legality-of-evil-torture-memos-and.html.

Erwin Chemerinsky, the founding Dean of the Law School at University of California Irvine, has called for the prosecution of John Yoo. Jon Wiener, *Prosecute John Yoo, Says Law School Dean Erwin Chemerinsky*, NATION (Dec. 12, 2014), www.thenation.com/article/prosecute-john-yoo-says-law-school-dean-erwin-chemerinsky/ (arguing that “[s]omeone isn’t excused from criminal liability just because they work for the federal government.”). Chemerinsky’s views may have changed, though, since becoming Dean of the Law School at University of California Berkeley. See Erwin Chemerinsky, *An Extremist Attorney General*, AM. CONST. SOC’Y (Nov. 12, 2018), www.acslaw.org/acsblog/an-extremist-attorney-general/ (praising John Yoo and other conservatives for standing against President Trump: “Thankfully, there is a strong argument made by conservatives such [as] George Conway, Alberto Gonzalez, and John Yoo that the appointment of Whitaker is unconstitutional.”). Outside of the United States, German human rights lawyer Wolfgang Kaleck has called on European prosecutors to seize CIA agents and U.S. officials involved in torture in the event those persons enter European territory: “[i]f these people enter European territory, they need to know that they’ll run into severe trouble.” Kate Connolly, *Edward Snowden Lawyer Calls on Europeans to Prosecute US Torture Architects*, GUARDIAN (Dec. 12, 2014), www.theguardian.com/us-news/2014/dec/12/german-lawyer-europeans-prosecute-us-torture-officials; see also Yvonne Ridley, *Bush Convicted of War Crimes in Absentia*, FOREIGN POL’Y J. (May 12, 2012), www.foreignpolicyjournal.com/2012/05/12/bush-convicted-of-war-crimes-in-absentia/ (outlining the *in absentia* convictions of George Bush, Dick Cheney, Donald Rumsfeld, and their key legal advisors—including John Yoo—for war crimes in Malaysian court).

There are also, of course, arguments against designating John Yoo a war criminal. His continued employment at U.C. Berkeley Law School, often considered one of the most “liberal” universities in the United States, highlights the fact that—at least within America—the war criminal designation is rhetorical only. See, e.g., Mark Abadi, *The 25 Most Liberal Colleges in America*, BUS. INSIDER (Sept. 10, 2018), www.businessinsider.com/most-liberal-colleges-in-america-2018-9 (ranking U.C. Berkeley as the fifth “most liberal” university in America). Multiple media institutions continue to publish him as a legitimate legal authority, and other attorneys coauthor articles with John Yoo. E.g., John Yoo & James C. Phillips, *A Clash of Judicial Visions*, NAT’L REV. (Oct. 19, 2018), www.nationalreview.com/2018/10/supreme-court-judicial-philosophy-constitutional-system/. One of Yoo’s recent co-authors, former National Security Advisor John Bolton, recently assured members of the Federalist Society that Americans would be safe from investigations into torture by International Criminal Court: “The United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate

was entitled to qualified immunity.⁴⁶ Unlike Lubanga and Katanga, the ICC never issued an arrest warrant for Yoo—both because it lacked jurisdiction and the deterrence provided by the “Hague Invasion Act.”⁴⁷ However, the ICC Prosecutor did initiate an investigation into alleged crimes committed in Afghanistan—including alleged U.S. torture.⁴⁸

court.” *Full Text of John Bolton’s Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html. The Federalist Society does not consider John Yoo a war criminal given the fact the society awarded him with the Paul M. Bator award (this was awarded in 2001, prior to the memorandum giving rise to the accusations), and regularly hosts him for events—including a recent event centered, unironically, on presidential power. See *Lunch With John Yoo*, FEDERALIST SOC’Y, www.fedsoc.org/events/lunch-with-john-yoo (last visited Nov. 12, 2018) (advertising the event); *Contributor Biography of Prof. John C. Yoo*, FEDERALIST SOC’Y, fedsoc.org/contributors/john-yoo (last visited Nov. 3, 2019) (providing the biography of Federalist Society contributor John Yoo).

In his own defense, John Yoo authored an op-ed in the Wall Street Journal. John Yoo, Opinion, *John Yoo: Litigating for Terrorists*, WALL ST. J. (May 3, 2012), www.wsj.com/articles/SB10001424052702304746604577381841940350560. There, Yoo accuses the Obama administration of leading a witch hunt against him as well as siding with terrorists by refusing to defend him in Padilla’s suit. *Id.* Yoo characterized his actions as fighting “to protect the nation’s ability to fight and win the war against al Qaeda—and other enemies—in the future.” *Id.* He further contended the Ninth Circuit must have recognized such, for ruling against Padilla. *Id.* According to Yoo, this is significant as the Ninth Circuit is “easily the most liberal in the land: It recently held, for example, that the Constitution guarantees a right to gay marriage, and it has a spectacular track record of reversals before the Supreme Court.” *Id.* In closing, although there is a legitimate argument to whether or not John Yoo is a war criminal, this Comment’s author believes the answer is, unequivocally, “yes.”

46. *Padilla*, 678 F.3d at 768.

47. See *U.S.: ‘Hague Invasion Act’ Becomes Law*, HUM. RTS. WATCH (Aug. 3, 2002), www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law (recounting the fact that “U.S. President George Bush [] signed into law the American Servicemembers Protection Act of 2002, which is intended to intimidate countries that ratify the treaty for the International Criminal Court (ICC). The new law authorizes the use of military force to liberate any American or citizen of a U.S.-allied country being held by the court, which is located in The Hague.”); American Service-Members’ Protection Act of 2002, 22 U.S.C. § 7402 (2002).

48. See Lawrenz Fares, *ICC: Court Will Continue Afghanistan War Crimes Investigation Despite US Threats*, JURIST (Sept. 12, 2019), www.jurist.org/news/2018/09/icc-court-will-continue-afghanistan-war-crimes-investigation-despite-us-threats/ (reporting that the ICC will continue its investigation into alleged U.S. crimes in Afghanistan that fall within its jurisdiction); *ICC Refuses to Investigate Crimes in Afghanistan, U.S. Torture*, CTR. FOR CONST. RTS. (Apr. 12, 2019), www.ccrjustice.org/home/press-center/press-releases/icc-refuses-to-investigate-crimes-afghanistan-us-torture (reporting that the ICC refused to grant the Prosecutor’s request to investigate alleged war crimes—including

The proposed investigation did not go over well with high ranking U.S. officials. While the ICC cannot establish jurisdiction over the U.S., Afghanistan—a member state—agreed to give the ICC authority to investigate crimes committed there.⁴⁹ In a speech to the Federalist Society, then-National Security Advisor John Bolton argued the ICC was unnecessary because the U.S. judicial system is “more vigorous, more fair, and more effective than the ICC.”⁵⁰ John Bolton went on to explain to the Federalist Society that the ICC was simultaneously a threat to U.S. sovereignty and too ineffective to deter war crimes.⁵¹ During that speech, the U.S. was in the process of covering up civilian deaths in Somalia.⁵² After John Bolton’s speech to the Federalist Society, the White House weighed in as well:

[T]he President is committed to defending our national sovereignty and all of our security interests, which would include using any means necessary to protect our citizens and those of our allies from unjust prosecution by the ICC. Their announcement that they would consider opening an investigation into—among other parties—U.S. soldiers in Afghanistan is a threat to American sovereignty. And if they proceed with that, then the United States would consider those options that Ambassador Bolton laid out today.⁵³

The U.S. later made good on one of its promises by revoking Chief ICC prosecutor Fatou Bensouda’s visa.⁵⁴ Despite U.S. leadership labelling possible ICC prosecution “unjust,” alleged U.S. misconduct goes beyond conduct by U.S. troops: Reports from late

torture—by the U.S. in Afghanistan); *Victims of U.S. Torture, Indefinite Detention Appeal ICC Ruling that Blocked Investigation*, CTR. FOR CONST. RTS. (Oct. 1, 2019), www.ccrjustice.org/home/press-center/press-releases/victims-us-torture-indefinite-detention-appeal-icc-ruling-blocked (reporting that victims of U.S. torture appealed the ruling refusing to allow the ICC Prosecutor to open investigations in alleged U.S. war crimes); *ICC Judges ‘Were Wrong to Reject Afghan Probe’; Prosecutors*, AL JAZEERA (Dec. 6, 2019), www.aljazeera.com/news/2019/12/icc-judges-wrong-reject-afghan-probe-prosecutors-191205221420695.html (providing an update on the state of the proposed ICC investigation: “But in a decision that was condemned by victims’ organizations and human rights groups, ICC judges said in April that an investigation would not be in the interests of justice because of a likely lack of cooperation and the time that has elapsed since the alleged crimes were committed.”).

49. Joshua Keating, *Why John Bolton Is So Obsessed with the International Criminal Court*, SLATE (Sept. 10, 2018), www.slate.com/news-and-politics/2018/09/john-bolton-international-criminal-court-speech.html.

50. *Id.*

51. *Id.*

52. Amanda Sperber, *Death from Above: US Air Strikes in Somalia Could Constitute ‘War Crimes’*, NATION (Mar. 20, 2019), www.thenation.com/article/somalia-amnesty-international-civilian-deaths/.

53. Fares, *supra* note 48.

54. Bill Chappel, *U.S. Strips Visa from World Criminal Court Prosecutor Pursuing War-Crimes Inquiry*, NPR (Apr. 5, 2019), www.npr.org/2019/04/05/710324238/u-s-strips-visa-from-intl-criminal-court-prosecutor-pursuing-war-crime-inquiry.

2019 show that CIA-backed militants continue to commit atrocities throughout Afghanistan as U.S. forces slowly withdraw.⁵⁵ Statements, and conduct, by top U.S. officials and ICC supporters present a dichotomy. Either the ICC is a threat to the U.S., content on undermining our national security interests. Or, the U.S. is acting, as Christoph Flügge put it, “consistent with the new American line: ‘We are No 1 and we stand above the law.’”⁵⁶ To evaluate the truthfulness of either stance—or, to form a less hardline stance—it is necessary to understand the Rome Statute that created the ICC.

B. The Rome Statute, the ICC, and the United States

The ICC has its roots in the international arrest of Augusto Pinochet.⁵⁷ This section will first cover a brief history of the ICC. Then, it will analyze its aims and purpose. Finally, it will address criticisms against the ICC.

1. An International Court to Hold National Leaders Accountable

Following an order by a Spanish judge, Augusto Pinochet was arrested at a hospital in London.⁵⁸ Pinochet was the Chilean dictator responsible for the murder and torture of thousands of people.⁵⁹ While the British released him due to declining health, “his seizure offered a tantalizing glimpse ahead to a world where a despot might be unsafe anywhere: crimes against humanity at home could get him indicted in another country and taken into custody in a third.”⁶⁰

55. See, e.g., *Afghanistan: CIA-Backed Forces Commit Atrocities*, HUM. RTS. WATCH (Oct. 31, 2019), www.hrw.org/news/2019/10/31/afghanistan-cia-backed-forces-commit-atrocities# (outlining allegations of war crimes committed by CIA backed forces and providing that, “[s]ince 2001, the CIA has maintained a counterterrorism operation in Afghanistan parallel to but distinct from the US military operation. It has continued to recruit, equip, train, and deploy Afghan paramilitary forces in pursuit of Al-Qaeda and Taliban forces, and, since 2014, militants affiliated with the Islamic State (also known as ISIS).”).

56. Eckerd, *supra* note 3.

57. *Pinochet’s Chile*, WASH. POST, www.washingtonpost.com/wp-srv/inatl/longterm/pinochet/overview.htm (last visited Apr. 7, 2019). Augusto Pinochet was the military dictator that seized control—with U.S. assistance—of Chile in 1973 after killing the elected Chilean President, Salvador Allende. *Id.* His rule was marked by a determination to exterminate leftists—leading to the torture and execution of thousands of Chileans. *Id.* The University of Chicago also assisted the Chilean dictator by educating hundreds of Chileans to better enact neoliberal policies, pioneered by Milton Friedman, in the authoritarian country. *Id.*

58. Hochschild, *supra* note 17.

59. *Id.*

60. *Id.*

That same year, in 1998, 160 countries, and more than 200 Non-Governmental Organizations (“NGOs”),⁶¹ took part in the Rome Conference.⁶² After five weeks of negotiations, 120 countries voted in favor of establishing the ICC, twenty-one states abstained and seven states opposed.⁶³ Among the countries that opposed establishing the ICC were the U.S., Israel, China, Iraq, and Qatar.⁶⁴ The Rome Statute was officially entered into force on April 11, 2002.⁶⁵

2. *The Aims and Objectives of the Rome Statute*

The Rome Statute is a treaty.⁶⁶ As such, it is bound by international treaty law.⁶⁷ A defining feature of international treaty law is its voluntary nature, “if a state does not consent to an international treaty, it is clearly not bound by its provisions.”⁶⁸ The Rome Statute provides the purpose of the ICC in Article 1, stating:

An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.⁶⁹

The ICC is headquartered at The Hague in the Netherlands,⁷⁰ it has “such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”⁷¹ In exercising that power, the ICC may operate within “the territory of any State Party

61. NGOs, or non-government organizations, function similarly to non-profit organizations—at an international level. *What is an NGO? What Role Does it Play in Civil Society?*, GRANTSPACE, www.grantspace.org/resources/knowledge-base/ngo-definition-and-role/ (last visited Oct. 1, 2019).

62. *History of the ICC*, COAL. FOR INT’L CRIM. CT., www.iccnw.org/?mod=icchistory (last visited Apr. 7, 2019).

63. *Id.*

64. *Id.*

65. *Id.*

66. *E.g.*, Faires, *supra* note 48 (providing an ICC statement in response to threats by the Trump administration: “The Court was established and constituted under the Rome Statute, the Court’s founding treaty—to which 123 countries from all regions of the world are party and have pledged their support through ratification—as an instrument to ensure accountability for crimes that shock the conscience of humanity.”).

67. *E.g.*, Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (providing an overview of treaty law).

68. Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 488 (2005).

69. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (hereinafter “Rome Statute”).

70. *Id.* at art. 3(1).

71. *Id.* at art. 4(1).

and, by special agreement, on the territory of any other State.”⁷²

However, the ICC’s jurisdiction is limited to “the most serious crimes of concern to the international community as a whole.”⁷³ Such crimes are genocide,⁷⁴ crimes against humanity,⁷⁵ war

⁷² *Id.* at art. 4(2).

⁷³ *Id.* at art. 5(1).

⁷⁴ *Id.* at art. 5(1)(a). The definition of genocide is provided by Article 6 of the statute:

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id. at art. 6.

⁷⁵ *Id.* at art. 5(1)(b). The definition for crimes against humanity is provided by Article 7:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing

crimes,⁷⁶ and the crime of aggression.⁷⁷ Targeting such crimes adheres to the objectives of the ICC: deterrence and retribution.⁷⁸ Some argue that a further objective is sending a message.⁷⁹ This objective can be seen as distinct from the main objectives because it “can be pursued in addition to, or even in the absence of, retribution.”⁸⁰

A defining feature of the Rome Statute is that it does not protect heads of state, rather:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of

great suffering, or serious injury to body or to mental or physical health.

Id. at art. 7(1); *see also id.* art. 7(1)-(2) (providing additional definitions as relevant for interpreting Article 7).

76. *Id.* at art. 5(1)(c). The definition of war crimes is provided by Article 8:

For the purpose of this Statute, ‘war crimes’ means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

Id. at art. 8(2). *See also id.* at art. 8(2)(b)(3) (providing additional definitions).

77. *Id.* at art. 5(1)(d).

78. *See Isanga, supra* note 29, at 240 (explaining that the preamble of the Rome Statute highlights these goals, although not explicitly).

79. *Id.* (citing Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanism*, 23 CONN. J. INT’L L. 209, 274 (2008)) (explaining that “[e]xpressivism . . . requires that the audience receive the message and absorb its meaning; that the conduct of the actor was wrong.”).

80. *Id.*

sentence.⁸¹

Article 27 further states that no immunity applies: “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.”⁸²

The ICC’s jurisdiction over heads of state reinforces its objective of deterrence: “[T]he ICC sends an unmistakable signal that perpetrators of international crimes will not go unpunished.... As early as 2004, the U.N. Secretary General noted that the ICC ‘was already having an important impact by putting would-be violators on notice that impunity is not assured.’”⁸³ Some argue that deterrence cannot be effective when threats of force have failed.⁸⁴ There is evidence to suggest that deterrence has worked: “ICC indictments caused the decline of Joseph Kony’s rebel movement, the Lord’s Resistance Movement/Army (LRA), which terrorized Northern Uganda and left horrendous atrocities in its wake.”⁸⁵

3. *African Bias and U.S. Opposition*

Outside of the pace at which the ICC operates, a major critique has been its focus on African countries. To date, the ICC has only issued warrants for African nationals.⁸⁶ This had led the African Union to accuse the ICC of singling Africans out, while others argue the targeting of Africa undermines the peace process, and others accuse the ICC as being a part of an elaborate conspiracy against Africa.⁸⁷ Professor Isanga recently addressed this bias:

Factually speaking, and with regard to situations referred by the Security Council, it is important to note that international tribunals other than the ICC exist—such as the ICTY and the Extra Ordinary Chambers in the Courts of Cambodia—none of which have targeted African conflicts. Also, the ICC can’t be dismissed as a mere Western tool of third world re-colonization as indeed some western countries—such as: France, the United Kingdom, Germany, Italy and the Netherlands—are parties to the Rome Statute, which potentially

81. Rome Statute art. 27(1).

82. *Id.* at art. 27(2).

83. Isanga, *supra* note 29, at 240-41 (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 49, U.N. Doc. S/2004/616 (Aug. 3, 2004)).

84. *E.g.*, John Bolton, *The Risks and the Weaknesses of the International Criminal Court from America’s Perspective*, 41 VA. J. INT’L L. 186, 197 (2000) (arguing that a strong national force is necessary because “[r]ecent history is filled with cases where even strong military force or the threat of force failed to deter aggression or the commission of gross abuses of human rights.”).

85. Isanga, *supra* note 29, at 242.

86. Rowland J V Cole, *Africa’s Relationship with the International Criminal Court: More Political than Legal*, 14 MELBOURNE J. INT’L L. 670, 676 (2014).

87. *Id.* at 671-72.

exposes them to the jurisdiction of the court. . . . The ICC maintains that the ICC Prosecutor’s “choice of cases is based on the relative gravity of abuses, and that crimes committed in Africa are among the world’s most serious.”⁸⁸

Outside of Africa, the most vocal opponent of the ICC is the U.S.⁸⁹ After initially signing the Rome Statute, the U.S. then “unsigned” the statute and began taking steps against the ICC.⁹⁰ First, the U.S. has passed legislation, often referred to as the “Hague Invasion Act,” to ensure that no American will have to face the ICC.⁹¹ The U.S. also worked with state-parties to the Rome Statute to conclude bilateral immunity treaties—in which member states refuse to hand over Americans to the ICC.⁹² However, it has cooperated with the ICC in some situations, such as refusing to use its Security Council veto power over certain ICC referrals.⁹³ However, as it stands, if a foreign national commits an international crime on U.S. soil, “neither the United States nor the ICC would have jurisdiction to prosecute it, [without invoking universal jurisdiction].”⁹⁴

While a justification for the lack of U.S. support of the ICC is the fact that neither China nor Russia are members,⁹⁵ others fear that the ICC may “gang up” on the U.S.⁹⁶ That seems unlikely, though, as non-members of the ICC account for the majority of world resources, military power, and population.⁹⁷ With that in

88. Isanga, *supra* note 29, at 248.

89. *See, e.g.*, Patricia M. Wald, *Why I Support the International Criminal Court*, 21 WIS. INT’L L.J. 513, 518 (2003) (explaining, “[t]he United States is the leading critic of the ICC, despite its active participation in the court’s formulation under the Rome Statute.”).

90. Isanga, *supra* note 29, at 290.

91. 22 U.S.C. § 7402.

92. Isanga, *supra* note 29, at 290.

93. *See, e.g.*, Keating, *supra* note 49 (outlining the ways in which the U.S. has cooperated with the ICC since its initial hardline opposition).

94. Isanga, *supra* note 29, at 301.

95. *E.g., id.* at 302 (defending the U.S. decision not to join the ICC considering that “its main competitors—especially Russia and China—have not demonstrated any willingness to join [the ICC]”).

96. Wald, *supra* note 89, at 522. Patricia Wald provides discussion on this issue:

Unsheathed, I think the real concern of ICC critics is that the other members of the Court will gang up on the U.S. and charge without justification either low-ranking servicemen or highly placed officials with war crimes or crimes against humanity. One such critic has said, “The greatest practical danger would be that the court, driven by members who may resent American global preeminence, could seek to restrain the use of U.S. military power through the prosecution of U.S. leaders.

Id.

97. David Bosco, *How to Respond When the International Criminal Court Goes After America*, LAWFARE (Dec. 3, 2017), www.lawfareblog.com/how-respond-when-international-criminal-court-goes-after-america.

mind, the real reasoning may be self-preservation for U.S. leaders lacking popularity at home and abroad.⁹⁸

Over the course of the so-called “War on Terrorism,” the U.S. tortured a substantial number of people.⁹⁹ In a 2014 report to the U.N. Committee against Torture in Geneva, multiple people within the U.S. delegation offered candid admissions that the United States had engaged in torture.¹⁰⁰ Further, the U.S. Senate released redacted portions of its report on the CIA’s Detention and Interrogation in which the Chairperson, Dianne Feinstein, admitted detainees were tortured—most famously in Abu Ghraib and Guantanamo Bay.¹⁰¹ In addition to torture, scholars have accused the U.S. of unauthorized human experimentation under the guise of interrogation.¹⁰²

After “a decade-long preliminary investigation[,]” the ICC Prosecutor requested a formal investigation into allegations of U.S. crimes in Afghanistan—including torture.¹⁰³ The United States has refused to cooperate “in any way” with the investigation.¹⁰⁴ In opposing this investigation, the U.S. has called the ICC “fundamentally illegal” and has threatened to “ban its judges and prosecutors from entering the country, freeze any funds they have in U.S. financial institutions, and attempt to prosecute them in U.S. courts.”¹⁰⁵ As of December 2019, it appears that the investigation

98. See, e.g., James Fallows, *The Iraq War and the Inevitability of Ignorance*, ATLANTIC (Mar. 20, 2018), www.theatlantic.com/international/archive/2018/03/iraq-war-anniversary-fifty-first-state/555986/ (providing examples of past military intervention and the varying political ramifications of such).

99. William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT’L L. & POL. 1, 2 (2015).

100. *Id.* at 3-4.

101. *Id.* at 4-5.

102. E.g., William J. Aceves, *Interrogation or Experimentation? Assessing Non-Consensual Human Experimentation During the War on Terror*, 29 DUKE J. COMP. & INT’L L. 41, 44 (2018) (summarizing the information available on non-consensual human experimentation over the course of the War on Terror).

103. Katherine Gallagher, Opinion, *The ICC Must Hold the US Accountable for Crimes in Afghanistan*, GUARDIAN (Feb. 16, 2018), www.theguardian.com/commentisfree/2018/feb/16/icc-us-accountable-for-crimes-afghanistan; ICC VICTIMS PARTICIPATION AND REPARATIONS SECTION, FINAL REPORT ON THE ARTICLE 15 VICTIM REPRESENTATION PROCESS 14 (2018), www.icc-cpi.int/RelatedRecords/CR2018_01452.PDF (providing: “The Registry further notes that both crimes against humanity and war crimes were reported. A non-exhaustive list of the crimes mentioned includes: murder; attempted murder; imprisonment or other severe deprivation of liberty; torture; rape; sexual violence; persecution; enforced disappearance of persons; other inhumane acts; attack against civilian population; attack against protected objects; destruction of property; pillage; forced displacement; outrages upon personal dignity; and denying a fair trial.”).

104. Ken Bredemeier, *US: No Cooperation with ICC Probe of Alleged Afghan War Crimes*, VOA (Sept. 11, 2018), www.voanews.com/a/us-afghan-investigatn/4564590.html.

105. *Id.*

will not go forward due to lack of cooperation from Afghanistan and the U.S.¹⁰⁶

As opposed to others accused of war crimes, no high-level official from the United States has been prosecuted for war crimes or crimes against humanity.¹⁰⁷ Instead, those directly responsible for the legal arguments that “justified” torture enjoy both freedom and success in America: John Yoo, the author of the “Torture Memos,”¹⁰⁸ is the Emanuel S. Heller Professor of Law at University of California Berkley Law School;¹⁰⁹ then-acting Assistant Attorney General Jay Bybee, the author of the infamous “Bybee Memo,”¹¹⁰ is a federal judge on the United States Court of Appeals for the Ninth Circuit;¹¹¹ then-acting Attorney General John Ashcroft is running a successful law firm;¹¹² then-acting White House counsel Alberto Gonzales is both the Dean and the Doyle Rogers Distinguished Professor of Law at Belmont University Law School;¹¹³ and, former President George Bush is regularly romanticized in the American Media.¹¹⁴ The U.S. message is clear: although international law

106. *E.g.*, Molly Quell, *Victims Fight for Probe of War Crimes in Afghanistan*, COURTHOUSE NEWS SERV. (Dec. 5, 2019), www.courthousenews.com/victims-fight-for-probe-of-war-crimes-in-afghanistan/ (reporting that ICC prosecutor Fatou Bensouda’s request to authorize an investigation “was denied in April when the ICC’s Pretrial chamber, a three-judge panel, found that a lack of cooperation from both Afghanistan and the United States meant it was unlikely the prosecutor would be able to collect sufficient evidence in the case.”).

107. Gallagher, *supra* note 103.

108. Andrew Cohen, *The Torture Memos, 10 Years Later*, ATLANTIC (Feb. 6, 2012), www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/.

109. John Yoo, *supra* note 44.

110. Cohen, *supra* note 108.

111. Andrew Cohen, *Torture Memo Author, Now a Federal Judge, Still Justifying Torture*, ATLANTIC (Feb. 9, 2013), www.theatlantic.com/national/archive/2013/02/torture-memo-author-now-a-federal-judge-still-justifying-torture/272998/.

112. *See John Ashcroft*, ASHCROFT L. FIRM, www.ashcroftlawfirm.com/professionals/john-ashcroft/john-ashcroft/ (last visited Feb. 9, 2019); *see also* Emily Jashinsky, Opinion, *John Ashcroft’s Law Firm Set to Earn \$2.5 Million from Qatari Government for Work as Foreign Agent*, WASH. EXAMINER (June 12, 2017), www.washingtonexaminer.com/john-ashcrofts-law-firm-set-to-earn-25-million-from-qatari-government-for-work-as-foreign-agent (outlining the obscene amounts of money Ashcroft’s law firm takes in from various lobbying initiatives).

113. *Meet Our Administration*, BELMONT U., www.belmont.edu/law/faculty/admin/index.html (last visited Jan. 21, 2019).

114. *E.g.*, Eliza Collins & Nicole Gaudiano, *In Trump Era, Nancy Pelosi Admits to Nostalgia About George W. Bush. Here’s Why*, USA TODAY (Jan. 3, 2019), www.usatoday.com/story/news/politics/2019/01/03/nancy-pelosi-admits-nostalgia-george-w-bush-trump-era/2430471002/ (providing that “Pelosi said she and Bush ‘had our differences of opinion, especially on the war in Iraq, but we had many areas of agreement and we were able to work together in respectful ways.’”); *see also* Lisa Respers France, *Ellen DeGeneres Explains*

does not apply to us, those that can legally justify international crimes will be rewarded.

C. *The Post-Human Rights Era*

While it appears Professor Makau Mutua was the scholar that drove the utilization of the post-human rights era as a label,¹¹⁵ the human rights movement has not been free of criticism. This section will first identify some historic criticisms of the human rights movement. Then, it will outline the post-human rights era analysis, and proposed solutions to the declining human rights conditions worldwide.

From the left, critiques have historically been made by Marxists.¹¹⁶ Such a critique “emphasize[s] the connections between human rights, capital, and private property; the need for overcoming individual conceptions of rights in favor of collective ones; [and] the fact that no human rights campaign has ever stemmed from Article 25 of the Universal Declaration.”¹¹⁷ Article 25 of the Universal Declaration of Human Rights provides:

Everyone has the right to a standard of living adequate for the health and well-being of himself and his clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack

Hanging Out with Her Friend George W. Bush, CNN (Oct. 8, 2019), www.cnn.com/2019/10/08/entertainment/ellen-degeneres-george-bush/index.html (outlining the controversy surrounding Ellen DeGeneres being spotted with George W. Bush and her response).

115. See Beiter, *supra* note 10 (explaining that “[o]ne of the most prolific African human rights scholars, Makau Mutua, has recently suggested that the age of human rights is over”); Wuerth, *supra* note 9 (citing Makau Mutua, *Is the Age of Human Rights Over?*, in *ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS* 450-58 (Sophia A. McClennen & Alexandra Schultheis Moore eds., 2016)) (explaining that “[t]he terms ‘decline’ and the ‘post-human rights era,’ do not mean we are at the end of human rights obligations themselves (indeed, they are multiplying), but instead that we have seen the end of an era: what Makau Mutua has termed the ‘age of human rights’ or what Louis Henkin called the ‘Age of Rights’ in international law.”).

116. See, e.g., Slavoj Žižek, *Against Human Rights*, *NEW LEFT REV.*, July-Aug. 2005, at 115, 128 (outlining the Marxist argument against human rights: “So, to put it in the Leninist way: what the ‘human rights of Third World suffering victims’ effectively means today, in the predominant discourse, is the right of Western powers themselves to intervene politically, economically, culturally and militarily in the Third World countries of their choice, in the name of defending human rights.”); see also Martin Moorby, “*Who is this Man who is Distinct from this Citizen?*” *Revisiting Marx’s Critique of Liberal Rights*, *LATERAL* (Spring 2018), www.csalateral.org/issue/7-1/moorby-marx-liberal-rights/ (arguing that Marxists are not inherently against human rights); G. JOHN IKENBERRY, *LIBERAL LEVIATHAN* (2011) (providing a Liberal argument against imperialism as practiced by George W. Bush, not against imperialism as a concept or as previously practiced).

117. Bécquer Seguí, *Imperialists for ‘Human Rights’*, *JACOBIN* (Dec. 19, 2014), www.jacobinmag.com/2014/12/imperialists-for-human-rights/.

of livelihood in circumstances beyond his control.¹¹⁸

While earlier, often Marxist, critiques of the human rights movement focused on U.S. imperialism¹¹⁹ and the singular focus on civil and political rights¹²⁰—as opposed to economic rights—the post human rights era analysis is also concerned with the internationally declining human rights conditions.¹²¹ As Alison Brysk points out, “[d]espite historic advances in human rights law and mobilization, unprecedented numbers suffer war crimes, forced displacement, ethnic persecution, gender violence, and backlash

118. Universal Declaration of Human Rights art. 25, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

119. Michael Parenti, *The Rational Destruction of Yugoslavia*, GRASSROOTS INST. (Apr. 27, 2016), www.grassroots-institute.org/uploads/1/3/4/5/13451637/064b91_michael_parenti_the_rational_destruction_of_yugoslavia.pdf. As an example, Michael Parenti’s opening to an essay provides an overview of the Marxist perspective, in relation to the hypocritical nature concerning the bombings of the former Yugoslavia:

In 1999, the U.S. national security state — which has been involved throughout the world in subversion, sabotage, terrorism, torture, drug trafficking, and death squads — launched round-the-clock aerial attacks against Yugoslavia for 78 days, dropping 20,000 tons of bombs and killing thousands of women, children, and men. All this was done out of humanitarian concern for Albanians in Kosovo. Or so we were asked to believe. In the span of a few months, President Clinton bombed four countries: Sudan, Afghanistan, Iraq repeatedly, and Yugoslavia massively. At the same time, the U.S. was involved in proxy wars in Angola, Mexico (Chiapas), Colombia, East Timor, and various other places. And U.S. forces are deployed on every continent and ocean, with some 300 major overseas support bases — all in the name of peace, democracy, national security, and humanitarianism.

While showing themselves ready and willing to bomb Yugoslavia on behalf of an ostensibly oppressed minority in Kosovo, U.S. leaders have made no moves against the Czech Republic for its mistreatment of the Romany people (gypsies), or Britain for oppressing the Catholic minority in Northern Ireland, or the Hutu for the mass murder of a half million Tutsi in Rwanda — not to mention the French who were complicit in that massacre. Nor have U.S. leaders considered launching “humanitarian bombings” against the Turkish people for what their leaders have done to the Kurds, or the Indonesian people because their generals killed over 200,000 East Timorese and were continuing such slaughter through the summer of 1999, or the Guatemalans for the Guatemalan military’s systematic extermination of tens of thousands of Mayan villagers. In such cases, U.S. leaders not only tolerated such atrocities but were actively complicit with the perpetrators — who usually happened to be faithful client-state allies dedicated to helping Washington make the world safe for the Fortune 500.

Id.

120. *E.g.*, Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOKLYN J. INT’L L. 689, 721-26 (1998) (outlining the shortcomings of a perception of human rights that disproportionately elevates civil and political rights above economic rights).

121. *E.g.*, Wuerth, *supra* note 9.

against rights defenders.”¹²² With the declining human rights conditions in mind, critics of the human rights movement criticize the “limitations in Enlightenment liberalism, state-centric enforcement, disregard of economic structures, alleged Western bias, and democratic deficit in international law.”¹²³

Professor Ingrid Wuerth has recently addressed the “retreat” of human rights law, and how the retreat affects international law as a whole.¹²⁴ The crux of Wuerth’s proposition that human rights law is in retreat—thus, negatively affecting international law as a whole—is the “broken windows” theory.¹²⁵ This theory is premised on the assumption that widespread violations of human rights law leads to a presumption that “no one cares,” and that “no one is in charge.”¹²⁶ As Wuerth sees it, this lack of accountability spells doom for international human rights law:

Accountability is a central concern of public international law. The system lacks a centralized enforcement mechanism, and as a result, compliance and effectiveness pose important—some would say fundamental—challenges to the relevance of the public international law. In this context, behavior that signals a lack of accountability may be especially damaging to the enforcement and deterrence of international law writ large. To some extent, this intuition has already been voiced within the human rights discourse.¹²⁷

Academics are not alone in pointing out the shortcomings—or perceived failure—of the human rights movement. In 2018, both

122. ALISON BRYSK, *THE FUTURE OF HUMAN RIGHTS 2* (2018).

123. *Id.* at 6 (citing UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2002); COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* (2000); ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014); MARK GOODALE, *SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS* (2009); CONOR GEARTY, *ON FANTASY ISLAND: WHY THE HUMAN RIGHTS ACT MATTERS* (2016)).

124. Wuerth, *supra* note 9, at 320.

125. *Id.* at 325; see also Jonathan Oberman & Kande Johnson, *The Underbelly of the Beast: Misdemeanor Practice in the Era of Broken Windows and Saturating Policing: Introduction: Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color?*, 37 CARDOZO L. REV. 931, 941 (2016) (providing that “[t]he Broken Windows theory emerged from a five-page essay by George Kelling and James Wilson, published in 1982 in the *Atlantic Monthly*. The essay argued that a single broken window left unaddressed will quickly result in a building full of broken windows; and that a car with a cracked windshield, allowed to remain on the street, will, if not repaired, be quickly vandalized. The authors wrote, ‘The unchecked panhandler is, in effect, the first broken window.’ As Ginia Bellafante of the *New York Times* observed more than thirty years later, ‘We have come to think of ‘broken windows’ in terms of the need to make arrests for minor offenses, the imperative to get rid of squeegee men and other avatars of nuisance.”).

126. Wuerth, *supra* note 9, at 325 (quoting Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 303, 305-06 (1998)).

127. *Id.* at 325-26.

Amnesty International and Human Rights Watch called for “an all-hands-on-deck response” from supporters.¹²⁸ Within the human rights movement, pushback is mounting on the most prevalent narrative: “[T]he idea that once binding legal norms are set, realities on the ground will eventually conform to them.”¹²⁹ With that in mind, many within the human rights movement have begun proposing ways to address the fact that more institutions and legal norms have not created better human rights conditions.

Some human rights activists argue for a doubling down on the current approach in response to declining human rights conditions.¹³⁰ In that same spirit, some want to continue to approach the problems in the same way but want more assistance from the U.S.¹³¹ Samuel Moyn argues the human rights movement must undergo dramatic changes to meet the challenges of the neoliberal world¹³²—this includes rethinking the way scholars discuss the historical advancement of human rights.¹³³ While

128. Rieff, *supra* note 6.

129. *Id.*

130. *E.g.*, BRYSK, *supra* note 122, at 16 (arguing that “[t]his is no time to abandon ship—it is a time for ‘all hands-on deck’ to navigate the storm and plot a new course”).

131. *E.g.*, Aryeh Neier, *The Human-Rights Movement Needs America*, PROJECT SYNDICATE (Jan. 16, 2019), www.project-syndicate.org/commentary/human-rights-supporters-need-america-by-aryeh-neier-2019-01 (arguing that the U.S. must change its domestic practices “[i]f it is again to play a leading role in promoting human rights worldwide”).

132. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 219-20 (2018). Samuel Moyn explains the challenges in this:

Above all, [the human rights movement] will need to take on the task of governance, local and global, and not critique alone. And it will need to be frightening enough to prompt the social bargains that the welfare state supervised to the end of material fairness, while not incurring the tremendous costs of twentieth-century conflict. The age of human rights has involved greater inclusion in national social justice, especially for women, and any new program and movement will need to preserve and extend those gains. Finally, it will need to be global in scale. On moral grounds, the wealthy in the world should want to save themselves from narrow identification with their fellow humans only when their lives are at stake in the most spectacular displacement, penury, and violence. To date, a global welfare structure has only been imagined but never institutionalized. Our job is, therefore, not an easy one. Indeed, it is daunting to the extreme.

Id.

133. SAMUEL MOYN, *HUMAN RIGHTS AND THE USES OF HISTORY*, xiii (expanded ed. 2017). Samuel Moyn recently outlined the failures of revisionist history as it relates to history:

The main goal of this book is to insist on the critical impulse: human rights history should turn away from ransacking the past as if it provided good support for the astonishingly specific international movement of the last few decades. That movement comprises a pfor which history offers little validation because it is so new. If study of the

Professor Wuerth does not advance solutions to the mounting problems, she does recommend altering the way in which human rights are discussed¹³⁴—and also stresses the benefits of domesticating international human rights law.¹³⁵ Other scholars share her opinion on the importance of domestication.¹³⁶ This is the beginning of these discussions. One thing should be clear, though, at this moment in history, those in the human rights movement must begin finding better ways to combat the declining human rights conditions. If not, the human rights movement is sure to become “a casualty of a justifiable revolt against the rich.”¹³⁷

III. ANALYSIS

It is clear that U.S. ratification of the Rome Statute will not, standing alone, reverse declining human rights conditions. It is one minor, yet significant, step towards addressing the decline in human rights conditions and the U.S.’s role in such. However, the fight for human rights must be an international movement. Despite rhetoric that suggests the contrary, the U.S. cannot change the world on its own. That said, by taking the correct steps—as opposed to the steps the U.S. has taken historically, i.e., refusing to ratify the Rome Statute—it is possible the U.S. can help drive the human rights movement forward. That will not be achieved, though, by bombing countries in the name of human rights. Nor by advancing U.S. economic interests at any cost. As such, this section is broken into two arguments. First, this section argues that U.S. ratification of the Rome Statute is an important, necessary step towards restoring the moral force of human rights. Next, it argues that the current American political climate, combined with the post-human rights era analysis, presents a pressing need for action from American human rights activists.

past is useful at all in coming to terms with what happens today in the name of timeless and universal values, it suggests the reinvention of our movement in the name of a more just world.

Id.

134. Wuerth, *supra* note 9, at 283 (explaining that her article “does not purport to resolve those issues,” instead “it endeavors instead to show that the debate about human rights should expand to consider the relationship between human rights and international law as a whole”).

135. *E.g., id.* at 346 (stating that “[d]omestic enforcement mechanisms may be effective without ongoing enforcement through international law.”).

136. *E.g.,* Beiter, *supra* note 10, at 14 (providing possible solutions to the retreat of human rights: “[F]irst human rights need to be domesticized; second, pure ‘developmental goal’ approaches should be debunked; and third, extraterritorial state obligations under international human rights law must be recognized.”); *see also* BRYSK, *supra* note 122, at 92-93 (providing examples of successful campaigns aiming to domesticate human rights goals).

137. Moyn, *supra* note 8.

A. *Restoring the Moral Force of Human Rights*

In the words of Makua Matua, “human rights have lost their moral force.”¹³⁸ While Matua will often invoke “the West”¹³⁹ when referring to this problem, this Comment focuses specifically on the U.S. This reasoning is two-fold: First, the U.S. has a massive—unsurpassed—international presence. Second, the U.S. is this author’s home country. This subsection will first break down the size of the U.S. military apparatus as well as selective nature of accountability—where only the elite are immune from punishment.

1. *U.S. Empire and Human Rights Violations*

In 2013, a Win/Gallup survey asked approximately 66,000 people in sixty-five countries which country posed the largest threat to world peace.¹⁴⁰ Of those interviewed, twenty-four percent believed the U.S. to be the largest threat to world peace.¹⁴¹ No other country came close to the perceived threat of the U.S.: “8 percent named Pakistan, putting that country in second place, while 6 percent named China. A mere 4 percent found Iran threatening — which tied it with Israel.”¹⁴² Throughout the course of writing this Comment, the U.S. cited human rights abuses as justifying possible military intervention in Venezuela.¹⁴³ Venezuela is only the most recent example. Other notable examples include Syria,¹⁴⁴ Libya,¹⁴⁵

138. Beiter, *supra* note 10.

139. *Id.*

140. Joe Hammer, *Which Country Is the Greatest Threat to World Peace?*, BRILLIANT MAPS (Feb. 19, 2017), www.brilliantmaps.com/threat-to-peace/.

141. *Id.*

142. Editorial, *US is the Greatest Threat to World Peace: Poll*, N.Y. POST (Jan. 5, 2014), www.nypost.com/2014/01/05/us-is-the-greatest-threat-to-world-peace-poll/.

143. See, e.g., Anatoly Kurmanaev & Clifford Krauss, *U.S. Sanctions Are Aimed at Venezuela’s Oil. Its Citizens May Suffer First.*, N.Y. TIMES (Feb. 8, 2019), www.nytimes.com/2019/02/08/world/americas/venezuela-sanctions-maduro.html (recounting that “Mr. Trump said the oil sanctions were meant to punish Mr. Maduro for human rights violations and force him to cede power to Juan Guaidó, the opposition leader whom the United States and many other countries have recognized as the rightful Venezuelan president”). *But see* Jennifer Jacobs, Saleha Mohsin, Ben Bartenstein & Josh Wingrove, *Trump Weighs More-Muscular Venezuela Moves on Doubts Over Guaidó*, BLOOMBERG (Dec. 6, 2019), www.bloomberg.com/news/articles/2019-12-06/trump-revisits-venezuela-strategy-as-confidence-in-guaido-wanes (reporting that, as of December 2019, White House officials allege that “[n]o military option is under consideration,” but other “maximum pressure” options are under discussion).

144. See, e.g., Zack Beauchamp & Yochi Dreazen, *The United States Has Officially Attacked Syria*, VOX (Apr. 6, 2017), www.vox.com/world/2017/4/6/15214758/us-syria-assad-bomb-cruise-missile (summarizing that President Trump called an alleged gas attack “an affront to humanity,” and stating that “something should happen” to Bashar al-Assad).

145. See, e.g., Micah Zenko, *The Big Lie About the Libyan War*, FOREIGN

Iraq,¹⁴⁶ Afghanistan,¹⁴⁷ Somalia,¹⁴⁸ Sierra Leone,¹⁴⁹ Yugoslavia,¹⁵⁰ Panama,¹⁵¹ and Grenada.¹⁵²

U.S. intervention in the name of human rights is beyond hypocritical. By simply analyzing the present situation, it is clear the U.S. is complacent—or an active participant—in numerous violations of human rights. Currently, the U.S. supports Saudi Arabia in a relentless campaign against Yemen—recently selling the Saudi Monarchy a precision guided bomb that killed fifty-one people, including forty children on a field trip.¹⁵³ U.S. support has

POLY (Mar. 22, 2016), foreignpolicy.com/2016/03/22/libya-and-the-myth-of-humanitarian-intervention/ (outlining the fact that Obama’s justification for the Libyan intervention—protecting civilians—was merely a pretext for regime change, which led to a disastrous outcome).

146. *E.g.*, Transcript: *George Bush’s Speech on Iraq*, GUARDIAN (Oct. 7, 2002), www.theguardian.com/world/2002/oct/07/usa.iraq (justifying the Iraq war by stating “America believes that all people are entitled to hope and human rights, to the nonnegotiable demands of human dignity”).

147. *E.g.*, Meghan Keneally, *Why the US Got Involved in Afghanistan—and Why It’s Been Difficult to Get Out*, ABC (Aug. 21, 2017), www.abcnews.go.com/US/us-involved-afghanistan-difficult/story?id=49341264 (recounting that “[Laura Bush gave a speech on women’s rights in Afghanistan] and it coincided with the release of a report titled ‘Report on the Taliban’s War Against Women’ by the State Department’s Bureau of Democracy, Human Rights and Labor.”).

148. *E.g.*, Seguín, *supra* note 117 (arguing that “[t]he Westphalian assumptions that motivated the Universal Declaration [of Human Rights] . . . also authorized a spate of US military interventions in the 1990s in places like Iraq, Somalia, Sierra Leone, and Yugoslavia”).

149. *Id.*

150. *E.g.*, Parenti, *supra* note 119 (outlining the hypocritical actions—premised on an alleged human rights concern for Albanians—of the U.S. in Yugoslavia).

151. *E.g.*, Andrew Glass, *United States Invades Panama, Dec. 20, 1989*, POLITICO (Dec. 20, 2018), www.politico.com/story/2018/12/20/united-states-invades-panama-1989-1067072 (stating that “Bush cited four reasons for the invasion: safeguarding the lives of the approximately 35,000 U.S. citizens living in Panama; defending democracy and human rights; combating drug trafficking in a country that had become a center for drug money laundering and a transit point for drug trafficking to the U.S. and Europe; and protecting the integrity of the treaties that President Jimmy Carter had signed with Panamanian authorities, which called for the Panama Canal to be turned over to them in 2000.”).

152. *See, e.g.*, Stephen Kinzer, *30 Years on: The Legacy of Reagan’s Invasion of Grenada*, AL JAZEERA (Oct. 25, 2013), www.america.aljazeera.com/articles/2013/10/25/invasion-grenadaronaldreagan.html (recounting that Reagan and his aides “depicted Grenada’s regime as murderous, anti-American and supported by Cuba”).

153. *E.g.*, Rasha Mohamed, *The US Should Have No Part in War Crimes in Yemen*, AMNESTY INT’L (Aug. 31, 2018), www.amnesty.org/en/latest/news/2018/08/the-us-should-have-no-part-in-war-crimes-in-yemen/ (reporting that “[t]he Saudi Arabia-led coalition attack on August 9, which it claimed was a ‘legitimate military action,’ killed 51 people, including more than 40 children.”); *see also* Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT’L SEC. J. 1 (2019) (providing a legal analysis on the U.S. involvement

led to the rapid expansion of illegal Israeli settlements into occupied Palestine.¹⁵⁴ The U.S. recently sent a delegate to discuss “unrest and human rights in Venezuela, Nicaragua, and Cuba” with newly elected Brazilian President Jair Bolsonaro.¹⁵⁵ Bolsonaro cannot be seen as an ideal candidate to discuss human rights considering that he has argued for the necessity of eradicating Brazilian indigenous populations.¹⁵⁶ And that is just support abroad.

Human Rights Watch has pointed out multiple examples of domestic U.S. human rights violations, including: harsh criminal sentencing, racial disparities in drug policy and policing, an astounding number of youth in the criminal justice system, the criminalization of poverty, limiting the rights of non-citizens, insufficient citizen access to healthcare, cutting funding for Americans with disabilities, restricting women’s rights, limiting rights based upon sexual orientation and gender identity, utilization of “national security” to justify torture, invasive surveillance practices, and insufficient freedom of expression and assembly.¹⁵⁷

Selective, hypocritical invocations of human rights for political purpose is not an isolated occurrence, it is the international reality: The U.S. warns Cuba, a country in which the U.S. operates a torture facility,¹⁵⁸ that it must end human rights violations if Cuba wants to continue “normalizing relations.”¹⁵⁹ China accuses the U.S. of “serious infringement on citizens’ civil rights” and “systematic

in Yemen).

154. *E.g.*, *Israel’s Settlement Population Growing Rapidly Amid Staunch US Support, Says Settler Group*, MIDDLE EAST EYE (Feb. 6, 2019), www.middleeasteye.net/news/israels-settlement-population-growing-rapidly-amid-staunch-us-support-says-settler-group (explaining that Israeli settlements in occupied Palestinian territory increased by 3.3 percent in 2018).

155. Taylor Barnes, *‘Trump of the Tropics’: Brazil’s Bolsonaro set to get Tough on, Well . . . Everything*, CNN (Jan. 1, 2019), www.cnn.com/2018/12/31/americas/brazil-bolsonaro-inauguration-intl/index.html.

156. *See, e.g.*, Fiona Watson, *Opinion, Bolsonaro’s Election is Catastrophic News for Brazil’s Indigenous Tribes*, GUARDIAN (Oct. 31, 2018), www.theguardian.com/commentisfree/2018/oct/31/jair-bolsonaro-brazil-indigenous-tribes-mining-logging (providing examples of statements such as “[i]t’s a shame that the Brazilian cavalry wasn’t as efficient as the Americans, who exterminated their Indians,” and “[i]f I become president, there will not be one centimeter more of indigenous land”).

157. *World Report 2018: United States*, HUM. RTS. WATCH, www.hrw.org/world-report/2018/country-chapters/united-states#8deaa8 (last visited Feb. 8, 2019).

158. Tom Miles, *U.N. Expert Says Torture Persists at Guantanamo Bay; U.S. Denies*, REUTERS (Dec. 13, 2017), www.reuters.com/article/us-usa-guantanamo-torture/u-n-expert-says-torture-persists-at-guantanamo-bay-u-s-denies-idUSKBN1E71QO.

159. David Smith, *Cuba Must End Human Rights Violations to Improve Relations, US Warns*, GUARDIAN (June 13, 2017), www.theguardian.com/world/2017/jun/13/cuba-human-rights-violations-rex-tillerson-us-relations.

racial discrimination”¹⁶⁰ while it operates internment camps for hundreds of thousands of Chinese Muslims.¹⁶¹ Benjamin Netanyahu, the leader of an apartheid state,¹⁶² and Turkish dictator Recep Erdogan,¹⁶³ accuse each other of human rights violations in the aftermath of Gaza violence,¹⁶⁴ as Turkey engages in ethnic cleansing in northern Syria.¹⁶⁵

The U.S. is far ahead of other countries, though, in global presence. As of 2015, the U.S. had almost 800 military bases in more than seventy countries.¹⁶⁶ For comparison, Britain, France and Russia have almost thirty military bases—combined.¹⁶⁷ As of 2018, the U.S. is officially fighting wars in seven countries: Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, and Niger.¹⁶⁸ The U.S. plans to elevate “defense” spending from 700 billion dollars in 2018 to 717 billion dollars in 2019.¹⁶⁹ Further, figures from a recent study paint

160. Chris Baynes, *China Accuses US of ‘Severe Infringements’ on Human Rights in Report*, INDEP. (Apr. 24, 2018), www.independent.co.uk/news/world/asia/china-us-human-rights-violations-state-executions-xinhua-state-department-trump-a8320176.html.

161. Chris Buckley & Austin Ramzy, *China’s Detention Camps for Muslims Turn to Forced Labor*, N.Y. TIMES (Dec. 16, 2018), www.nytimes.com/2018/12/16/world/asia/xinjiang-china-forced-labor-camps-uighurs.html; see also Merrit Kennedy, *China Rebukes House Bill Condemning Crackdown on Uighurs*, NPR (Dec. 4, 2019), www.npr.org/2019/12/04/784753252/china-rebukes-house-bill-condemning-crackdown-on-uighurs (reporting that China has condemned the U.S. over a recent bill that “condemns ‘gross human rights violations’ against the Uighur[] [Muslims] and calls for ‘an end to arbitrary detention, torture, and harassment of these communities inside and outside of China.’”).

162. Avi Schlaim, Opinion, *Palestinians Still Live Under Apartheid in Israel, 25 Years After the Oslo Accord*, GUARDIAN (Sept. 13, 2018), www.theguardian.com/commentisfree/2018/sep/13/palestinians-still-face-apartheid-israel-25-years-after-oslo-accord. *Contra*, *Response to Common Inaccuracy: Israel is an Apartheid State*, ANTI-DEFAMATION LEAGUE www.adl.org/resources/fact-sheets/response-to-common-inaccuracy-israel-is-an-apartheid-state (last visited Jan. 17, 2019) (arguing against the apartheid analogy).

163. See Alon Ben-Meir, *25 Reasons Erdogan’s ‘Victory’ Was Illegitimate*, HUFFINGTON POST (Apr. 20, 2017), www.huffingtonpost.com/entry/a-sad-day-for-turkey_us_58f8c9dae4b01d4eb1e169ec (outlining Erdogan’s power grab).

164. Natasha Turak, *Netanyahu and Erdogan Trade Insults on Twitter Over Gaza Violence*, CNBC (May 16, 2018), www.cnbc.com/2018/05/16/netanyahu-and-erdogan-trade-insults-on-twitter-over-gaza-violence.html.

165. Tom Perry, *Syrian SDF Accuses Ankara of Ethnic Cleansing in Afrin, Turkey Denies*, REUTERS (Mar. 13, 2018), www.reuters.com/article/us-mideast-crisis-syria-turkey-populatio/syrian-sdf-accuses-ankara-of-ethnic-cleansing-in-afrin-turkey-denies-idUSKCN1GP13F.

166. David Vine, *Where in the World is the U.S. Military?*, POLITICO MAG. (July/Aug. 2015), www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321.

167. *Id.*

168. Alexa Liataud, *White House Acknowledges the U.S. Is at War in Seven Countries*, VICE (Mar. 15, 2018), www.vice.com/en_us/article/a3ywd5/white-house-acknowledges-the-us-is-at-war-in-seven-countries.

169. Amanda Macias, *Trump Vows to Bolster the Military by Boosting the Pentagon’s Budget and Reassessing Foreign Alliances*, CNBC (Feb. 5, 2019),

an alarming picture of the effects of U.S.-led “war on terror”: roughly 15,200 U.S. military members, contractors, journalists and human rights workers killed since 2001; 755,000 to 786,000 civilians killed as a direct result of combat; an estimated 3,100,000 civilians killed indirectly by the wars; fifty-six percent of Iraqi children exhibiting signs of PTSD; and more than 12,500,000 people displaced from their homes.¹⁷⁰

Given the U.S.’s massive global operation, and its purported interest in promoting human rights,¹⁷¹ it would follow that additional oversight would be welcomed.¹⁷² However, as the U.S. has made clear, it will not cooperate with the ICC—especially with its proposed investigation into Afghanistan.¹⁷³ That makes sense when considering where the opposition is coming from.

2. *Accountability for Most, Immunity for the Powerful*

Over the course of the so-called “War on Terror,” at least 100 people are known to have died in U.S. custody in Iraq, Afghanistan, Guantanamo, and CIA black sites—with over a quarter of those deaths classified as homicides.¹⁷⁴ One of those persons was an Afghan taxi driver named Dilawar, whose interrogators considered “almost certainly innocent” of any connection to the rocket attack for which he was arrested.¹⁷⁵ Dilwar was treated savagely: “While

www.cnn.com/2019/02/05/trump-vows-to-rebuild-military-and-assess-military.html.

170. David Vine, Opinion, *Reckoning with the Costs of War: It’s Time to Take Responsibility*, HILL (Nov. 13, 2019), www.thehill.com/opinion/national-security/470128-reckoning-with-the-costs-of-war-its-time-to-take-responsibility.

171. See, e.g., Ryan Browne & Jennifer Hansler, *US to Cut Aid to Cameroon Due to Alleged Human Rights Violations*, CNN (Feb. 7, 2019), www.cnn.com/2019/02/06/politics/cameroon-security-assistance/index.html (outlining the U.S. decision to cut off military support to Cameroon in light of alleged human rights violations).

172. See Terrence Chapman & Stephen Chaudoin, *John Bolton Attacked the ICC. Cooperating with It Might Be a Better Way to Protect U.S. Interests.*, WASH. POST (Sept. 14, 2018), www.washingtonpost.com/news/monkey-cage/wp/2018/09/14/john-bolton-attacked-the-icc-cooperating-with-it-might-be-a-better-way-to-protect-u-s-interests/ (arguing that working with the ICC “would likely be more effective [than attacking it], would pose less danger to U.S. personnel, and could promote such traditional U.S. foreign policy interests as democracy and human rights”).

173. E.g., Ayesha Rascoe, *Bolton: International Criminal Court Will Face Repercussions if Americans Prosecuted*, NPR (Sept. 10, 2018), www.npr.org/2018/09/10/646321536/bolton-icc-will-face-repercussions-if-action-taken-against-americans (reporting that “[Bolton] said the U.S. would take action against any countries or companies that cooperated with the ICC during the Afghanistan investigation.”).

174. Stuart Streichler, *The War Crimes Trial that Never Was: An Inquiry into the War on Terrorism, the Laws of War, and Presidential Accountability*, 45 U. S.F. L. REV. 959, 967 (2011).

175. *Id.*

Dilawar was shackled, soldiers struck him in his legs so often that a coroner likened his fatal injuries to those sustained by someone run over by a bus.”¹⁷⁶ After Dilawar was murdered at the American Base in Bagram, Specialist¹⁷⁷ Glendale Wells pled guilty to pushing Dilawar against a wall and doing nothing to stop other soldiers from abusing him.¹⁷⁸ He was sentenced to two months in prison.¹⁷⁹

Treatment of prisoners at the Iraqi prison of Abu Ghraib is one of the most well-known instances of U.S. war crimes.¹⁸⁰ The U.S. assigned Major General Antonio M. Taguba to investigate the crimes at Abu Ghraib.¹⁸¹ After his investigation, “[h]e subsequently stated that ‘there is no longer any doubt’ that the Bush Administration ‘committed war crimes.’”¹⁸² Indeed, eleven soldiers were convicted for various charges, predominately for dereliction of duty¹⁸³—none were for war crimes or crimes against humanity.¹⁸⁴ The longest sentence was for Specialist Charles Graner, who was sentenced to ten years—but freed after six.¹⁸⁵ Although charges were brought against officers, the highest ranking servicemember convicted was Staff Sergeant Ivan Frederick.¹⁸⁶

The soldiers convicted for their conduct at Abu Ghraib are not alone, multiple other U.S. servicemembers have been convicted of crimes during the so-called “War on Terror.” Staff Sergeant Calvin Gibbs was sentenced to life in prison for his role in orchestrating the premeditated murder of Afghan civilians in the Maywand¹⁸⁷

176. *Id.*

177. *Army Specialist*, MILITARY-RANKS, www.military-ranks.org/army/specialist (last visited Feb. 9, 2019). A Specialist is a junior enlisted rank that is automatically assigned after two years of service, or earlier with a waiver. *Id.* Enlisted servicemembers with college degrees join as Specialists. *Id.* It is not typically a leadership position. *Id.*

178. *Afghan Abuse Sentence ‘Lenient’*, BBC (Aug. 25, 2005), www.news.bbc.co.uk/2/hi/south_asia/4182952.stm.

179. *Id.*

180. *E.g.*, Maha Hilal, Opinion, *Abu Ghraib: The Legacy of Torture in the War on Terror*, AL JAZEERA (Oct. 1, 2017), www.aljazeera.com/indepth/opinion/abu-ghraib-legacy-torture-war-terror-170928154012053.html (recounting that “[i]t was Abu Ghraib prison that introduced the world to the violent infrastructure of torture in the war on terror.”).

181. Streichler, *supra* note 174, at 968.

182. *Id.* (quoting Warren Strobel, *General Who Probed Abu Ghraib Says Bush Officials Committed War Crimes*, MCCLATCHY (June 18, 2008), www.mcclatchydc.com/news/politics-government/article24487483.html).

183. Within the U.S. military, a prosecution for dereliction of duty—or the failure to perform required duties—is authorized by the Uniform Code of Military Justice. *E.g.*, *United States v. Poynor*, No. ACM 39185, 2018 CCA LEXIS 367, at *3-10 (A.F. Ct. Crim. App. May 2, 2018) (providing the facts and law in prosecution for dereliction of duty).

184. *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 18, 2018), www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html.

185. *Id.*

186. *Id.*

187. In the interest of clarity, it should be noted that the author of this

province of Afghanistan.¹⁸⁸ As part of the “kill team,” Gibbs was responsible for the murder of innocent Afghan civilians.¹⁸⁹ Gibbs would cut the fingers off of dead Afghans, telling another soldier he planned to make them into a bone necklace.¹⁹⁰ Other members of the kill team that were sentenced to jail time were Andrew Holmes, sentenced to seven years, and Jeremy Morlock, sentenced to twenty-four years.¹⁹¹ Another soldier, Staff Sergeant Robert Bales, was sentenced to life in prison for murdering sixteen civilians in the Panjwai District of Kandahar Afghanistan in 2012.¹⁹²

The previous examples are examples of the most well-known violations by U.S. servicemembers. Of course, it is true that sentencing soldiers is a rare occurrence, and the U.S. military is often lenient or complacent in covering up atrocities.¹⁹³ What this shows, though, is that enlisted soldiers are held to some sort of—often far too lenient—standard. Whereas, to date, no high-ranking U.S. official has been prosecuted for war crimes or crimes against humanity.¹⁹⁴ This is despite the fact that high-ranking officials were directly responsible for the torture that occurred at Abu Ghraib:

[T]he Bush administration authorized coercive interrogation practices by the CIA and the military that amounted to torture, and

comment was part of 1st Squadron 2nd Cavalry regiment that relieved the 5th Stryker Brigade of the 2nd Infantry Division (5/2). The “kill team” was part of 5/2. While the author is not aware of direct connections to the kill team, as a former infantryman, the author may have had some contact with war criminals during the process of relieving 5/2. While the author spent the majority of his one-year deployment in Urozgan province, the last four months were spent in Dand district of Kandahar—near Maywand and Panjwai. Prior to leaving Afghanistan in 2011, this author was part of two clearing missions in Panjwai—where Staff Sergeant Robert Bales would kill 22 villagers in 2012. See Adam Ashton, *Investigation: Robert Bales’ JBLM Unit was set Back by Uncertain Plans, Rushed Deployment*, OLYMPIAN (Aug. 23, 2015), www.theolympian.com/news/local/military/article31902192.html (providing findings of investigation into Robert Bales).

188. Andrew O’Hehir, “*The Kill Team*”: *When U.S. Soldiers in Afghanistan Became Trophy Hunters*, SALON (July 25, 2014), www.salon.com/2014/07/24/the_kill_team_when_u_s_soldiers_in_afghanistan_became_trophy_hunters/.

189. *Id.*

190. *Id.*

191. Katy Moeller, *Youngest of JBLM ‘Kill Team’ Soldiers Released from Army Prison*, OLYMPIAN (Oct. 28, 2015), www.theolympian.com/news/local/military/article41492964.html; see also Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 28, 2011), www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/ (providing an in-depth summary of the kill team’s crimes).

192. Ashton, *supra* note 187.

193. See, e.g., Alan F. Williams, *Overcoming the Unfortunate Legacy of Haditha, The Stryker Brigade “Kill Team,” and Pantano: Establishing More Effective War Crimes Accountability by the United States*, 101 KY. L.J. 337, 373-380 (2012) (providing numerous examples of questionable handlings of prosecutions against U.S. servicemembers accused of war crimes).

194. Gallagher, *supra* note 103.

instituted an illegal secret CIA detention program in which detainees were held in undisclosed locations without notifying their families, allowing access to the International Committee of the Red Cross, or providing for oversight of their treatment. Detainees were also unlawfully rendered (transferred) to countries such as Syria, Egypt, and Jordan, where they were likely to be tortured. Indeed, many were, including Canadian national Maher Arar who described repeated beatings with cables and electrical cords during the 10 months he was held in Syria, where the US sent him in 2002. Evidence suggests that torture in such cases was not a regrettable consequence of rendition; it may have been the purpose. At the same time, politically appointed administration lawyers drafted legal memoranda that sought to provide legal cover for administration policies on detention and interrogation.¹⁹⁵

Even assuming another case can, or will, be brought within the U.S. courts, any former official would likely be entitled to immunity: “because it was not clearly established in 2001-03 that the treatment to which [victims were] subjected amounted to torture.”¹⁹⁶ It is in this context that it is important to remember that the Rome Statute does not impose statutes of limitation on war crimes or crimes against humanity.¹⁹⁷

The U.S. has shown itself willing to hold some servicemembers responsible for their crimes. However, it has shown itself unwilling to hold responsible those that created the conditions for crimes against humanity. The ICC would be able to do so. With that in mind, when high-ranking officials make statements such as: “[t]he United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by the illegitimate court,”¹⁹⁸ they are not referring to all U.S. citizens—nor a substantial number of citizens. They are referring to themselves. Therefore, when officials like John Bolton, who has served in every Republican administration since the election of Ronald Reagan, rejoice at “the opportunity to strangle the ICC in its cradle,”¹⁹⁹ we have to ask ourselves “for whose benefit?” In the case of John Bolton, a man that describes un-signing the Rome Statute as the “happiest moment” in his career,²⁰⁰ the answer is clear: his.

195. *Getting Away With Torture: The Bush Administration and Mistreatment of Detainees*, HUM. RTS. WATCH (July 12, 2011), www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#.

196. *Padilla*, 678 F.3d at 764.

197. Rome Statute art. 29.

198. David Davenport, *Will the International Criminal Court Prosecute Americans over Afghanistan?*, FORBES (Mar. 26, 2018), www.forbes.com/sites/daviddavenport/2018/03/26/will-the-international-criminal-court-prosecute-americans-over-afghanistan/#63a5726a10a5.

199. *Id.*

200. *Id.*

B. Now More Than Ever

The U.S. ratification of the Rome Statute has always been improbable. As of the time of this Comment—after the dismissal of John Bolton—the U.S. relationship with the ICC continues to be tense.²⁰¹ Further, the ratification process requires large support: Per the U.S. Constitution, President Trump would have to sign the Rome Statute, and two thirds of the Senate would have to agree to ratify it.²⁰²

While unlikely, the increase in ICC related news provides a unique opportunity to gain ground—and push back against fearmongering, self-serving narratives. Trump officials are already getting the ICC into the news,²⁰³ it is time to capitalize on the publicity. This subsection argues that is the case for two reasons: First, the recent influx of former-Bush officials shows a genuine disregard for human rights records in the appointment process. Next, the response of these officials shows that one of the main objectives of the ICC, deterrence, is already working. Ratification of the Rome Statute would only increase the effect.

1. The Boys Are Back in Town

Over the course of writing this Comment, the prospect of military intervention in Venezuela arose. Of particular relevance to this Comment are recent appointments—National Security Advisor John Bolton²⁰⁴ and U.S. special advisor on Venezuela Elliott

201. Peter Baker, *Trump Ousts John Bolton as National Security Advisor*, N.Y. TIMES (Sept. 10, 2019) www.nytimes.com/2019/09/10/us/politics/john-bolton-national-security-adviser-trump.html; see, e.g., Brett Wilkins, *ICC Holds Hearing on Afghanistan War Crimes, Including US Torture*, COMMON DREAMS (Dec. 5, 2019), www.commondreams.org/views/2019/12/05/icc-holds-hearing-afghanistan-war-crimes-including-us-torture (reporting that “Jay Sekulow, a member of Trump’s personal legal team, argued Wednesday [December 4, 2019] at the ICC that . . . court prosecutors had not legal basis upon which to build a case against US personnel.”);

202. U.S. CONST. art. II, § 2.

203. E.g., Davenport, *supra* note 198 (discussing how Bolton’s appointment to the Trump administration affects the perspectives of an ICC investigation into conduct in Afghanistan).

204. See Jordan Fabian, *Bolton: US Military Intervention in Venezuela Not Imminent*, THE HILL (Feb. 1, 2019),

thehill.com/homenews/administration/428017-bolton-us-military-intervention-in-venezuela-not-imminent (explaining that “Bolton was photographed at a White House press briefing this week holding a yellow notepad with the phrase ‘5,000 troops to Colombia’ written on it”).

Abrams.²⁰⁵ Both were involved in the Reagan administration²⁰⁶ and they appear to be utilizing the Reagan playbook. Just as Reagan invaded Nicaragua after pulling U.S. forces out of Lebanon,²⁰⁷ the U.S. is set for military action in Venezuela after entering peace talks with the Taliban—after nineteen years of war.²⁰⁸ Both also worked with the George W. Bush administration²⁰⁹ and appear to be sprinkling in some Bush-era strategy as well. Like Bush falsely claimed that Iraq had weapons of mass destruction,²¹⁰ the U.S. media has begun focusing on an alleged Venezuelan connection to Hezbollah.²¹¹ Although the Hezbollah in Venezuela likely has some truth to it²¹²—just as the Iraq has weapons of mass destruction rhetoric²¹³—the claims are hyperbolic.²¹⁴

205. See Julian Borger, *US Diplomat Convicted over Iran-Contra Appointed Special Envoy for Venezuela*, GUARDIAN (Jan. 26, 2019), www.theguardian.com/us-news/2019/jan/26/elliott-abrams-venezuela-us-special-envoy (discussing Abrams appointment as special envoy to Venezuela).

206. E.g., *Trump's 'Axis of Evil': Pompeo, Bolton, & Abrams*, COMMON DREAMS (Jan. 26, 2019), www.commondreams.org/news/2019/01/26/trumps-axis-evil-pompeo-bolton-abrams (providing an overview of Elliot Abrams career); Grace Panetta & Ellen Cranley, *Meet John Bolton, Trump's Former National Security Adviser Who Shattered Trump's Defense in the Impeachment Trial*, BUS. INSIDER (Jan. 28, 2020), www.businessinsider.com/who-is-john-bolton-architect-iraq-war-pushing-action-against-iran-2019-5 (providing an overview of John Bolton's career).

207. Kinzer, *supra* note 152.

208. See Vanessa Romo, *U.S. Envoy for Peace in Afghanistan Sees 'Long Road' Ahead for Final Deal*, NPR (Feb. 8, 2019), www.npr.org/2019/02/08/692910396/u-s-envoy-for-peace-in-afghanistan-sees-long-road-ahead-for-final-deal (discussing the continuing peace talks with the Taliban in Afghanistan). *But see* Jacobs, Mohsin, Bartenstein & Wingrove, *supra* note 143 (reporting that the Trump administration denies any consideration of military force against Venezuela as of December 2019).

209. See *supra* note 206 and accompanying text.

210. E.g., Julian Borger, *There Were No Weapons of Mass Destruction in Iraq*, GUARDIAN (Oct. 7, 2004), www.theguardian.com/world/2004/oct/07/usa.iraq1 (articulating, in 2004, the now well-known fact that Iraq did not possess weapons of mass destruction).

211. E.g., Colin P. Clarke, *Hezbollah Is in Venezuela to Stay*, FOREIGN POL'Y (Feb. 9, 2019), www.foreignpolicy.com/2019/02/09/hezbollah-is-in-venezuela-to-stay/ (recounting that “U.S. Secretary of State Mike Pompeo confirmed in a recent interview that the Trump administration believes that the ‘Party of God,’ as Hezbollah is known, maintains ‘active cells’ in Venezuela”).

212. See, e.g., Simeon Tegel, *Is Venezuela Harboring Hezbollah*, PRI (Jan. 8, 2013), www.pri.org/stories/2013-01-08/venezuela-harboring-hezbollah (stating that “[t]he existence of a Lebanese community [in Venezuela] plus a left-wing populist government plus the anti-American rhetoric does not equal terrorism,” says Control Risks’ Watson. “That is speculation.”).

213. See, e.g., Hamish de Bretton, Opinion, *Remembering Halabja Chemical Attack*, AL JAZEERA (Mar. 16, 2016), www.aljazeera.com/indepth/opinion/2016/03/remembering-halabja-chemical-attack-160316061221074.html (providing a summary of Iraq's usage of chemical weapons on Kurdish people).

214. See Jessica Corbett, *Replicating Regime Change Playbook, Pompeo Says US Obligated to 'Take Down' Hezbollah in Venezuela*, COMMON DREAMS (Feb. 7, 2019), www.commondreams.org/news/2019/02/07/replicating-regime-

The claim is further diminished by Elliott Abrams' connection to U.S. strategy in Venezuela. Abrams is known for lying to Congress to conceal the Iran-Contra affair²¹⁵—where the executive branch, under Ronald Reagan, illegally sold arms to Iran and funneled the money to a right-wing terrorist group, the contras.²¹⁶ After committing that crime, Abrams went on to lead a—failed—coup attempt against democratically elected leader Hugo Chavez in Venezuela.²¹⁷ As of late 2019, it appears that Abrams continued attempts at enabling a coup against current Venezuelan President Nicolás Maduro have failed as well.²¹⁸

In addition to failed Venezuelan coups and his enthusiastic support for the invasion of Iraq, Abrams is also known for his connection to El Salvadorian death squads responsible for a massacre in the village of El Mozote.²¹⁹ While acting as *Assistant Secretary of State for Human Rights*, Abrams brushed off the massacre as communist propaganda, stating “[t]he [Reagan] administration’s record in El Salvador is one of fabulous achievement.”²²⁰ Abrams also worked to back another genocidal dictator in Guatemala:

Abrams sought to ensure that General Efraín Ríos Montt, Guatemala’s then-dictator, could carry out “acts of genocide”—those are the legally binding words of Guatemala’s United Nations-backed Commission for Historical Clarification—against the indigenous people in the Ixil region of the department of Quiché, without any pesky interference from human-rights organizations, much less the US government. As the mass killings were taking place, Abrams fought in Congress for military aid to Ríos Montt’s bloody regime. He credited the murderous dictator with having “brought considerable progress” on human-rights issues. Abrams even went so far as to insist that “the amount of killing of innocent civilians is being reduced

change-playbook-pompeo-says-us-obligated-take-down-hezbollah (comparing the rhetoric about Venezuela to the rhetoric leading up to the invasion of Iraq).

215. *E.g.*, Ed Vulliamy, *Venezuela Coup Linked to Bush Team*, *GUARDIAN* (Apr. 2002), www.theguardian.com/world/2002/apr/21/usa.venezuela (explaining that Elliot Abrams “has a conviction for misleading Congress over the infamous Iran-Contra affair”).

216. Julian E. Zelizer, *Why the Russia Investigation Could be More Like Iran-Contra than Watergate*, *ATLANTIC* (Feb. 27, 2018), www.theatlantic.com/politics/archive/2018/02/why-the-russia-investigation-could-end-more-like-iran-contra-than-watergate/554345/.

217. Vulliamy, *supra* note 215.

218. See Alan Macleod, *Another Failed US-Backed Coup Attempt in Venezuela Goes Unnoticed*, *MINT PRESS NEWS* (Nov. 18, 2019), www.mintpressnews.com/juan-guidos-latest-coup-attempt-venezuela-ends-was-a-massive-flop/262870/ (providing an overview of multiple, recent U.S. backed efforts to unseat Maduro in favor of the U.S. supported Juan Guaidó).

219. Vulliamy, *supra* note 215.

220. *Id.*; see also Elisabeth Malkin, *Survivors of Massacre Ask: ‘Why Did They Have to Kill Those Children?’*, *N.Y. TIMES* (May 26, 2018), www.nytimes.com/2018/05/26/world/americas/el-salvador-el-mazote-massacre.html (providing a summary of the massacre in El Salvador).

step by step” before demanding that Congress provide the regime with advanced arms because its alleged “progress need[ed] to be rewarded and encouraged.”²²¹

While this Comment has already addressed John Bolton, it is worth noting that he does not hide his Venezuelan agenda well, stating:

It will make a big difference to the United States economically if we can have American oil companies really invest in and produce the oil capabilities in Venezuela; it will be good for the people of Venezuela, it will be good for the people of the United States. We both have a lot of stake here making this come out the right way.²²²

2. *The U.S. Needs More Deterrence*

A primary purpose of the ICC, as explained, is deterrence.²²³ While it appears that the existence of the ICC has—at least slightly—deterred the U.S.,²²⁴ we need more. Especially when considering the existence of the “Hague Invasion Act.”²²⁵ As it stands, without ratifying the Rome Statute, Bolton, Abrams, and others are free to facilitate massive human rights abuses—including genocide, war crimes, and crimes against humanity under the protection of sovereign immunity.

It should be noted that it is unlikely that any regular U.S. citizen would be indicted by the ICC. This is because the “ICC’s jurisdiction is predicated on the fundamental principle of complementarity. Based on this principle, it is inconceivable that the United States would ever be conceived as unable—except perhaps under the second prong of ‘unwillingness’—to prosecute those who would otherwise come under the purview of the ICC.”²²⁶ Ratification of the ICC would merely hold U.S. leaders to the same standard as most U.S. citizens that do not enjoy immunity for

221. Eric Alterman, *An Actual American War Criminal May Become Our Second-Ranking Diplomat*, NATION (Feb. 2, 2017), www.thenation.com/article/an-actual-american-war-criminal-may-become-our-second-ranking-diplomat/.

222. Ben Wray, *Media Rebuttal: Why is there a Blackout on John Bolton’s Venezuela Oil Grab Remarks?*, COMMON SPACE (Jan. 30, 2019), www.common-space.scot/articles/13794/media-rebuttal-why-there-blackout-john-bolton-s-venezuela-oil-grab-remarks.

223. Isanga, *supra* note 29.

224. See Ron Synovitz, *Explainer: Why Does the U.S. Have it Out for the International Criminal Court?*, RADIO FREE EUR. (Sept. 11, 2018), www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court-/29484529.html (explaining that “President George W. Bush’s administration actively sought to keep the ICC from attaining jurisdiction over the United States or its citizens. It did so by negotiating bilateral agreements with about 100 other countries to ensure U.S. citizens would have immunity from prosecution by the ICC.”).

225. *Id.*

226. Isanga, *supra* note 29, at 298.

crimes:

If you, a U.S. citizen, go to another country and become accused of a crime against humanity, and that country's government decides that, rather than prosecute you itself, it will refer your case to the ICC, then yes, you could find yourself on the docket at the Hague facing judges elected by an international body rather than the U.S. government. Then again, I never got to vote for anyone in the Canadian government, but if I went and robbed a gas station in Calgary, the local authorities could prosecute me without anyone kicking up much of a fuss about national sovereignty.²²⁷

Further, as Joshua Keating recommends,²²⁸ the best way to avoid being tried for war crimes is to not go into other countries and commit war crimes in the first place, or actually prosecute those that do. The U.S. seems fundamentally incapable, or fundamentally unwilling, to do such. Because the U.S. keeps rehiring some of the worst violators of human rights, international law, and basic decency to oversee its massive military apparatus—the need for U.S. ratification of the Rome Statute is more pressing now than ever.

IV. PROPOSAL

As acknowledged, convincing the U.S. to ratify the Rome Statute is no small task. Right now, it appears the U.S. is on the verge of outright conflict with the ICC.²²⁹ Ratification would require a drastic overhaul of the U.S. political system. Although this Comment has targeted U.S. Republicans, drastic overhaul does not mean only voting for Democrats—Democrats are guilty of the same conduct.²³⁰ In order to ensure the survival of human rights as a

²²⁷ Keating, *supra* note 49.

²²⁸ *Id.*

²²⁹ See, e.g., Felipe Bueno, *John Bolton's Crusade Against the International Criminal Court Is So Hard-Line It Threatens a US Invasion of Holland*, BUS. INSIDER (Sept. 17, 2018), www.businessinsider.com/boltons-crusade-against-the-icc-supports-a-us-invasion-of-holland-2018-9 (recounting that “[i]n his speech, Bolton claimed that the court was ‘already dead to us,’ and said that the US will use ‘any means necessary’ to protect Americans in response to the court’s first-ever public investigation into alleged US war crimes.”).

²³⁰ E.g., Jennifer Williams, *From Torture to Drone Strikes: The Disturbing Legal Legacy Obama is Leaving for Trump*, VOX (Jan. 10, 2017), www.vox.com/policy-and-politics/2016/11/14/13577464/obama-farewell-speech-torture-drones-nsa-surveillance-trump (explaining that “Presidents George W. Bush

and Obama both dramatically expanded the power and authority of the executive branch, particularly in the realm of national security. In addition to having nearly unlimited power to start wars without Congress’s approval, presidents now have the power to order drone strikes on US citizens abroad without charges or trial, gather millions of Americans’ emails and phone records with minimal judicial oversight, and radically redefine what does and does not constitute ‘torture’ without fear of ever being prosecuted for war crimes.”); see

morally just concept, U.S. human rights activists must change their strategy. In the words of Samuel Moyn:

If the movement itself should not squander the chance to reconsider how it is going to survive, the same is even truer of its audience — policymakers, politicians and the rest of the elite. They must keep human rights in perspective: Human rights depend on majority support if they are to be taken seriously. A failure to back a broader politics of fairness is doubly risky. It leaves rights groups standing for principles they cannot see through. And it leaves majorities open to persuasion by troubling forces.²³¹

Ratifying the Rome Statute would be a minor, yet important, step towards addressing the “broken windows” problem laid out by Professor Wuerth.²³² Additionally, it would be a step towards addressing the problem with real or perceived Western hypocrisy described by Professor Mutua.²³³ To get there, though, this Comment recommends two strategic changes. First, the U.S. human rights movement needs to organize politically. Next, as part as that same process, the U.S. human rights movement needs to divorce itself from the U.S. strategy of foreign intervention. If these steps are taken, ratification of the Rome Statute will be an attainable goal. Today, the Rome Statute—as it relates to the U.S.—is discussed in a theoretical lens of hypotheticals, as this Comment is guilty of doing. ICC oversight would change that and hold the worst U.S. violators of international law liable, instead of rewarding them with positions.

A. Human Rights and Political Organization

As stated above, the need to organize politically does not entail support for either major contemporary political party. As long as states prioritize profit and property rights over human rights, a substantial portion of the world’s population will suffer.²³⁴ The U.S.

also Sarah Lazare, *When Will Obama Aides Come Clean About U.S.-Saudi War Crimes?*, IN THESE TIMES (Oct. 22, 2018), www.inthesetimes.com/article/21522/saudi-arabia-obama-ben-rhodes-samantha-power-jamal-khashoggi-yemen-war (outlining the ways in which various Obama aids, including “human rights activist” Samantha Power, publicly oppose the war in Yemen but did nothing to oppose it when they were in power); Elizabeth Schulte, *Hillary Clinton, Secretary of War*, JACOBIN (Aug. 18, 2016), www.jacobinmag.com/2016/08/hillary-clinton-secretary-state-war-drones/ (providing five instances in which Hillary Clinton “used the State Department to maintain and expand US power across the globe”); Tiana Lowe, Opinion, *A Clinton War Crime, 20 Years Later*, WASH. EXAMINER (June 11, 2019), www.washingtonexaminer.com/opinion/a-clinton-war-crime-20-years-later (arguing that “[o]f all the atrocities levied by the Clintons, perhaps none is more unjustified, brutal, and lasting as his Serbian legacy.”).

231. Moyn, *supra* note 8.

232. Wuerth, *supra* note 9.

233. Beiter, *supra* note 10.

234. See Robert L. Borosage, *The Pentagon’s Plan for Never-Ending War*,

human rights activists must forgo the insistence on maintaining an apolitical²³⁵ stance: “The movement for global equality, before the New International Economic Order died, was a governmental one rather than a non-governmental one, for the sake of building new institutions rather than only stigmatizing existing ones.”²³⁶

As part of political organization, an important step will be to divert focus away from civil political rights to economic rights. This does not mean undermining civil political rights. Rather, it means elevating economic rights to the same threshold of respect that civil political rights enjoy in the U.S. and other western countries.²³⁷ Anyone serious about human rights must be serious about addressing poverty. Poverty is the leading cause of death and human suffering in the world.²³⁸ The exclusive focus on civil and political rights has done little to benefit those that suffer the most

NATION (Jan. 25, 2018), www.thenation.com/article/the-pentagons-plan-for-never-ending-war/ (outlining the most recent proposal to continue spending money in the name of “defense”); Laura Flanders, *Noam Chomsky Talks US Militarism and Capitalism at Home and Abroad*, TRUTHOUT (Dec. 9, 2014), www.truthout.org/articles/noam-chomsky-talks-us-militarism-and-capitalism-at-home-and-abroad/ (discussing the connections between capitalism, poverty, and war); STEPHEN KINZER, *OVERTHROW: AMERICA’S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* (2006) (providing a summary of the last century of U.S. led regime change); JENNIFER L. ERICKSON, *DANGEROUS TRADE: ARMS EXPORTS, HUMAN RIGHTS, AND INTERNATIONAL REPUTATION* (2015) (analyzing the role that arms sales have in shaping policy and human rights movements); JOHN PERKINS, *THE NEW CONFESSIONS OF AN ECONOMIC HIT MAN* (2016) (explaining the role between capitalism, private corporations, and the destabilization of countries); EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA* 3 (Monthly rev. ed. 1997) (discussing Latin American history as of 1971: “Our defeat was always implicit in the victor of others; our wealth has always generated our poverty by nourishing the prosperity of others—the empires and their native overseers. In the colonial and neocolonial alchemy, gold changes into scrap metal and food into poison.”).

235. See Dumiso Gatsha, *Human Rights Work—Is it Truly Apolitical?*, WYMD (June 5, 2019), www.wymd.network/2019/06/05/human-rights-work-is-it-truly-apolitical/# (outlining some of the problems with the apolitical nature of the human rights movement).

236. MOYN, *supra* note 133, at 219; see also SHARING ORG., www.sharing.org/how-to-share-the-worlds-resources/sharing-the-global-commons (last visited Feb. 9, 2019) (providing an alternative mode of production to capitalism).

237. See Gordon, *supra* note 120, at 701-21 (outlining the difference in enforcement between economic rights and civil and political rights).

238. *E.g.*, *Poverty and Early Deaths Await Millions of World’s Most Disadvantaged Children—UNICEF*, UNITED NATIONS (June 28, 2016),

www.news.un.org/en/story/2016/06/533242-poverty-and-early-deaths-await-millions-worlds-most-disadvantaged-children (stating that “[s]ome 69 million children under five years of age will die from mostly preventable causes, 167 million children will live in poverty, and 750 million women will have been married as children by 2030, unless the world focuses more on the plight of its most disadvantaged children, according to a United Nations report published today.”).

in the world:

Under the dominant conception, political equality is a human right. Yet political equality is purely formal: the fact that all citizens of a certain age have the right to hold public office does not mean that substantively they have the means to do so. Political equality—the formal equality of all citizens in relation to government and to law—does not entail economic equality—substantively having the means to exercise one’s political rights.

The dominant conception of human rights attributes great value to rights which are formal and abstract, or which are not self-standing, and for that reason are quite worthless to many. What is it that we have when we have the right to run for office, to start a newspaper, to buy television time—without the money necessary for each of these things? If I do not have \$12 million and I do not receive \$12 million in campaign contributions—what exactly is it that I have then, if I have the right to run for Congress? What do I have when I have a right which is purely formal? What I have is either a promise of a very limited sort, or it is simply and entirely an abstraction.

If it is a promise, then it is the promise regarding the concrete and direct activities of the state. The promise is: if I have the inclination—and the funds—to run for public office, the state will not intervene to prevent me from doing so. If I want to buy television time—and can afford to—the state will not prevent me from doing so. If I am arrested the state will not prevent me from hiring a competent and thorough lawyer—if I can afford to pay for her. If I and my organization contribute \$100,000 to the Democratic National Committee and my Democratic senator is then willing to spend two hours meeting with me, the state will not prevent me from lobbying for laws that will serve my interests. If a political right is a promise, then it is a promise regarding the limitations on the state’s intervention in how to make use of their resources. Thus, it is the equal right of all to make use of resources, where those resources are distributed *unequally*.²³⁹

The transition from the need to ratify the Rome Statute to a need to refocus the movement to a more holistic view of rights may seem to be an extreme leap. In a way, it is. However, in order to save the moral force of human rights, drastic, politically driven changes need to occur. Among those is adopting a political stance that opposes the cruel nature of international capitalism—an economic system that facilitates perpetual human rights violations.²⁴⁰ Within the human rights movement, this requires a

239. Gordon, *supra* note 120, at 724.

240. See Aurelio Santos, *Capitalism Replaces Human Rights With Inhuman Rights*, PEOPLE’S WORLD (Apr. 23, 2010), www.peoplesworld.org/article/capitalism-replaces-human-rights-with-inhuman-rights/ (arguing that “economic recovery plans” do nothing for the majority of people while enriching the elite); Matt Bruenig, *Capitalism is Violence*, JACOBIN (Apr. 12, 2017), www.jacobinmag.com/2017/04/united-airlines-video-passenger-private-property (arguing that the capitalist system requires immense violence to sustain); Dinah Foley, *New Capitalism, Old Problems*, JACOBIN (Oct. 28, 2019), www.jacobinmag.com/2019/10/marc-benioff-salesforce-capitalism-immigration

retreat from the cold war mentality of East versus West, economic rights versus civil-political rights:

During the Cold War, there was extensive debate about the political and economic interests underlying the notion of human rights. Western governments and non-governmental organizations (NGOs) (such as Amnesty International) routinely condemned the Eastern bloc countries for human rights violations, partly on the grounds that the judicial and electoral processes were inadequate or oppressive. The Soviets would respond that in their view, human rights entailed health care, education, employment and economic equity. They accused their Western critics of purporting to offer a "universal" standard which in fact reflected Western First World societies, which had highly developed political systems, but also great economic disparities.²⁴¹

A more holistic approach is better suited to address the growing problems with the human rights movement. Global human rights conditions are declining worldwide, despite drastic increases in international enforcement mechanisms. The divide is clear. In order to get to a point in history in which the U.S. would ratify the Rome Statute, a complete overhaul in strategy and ideology needs to occur. This can *only* be accomplished through a political movement.²⁴²

(arguing that a "gentler capitalism" cannot, and will not, solve global inequality and the suffering it causes); Nathan J. Robinson, *The Meaning of Freedom*, CURRENT AFF. (Aug. 13, 2018), www.currentaffairs.org/2018/08/the-meaning-of-freedom (reviewing a recent book by Rob Larson that "further develops the 'left' idea of freedom. But in doing so, [Larson] departs from the usual way of framing the 'positive-negative liberty' debate. Often, the left says something like 'Free market economies may provide "negative" liberty, but they do not provide "positive" liberty.' Larson says that they do neither. In fact, he says, capitalism both restricts people's ability to act and acts upon them against their will.").

241. Gordon, *supra* note 120, at 694-95.

242. See, e.g., Joseph Kay, "*The Enemy is the System That Sends Us to War*"—*Speech by Iraq War Veteran*, LIBCOM.ORG (Aug. 18, 2010), www.libcom.org/library/enemy-system-sends-us-war-speech-iraq-war-veteran (providing the transcript of a speech by Iraq War veteran Mike Prysner that advocates for political action as the only solution to curb U.S. imperialism).

Those who send us to war do not have to pull a trigger or lob a mortar round; they don't have to fight the war, they merely have to sell us the

war. They need a public who is willing to send their soldiers into harm's way, and they need soldiers who are willing to kill and be killed, without question. They can spend millions on a single bomb - but that bomb only becomes a weapon when the ranks in the military are willing to follow the orders to use it. They can send every last soldier anywhere on earth, but there will only be a war if soldiers are willing to fight. The ruling class - the billionaires who profit from human suffering, who care only about expanding their wealth and controlling the world economy - understand that their power lies only in their ability to convince us that war, oppression, and exploitation is in our interest. They understand that their wealth is dependent on their ability to convince the working

Within the legal field, this can be accomplished in a way similar to the actions of the Federalist Society.²⁴³ However, instead of focusing on benefitting the few at the cost of the many, via an intense, singular focus on select civil political rights, the movement can focus on benefitting the many at the expense of those that created the very conditions in which the many suffer. Instead of focusing on restricting rights, the human rights movement could focus on expanding rights—internationally.

In the meantime, it would also be beneficial to pushback against not just the Federalist Society, but the members of the Federalist Society that obtained their success through the legitimization of war crimes: John Yoo,²⁴⁴ Jay Bybee,²⁴⁵ John Ashcroft,²⁴⁶ John Bolton,²⁴⁷ Alberto Gonzalez,²⁴⁸ George W. Bush,²⁴⁹ and Dick Cheney.²⁵⁰ It would also mean calling for accountability

class to die to control the market of another country. And convincing us to die and kill is based on their ability to make us think that we are somehow superior. Soldiers, sailors, marines, and airmen have nothing to gain from this war. The vast majority of people living in the United States have nothing to gain from this war. In fact, not only do soldiers and workers gain nothing from this occupation, but we suffer more because of it. We lose the limbs, endure the trauma and give our lives. Our families have to watch flag-draped coffins lowered into the earth. Millions in this country without health care, jobs, or access to education must watch this government squander over \$400 million a day on this war. . . . We need to wake up and realize that our real enemies are not in some distant land; they're not people whose names we don't know and whose cultures we don't understand. The enemy is people we know well and people we can identify - the enemy is the system that sends us to war when it's profitable; the enemies are the CEOs who lay us off from our jobs when it's profitable; they're the insurance companies who deny us health care when it's profitable; they're the banks that take away our homes when it's profitable. Our enemies are not 5,000 miles away. They are right here at home, and if we organize and fight with our sisters and brothers we can stop this war, stop this government, and create a better world.

Id.

243. See George E. Curry & Trevor W. Coleman, *Hijacking Justice*, EMERGE (Oct. 1999), www.ratical.org/ratville/CAH/hijakjustice.html (outlining how the Federalist Society changed the legal field).

244. *Contributors: Prof. John C. Yoo*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/john-yoo (last visited Feb. 9, 2019).

245. *Contributors: Hon. Jay S. Bybee*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/jay-bybee (last visited Feb. 9, 2019).

246. *Contributors: Hon. John Ashcroft*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/john-ashcroft-1 (last visited Feb. 9, 2019).

247. *Contributors: John Bolton*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/john-bolton (last visited Feb. 9, 2019).

248. *Contributors: Alberto Gonzales*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/alberto-gonzales (last visited Feb. 9, 2019).

249. *Contributors: Hon. George W. Bush*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/george-bush (last visited Feb. 9, 2019).

250. *Contributors: Hon. Richard B. Cheney*, FEDERALIST SOC'Y, www.fedsoc.org/contributors/richard-cheney (last visited Feb. 9, 2019).

for non-Federalist Society members—including Democrats: Elliot Abrams,²⁵¹ Henry Kissinger,²⁵² Samantha Power,²⁵³ Ben Rhodes,²⁵⁴ Ann-Marie Slaughter,²⁵⁵ Barack Obama,²⁵⁶ Hillary Clinton,²⁵⁷ Bill Clinton,²⁵⁸ and any other member of the U.S. political elite that has used their political capital in furtherance of the U.S. empire—which is built on war crimes and crimes against humanity.²⁵⁹

A lot of this is elementary: People that socialize and receive awards from Henry Kissinger²⁶⁰ must not be described as “human rights advocates.”²⁶¹ People that facilitate torture should not have positions in academia, nor the courts, nor be accepted by U.S. human rights advocates—nor society in general. These people are

251. See, e.g., Alterman, *supra* note 222 (providing numerous instances of Elliot Abrams’ involvement in crimes against humanity).

252. See, e.g., Jon Lee Anderson, *Does Henry Kissinger Have a Conscience*, NEW YORKER (Aug. 20, 2016), www.newyorker.com/news/news-desk/does-henry-kissinger-have-a-conscience (providing some of the many crimes committed by Henry Kissinger).

253. See, e.g., Jon Schwarz, *A Memoir From Hell: Samantha Power Will do Anything for Human Rights Unless it Hurts her Career*, INTERCEPT (Sept. 11, 2019), theintercept.com/2019/09/11/a-memoir-from-hell-samantha-power-will-do-anything-for-human-rights-unless-it-hurts-her-career/ (providing some examples of Samantha Power’s selective invocations of human rights in furtherance of U.S. empire).

254. See Lazare, *supra* note 230 (explaining that Ben Rhodes and Samantha Power were the chief proponents of U.S. support of the Saudi war on Yemen despite distancing themselves from it after Obama’s presidency).

255. See, e.g., Anne-Marie Slaughter, *Fiddling While Libya Burns*, N.Y. TIMES (Mar. 13, 2011), www.nytimes.com/2011/03/14/opinion/14slaughter.html (arguing for U.S. intervention in Libya); *Why is Libya so Lawless?*, BBC (Apr. 10, 2019), www.bbc.com/news/world-africa-24472322 (providing an overview of the abysmal situation in Libya eight years after U.S. intervention).

256. See, e.g., Williams, *supra* note 230 (outlining various immoral acts committed by Obama, including the fact that “the Obama administration still regularly kills people without even being completely sure who it is they’re actually killing.”).

257. See, e.g., Schulte, *supra* note 230 (providing examples of Hillary Clinton’s utilization of the U.S. military in support of U.S.—primarily economic—interests).

258. See, e.g., Lowe, *supra* note 230 (outlining the legacy of Serbian intervention under Bill Clinton); Parenti, *supra* note 119 (providing the same).

259. See, e.g., Danny Sjursen, *Whitewashing War Crimes Has Become the American Way*, COMMON DREAMS (June 7, 2019), www.commondreams.org/views/2019/06/07/whitewashing-war-crimes-has-become-american-way (providing some examples of the U.S. covering up war crimes); see also Idrees Ali, *Trump Pardons Army Officers, Restores Navy SEAL’s Rank in War Crimes Cases*, REUTERS (Nov. 15, 2019) (reporting on Trump’s recent pardon of multiple war criminals).

260. See Dave Denison, *Dinner With a War Criminal*, BAFFLER (June 25, 2019), www.thebaffler.com/civilifications/dinner-with-a-war-criminal-denison (covering Samantha Power’s connection to Henry Kissinger, a war criminal).

261. See Eric Ruth, *A Powerful Voice for Change*, U. DELAWARE (Nov. 14, 2019), www.udel.edu/udaily/2019/november/samantha-power-un-ambassador-speaks-human-rights/ (referring to Samantha Power as a “human rights advocate”).

the opposition. The ones that belittle the human rights cause in furtherance of imperialism. As long as war criminals are idolized in the U.S., especially in the legal field, our country will forever be synonymous with the crimes they are responsible for. As long as that is the reality we live in, U.S. invocation of “human rights” will always be synonymous with regime change, U.S. empire, crimes against humanity, and war crimes.

*B. U.S. Human Rights Activists Must Divorce the
Movement from U.S. Foreign Policy*

In a 2014 article, Belén Fernández asked readers to imagine they were starting an organization to defend the rights of people across the globe.²⁶² In doing so, she asked readers to consider which characters they would exclude from intimate roles in said organization’s operation:

1. An individual who presided over a NATO bombing, including various civilian targets.
2. An individual who was formerly a special assistant to President Bill Clinton, a speechwriter for Secretaries of State Warren Christopher and Madeleine Albright and a member of the State Department’s policy planning staff who in 2009 declared that, under “limited circumstances, there is a legitimate place” for the illegal CIA rendition program that has seen an untold number of innocent people kidnapped and tortured.
3. A former US Ambassador to Colombia, who later lobbied on behalf of Newmont Mining and J.P. Morgan — two US firms whose track records of environmental destruction would suggest that human wellbeing falls below elite profit on their list of priorities.
4. A former CIA analyst.²⁶³

The point Fernández wanted to make was that Human Rights Watch has employed four people matching those exact descriptions—and many more with similar backgrounds.²⁶⁴ She raises a fundamental problem with the human rights movement, it is too often perfectly in step with U.S. government and foreign intervention.²⁶⁵ Even those within the U.S. human rights movement sounding alarm often fail to see this chief issue within the movements.²⁶⁶ As long as those within the U.S. human rights movement continue to cycle in and out of U.S. government, the

²⁶² Belén Fernández, *Human Rights Watch’s Revolving Door*, JACOBIN (June 8, 2014), www.jacobinmag.com/2014/06/human-rights-watches-revolving-door.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *See, e.g.*, BRYSK, *supra* note 122, at 13-16 (outlining what the human rights movement should focus on—i.e. the same things they already are).

movement will have little-to-no moral authority.

Human rights activists within America need to start focusing on the crimes of America. These are often overlooked. Indeed, even those Americans critical of the shortcomings of the human rights movement often point the finger everywhere but America.²⁶⁷ Human Rights Watch, an “independent”²⁶⁸ organization, is almost always in line with the U.S. foreign policy—especially as it relates to Latin America.²⁶⁹ However, Human Rights Watch has become more critical of U.S. human rights violations since the election of Donald Trump.²⁷⁰ Opposition to Trump is not enough, though. If we are ever going to get to a point in history where the U.S. is a defender of human rights—and ratifies the Rome Statute—we have to reshape the entire human rights movement and strategy. Anything less is merely an attempt to save face after decades of unaccountability and war in the name of human rights.

Above all, it is imperative that U.S. human rights activists focus our attention inward. As of December 2019, the U.S. is separating children from families at the U.S.-Mexico border;²⁷¹ the U.S. continues to incarcerate people on a massive scale;²⁷² the U.S.

267. *See, e.g., id.* at 6 (explaining that “[r]ising powers in Russia and China remain authoritarian, combining long-standing suppression of civil liberties with new mechanism of surveillance and repression that touch perhaps a quarter of the world’s population—and even exporting these negative influences to trade partners and disputed zones. Developed liberal democracies that were rights promoters, however partial and inconsistent, have now abandoned all pretense of cosmopolitan concern—from Brexit to the populist nationalism of Donald Trump.”); Wuerth, *supra* note 9, at 315 (quoting Richard Gowan, *Who is Winning on Human Rights at the UN?*, EUR. COUNCIL ON FOREIGN REL. (Sept. 24, 2012), www.ecfr.eu/article/commentary_who_is_winning_on_human_rights_at_the_un) (recounting a “study focusing just on human rights has found that in both the General Assembly and the HRC, ‘China, Russia and developing countries pass regular resolutions undercutting Western human rights agendas.’”).

268. *See About*, HUM. RTS. WATCH, www.hrw.org/about (last visited Feb. 9, 2019) (stating that Human Rights Watch “ensures [its] independence” by refusing government funding and corporate ties).

269. *See, e.g.,* Keane Bhatt, *The Hypocrisy of Human Rights Watch*, NACLA (Feb. 4, 2014), www.nacla.org/news/2014/2/4/hypocrisy-human-rights-watch (outlining the history of Human Rights Watch’s parroting of official U.S. policy positions).

270. *See, e.g.,* Lydia Gall, *Will the US Speak Out on Hungary’s Rights Crisis?*, HUM. RTS. WATCH (Feb. 9, 2019), www.hrw.org/news/2019/02/09/will-us-speak-out-hungarys-rights-crisis (calling on the U.S. to denounce Hungarian Prime Minister Viktor Orban’s authoritarian rule); *End Family Detention*, HUM. RTS. WATCH, www.hrw.org/EndFamilyDetention (last visited Feb. 9, 2019) (outlining initiative to combat separation of families at U.S.-Mexico border).

271. Elliot Spagat, *Trump Administration Wants 2 Years to Identify Children Separated from Parents at the Border*, PBS (Apr. 6, 2019), www.pbs.org/newshour/politics/us-wants-2-years-to-id-migrant-kids-separated-from-families.

272. *See, e.g.,* Drew Kann, *5 Facts Behind America’s High Incarceration Rate*, CNN (July 10, 2018), www.cnn.com/2018/06/28/us/mass-incarceration-

continues to fund a barbaric war in Yemen;²⁷³ the FBI wields unchecked power to surveille the U.S. population;²⁷⁴ and the U.S. is stoking hostilities in the Middle East by recognizing the Golan Heights as part of Israel.²⁷⁵ Considering these select examples, any focus abroad should be reserved to the enablement of locally fostered solutions to human rights issues. Military intervention must be reserved to assist local populaces with ending the most severe crimes against humanity. Not only crimes the U.S. helped to foster—nor crimes for which military action can gain quick political approval in the U.S.²⁷⁶

Throughout this process, we must reiterate to those in power, and their supporters, that *policing the world is not the answer* to declining human rights conditions. In academia, we debate over when it may be acceptable for foreign intervention. We argue over what circumstances may justify torture. We are not focusing on ways to curb U.S. imperialism. Nor are we focusing on fostering local solutions to the complex issues that often give rise to violence in the first place.²⁷⁷ We are focusing on obtaining more donations

five-key-facts/index.html (providing statistics related to the enormous U.S. prison population).

273. See Alan Fisher, *US Lawmakers Vote to End Funding Yemen War*, AL JAZEERA (Mar. 7, 2019), www.aljazeera.com/news/2019/03/lawmakers-vote-funding-yemen-war-190307074453862.html (reporting that President Trump plans to continue funding Saudi Arabia despite pushback from the Senate).

274. See, e.g., Neema Singh Guliani, *The FBI has Access to Over 640 Million Photos of us Through its Facial Recognition Database*, ACLU (June 7, 2019), www.aclu.org/blog/privacy-technology/surveillance-technologies/fbi-has-access-over-640-million-photos-us-through (providing an alarming overview the unchecked FBI surveillance capabilities).

275. See Andrew Buncombe, *Trump Says He Made Snap Decision to Recognize Golan Heights as Israel's After 'Quick History Lesson' on Middle East*, INDEP. (Apr. 7, 2019), www.independent.co.uk/news/world/middle-east/trump-golan-heights-israel-syria-sovereignty-snap-decision-las-vegas-sheldon-adelson-a8858461.html (reporting that Trump decided to recognize the Golan Heights—territory within Syria—as part of Israel after a history discussion).

276. See, e.g., Caitlin Oprysko, *'The Ultimate Fighter': Trump Shows off Conan the Military dog from Baghdadi Raid*, POLITICO (Nov. 25, 2019), www.politico.com/news/2019/11/25/trump-conan-military-dog-baghdadi-raid-073598 (reporting on the reception that was held for the military dog allegedly responsible for the death of ISIS leader Abu Bakr al-Baghdadi); Seth J. Frantzman, *The Fight for ISIS's Old Territory Is Just Beginning*, FOREIGN POLY (Dec. 4, 2019), www.foreignpolicy.com/2019/12/04/syria-iraq-fight-for-isis-old-territory-just-beginning/ (arguing: “The successful operation against Baghdadi symbolizes how short-term tactics, such as killing terrorists, fail to advance any sort of long-term solution to the instability and radicalization that led to the Islamic State’s rise. The U.S. government doesn’t want to address these issues in Iraq or Syria.”); Seumas Milne, *Opinion, Now the Truth Emerges: how the US Fuelled the Rise of ISIS in Syria and Iraq*, GUARDIAN (June 3, 2015),

www.theguardian.com/commentisfree/2015/jun/03/us-isis-syria-iraq (arguing that the U.S. was instrumental in the rise of ISIS).

277. An anonymous international fighter in northern Syria recently summarized this issue well while discussing the narratives of the different

for human rights NGOs that provide the products of elite institutions a seamless transition into politics.²⁷⁸ As history has shown us—time,²⁷⁹ and time,²⁸⁰ and time again²⁸¹—U.S. foreign

factions active in the Syrian War:

I want to be clear that each of these groups is motivated by a narrative that contains at least some kernel of truth. For example, in regards to the question of who is to blame for the rise of ISIS, it is true that the US “ploughed the field” for ISIS with the invasion and occupation of Iraq and its disastrous fallout (loyalist narrative); but it is also true that the Turkish state has tacitly and sometimes blatantly colluded with ISIS because ISIS was fighting against the primary adversary of the Turkish state (Kurdish narrative) and that Assad’s brutal reaction to the Arab Spring contributed to a spiral of escalating violence that culminated in the rise of Daesh (rebel narrative). And although I’m least sympathetic to the jihadi and Turkish state perspectives, it is certain that unless the well-being of Sunni Arabs in Iraq and Syria is factored into a political settlement, the jihadis will go on fighting, and that unless there is some kind of political settlement between the Turkish state and the PKK, Turkey will go on seeking to wipe out Kurdish political formations, without hesitating to commit genocide.

Anonymous Author, *The Threat to Rojava: An Anarchist in Syria Speaks on the Real Meaning of Trump’s Withdrawal*, CRIMETHINC (Dec. 28, 2012), www.crimethinc.com/2018/12/28/the-threat-to-rojava-an-anarchist-in-syria-speaks-on-the-real-meaning-of-trumps-withdrawal.

278. Kenneth Roth, the executive director of Human Rights Watch, received his B.A. from Brown and his J.D. from Yale. *Kenneth Roth*, HUM. RTS. WATCH, www.hrw.org/about/people/kenneth-roth (last visited Apr. 7, 2019). Two of the most prevalent names in human rights are also products of the most elite schools in the U.S. Samantha Power, a member of President Obama’s cabinet, earned her B.A. from Yale and her J.D. from Harvard—where she currently teaches. *Samantha Power*, HARV. KENNEDY SCH., www.hks.harvard.edu/faculty/samantha-power (last visited Apr. 7, 2019). Ann-Marie Slaughter received a B.A. from Princeton, a Masters and Doctorate in Philosophy from Oxford, and a J.D. from Harvard. Princeton, *Ann-Marie Slaughter*, PRINCETON, www.scholar.princeton.edu/slaughter/home (last visited Apr. 7, 2019). The actual numbers of ivy-league graduates, as well as graduates from other elite institutions, is hard to ascertain. However, as human rights are regularly attacked as products of western elitism, see *Latest in “Human Rights: Mass or Elite Movement?”*, OPEN DEMOCRACY, www.opendemocracy.net/en/tagged/human-rights-mass-or-elite-movement/ (last visited Apr. 9, 2019) (providing a collection of articles related to a debate over who the human rights movement

serves), the fact that the most visible U.S. proponents of human rights abroad are from the most elite schools in the country is telling.

279. See Greg Grandin, *Henry Kissinger’s Genocidal Legacy: Vietnam, Cambodia and the Birth of American Militarism*, SALON (Nov. 10, 2015), www.salon.com/2015/11/10/henry_kissingers_genocidal_legacy_partner/ (outlining U.S. policy related to Vietnam, Cambodia, and Laos—and the disastrous effects of such).

280. See Milne, *supra* note 276 (outlining the ways in which the U.S. invasion—and subsequent occupation—of Iraq helped create ISIS).

281. See Ethan Chorin, *The Case Against Another Intervention in Libya*, FORBES (Apr. 7, 2019), www.forbes.com/sites/ethanchorin/2019/04/07/the-case-against-another-intervention-in-libya/ (outlining the disastrous state of Libya after U.S. led intervention).

intervention does not foster local—nor any—solutions to real problems. It creates more complex problems and rewards those responsible with peace prizes.²⁸² U.S. “human rights activists” that are not discussing new strategies should, and must, be seen and called what they are: Imperialists using the human rights label in furtherance of U.S. empire—built and maintained upon the suffering of billions.

V. CONCLUSION

The U.S. based human rights movement should begin focusing on pressuring for U.S. ratification of the Rome Statute. Ratification of the Rome Statute would be a large stride in reshaping the ways in which the U.S. government utilizes human rights rhetoric in furtherance of U.S. imperialism. The need for immediate action is pressing in light of the post-human rights era analysis. U.S. ratification would address the “broken windows” effect pointed out by Professor Wuerth, as well as the hypocrisy of U.S.-led human rights initiatives. However, without first radically reshaping the views and strategies of the U.S. human rights movement, ratification is only a pipedream. To get there, the U.S. human rights movement must revamp itself completely. It must politicize and divorce itself from the current U.S. foreign policy agenda. Every U.S. based human rights activist that is interested in anything more than legitimizing U.S. imperialism needs to begin organizing. We do not hold our biggest violators of human rights responsible. We reward them. Until that changes, U.S. led human rights initiatives abroad will be hypocritical at best, and devious at worse.

282. See e.g., Nika Knight, *Groups Demand Arrest of ‘War Mastermind’ Kissinger at Nobel Peace Prize Forum*, COMMON DREAMS (Dec. 7, 2016), www.commondreams.org/news/2016/12/07/groups-demand-arrest-war-mastermind-kissinger-nobel-peace-prize-forum (reporting, “The Nobel Peace Prize committee last month stunned many observers by choosing Henry Kissinger—the former secretary of state behind the secret American bombing of Cambodia and who supported Argentina’s ‘dirty wars,’ among other things—to speak at a forum on ‘The United States and World Peace after the Presidential Election.’ . . . Kissinger was infamously awarded the Nobel Peace Prize in 1973 for his role in the Vietnam war—a decision that comedian Tom Lehrer said ‘made political satire obsolete.’”).