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# Inter-National Justice for Them or Global Justice for Us?: The U.S. as a Supranational Justice Donor

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# INTER-NATIONAL JUSTICE FOR THEM OR GLOBAL JUSTICE FOR US?: THE U.S. AS A SUPRANATIONAL JUSTICE DONOR\*

*Margaret M. deGuzman\*\**

*U.S. policy concerning international justice, particularly at the ICC, involves case-by-case support when such support is in U.S. national interests. This policy signals that the U.S. considers itself a supranational justice donor rather than a member of a global justice community committed to enforcing shared values. This approach to international criminal justice both inhibits global justice efforts and undermines the U.S. claim to global moral leadership. The next U.S. administration should assert full membership in the global justice community by joining the ICC and providing unequivocal support for all efforts to address serious international crimes.*

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## I. INTRODUCTION

In one of his relatively few statements about the International Criminal Court (ICC), President Obama said: “[W]e are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC’s prosecution of those cases that advance U.S.

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\* These remarks were prepared for a conference on *The International Legal Practices of the Obama Administration* at Case Western Reserve University School of Law on September 18, 2015.

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interests and values, consistent with the requirements of U.S. law.”<sup>1</sup> This statement reflects the U.S.’s “case-by-case” approach to supporting international justice efforts.<sup>2</sup> Under this policy, the administration’s support for international justice depends on a situation-specific assessment of U.S. national interests. As then Secretary of State Hilary Clinton put it, the U.S. will “look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”<sup>3</sup> This focus on national interests stands in contrast to the approach to supranational criminal justice taken in some other parts of the world. For instance, the European Union emphasizes the importance of promoting “universality” in relation to the ICC.<sup>4</sup> Former UN Secretary General Kofi Annan also highlights the global nature of the enterprise, urging all states to “demand that those who claim the mantle of global leadership accept the duty of promoting *global* values.”<sup>5</sup>

The contrast between U.S. policy and rhetoric concerning supranational justice and those in other parts of the world reflects a fundamental open question about the nature of the international criminal justice enterprise. That is, it remains unclear whether the supranational criminal law regime is intended largely to provide a framework for states to assist one another in effectuating national justice goals, an “inter-national” justice agenda, or is instead meant primarily to reflect and promote global justice norms, a “global” justice agenda.

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1. NATIONAL SECURITY STRATEGY, WHITE HOUSE, 48 (May 2010), [https://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) [http://perma.cc/2BEC-LRLY].
  2. See Caitlin Lambert, *The Evolving US Policy Towards the ICC*, INT’L JUST. PROJECT (Mar. 6, 2014), available at <http://www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/> [http://perma.cc/FE5M-ALS7].
  3. Walter Pincus, *Clinton’s Goals Detailed*, WASH. POST (Jan. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/18/AR2009011802268.html> [http://perma.cc/BSA4-ZWZM].
  4. *EU efforts to combat impunity*, EUR. UNION EXTERNAL ACTION, [http://eeas.europa.eu/human\\_rights/icc/index\\_en.htm](http://eeas.europa.eu/human_rights/icc/index_en.htm) [http://perma.cc/C8SU-QELT] (last visited Sept. 11, 2015) (noting “the EU’s ongoing engagement towards the universality of the Rome Statute and promoting a better understanding of the ICC’s mandate.”).
  5. Kofi Annan, Address at the First Review Conference of the Assembly of States Parties to the Rome Statute of the ICC, Kampala, Uganda (May 31, 2010) (emphasis added) (transcript available at <http://kofiannanfoundation.org/newsroom/speeches/2010/05/kofi-annan-addresses-first-review-conference-assembly-states-parties-to-assembly-states-parties-to> [http://perma.cc/9XHS-3JNU]).

This essay argues that the U.S. has chosen a policy that promotes a selective “inter-national” justice for others, rather than one that signals U.S. membership in a global community committed to global justice norms. For the U.S. to support supranational justice only in cases that align with U.S. national interests may make sense if the regime’s primary goal is inter-national justice assistance. If outside support is designed to help ensure that justice is done in the state most affected by the crimes at issue, there are good reasons to make the investment only when foreign justice advances—or at least does not detract from—the interests of the assisting state. On the other hand, if the central purpose of supranational justice is to promote the norms of a global community, members of the community should provide their support whenever possible; that is, whenever the costs of support are not too great in relation to the supporting state’s other obligations.

The U.S.’s selective case-by-case approach to supranational justice signals that the U.S. views itself as a supranational justice “donor” rather than as a leading member of the global justice community. Although current U.S. policy certainly suggests greater affinity toward the global justice community than did that of the Bush Administration, particularly in the latter’s early years, the U.S. has not claimed full membership in the community. This approach has consequences for the U.S.’s reputation as a global leader and for the effectiveness of the supranational justice regime. Remaining outside the global justice community undermines the U.S.’s ability to act as a global leader in matters affecting the shared moral norms of the global community. U.S. exceptionalism in this regard also undermines the legitimacy of the ICC and of other global justice actors. Not only is the U.S. withholding its full support from such actors, its case-by-case policy undermines the very notion that a global justice community exists. If institutions such as the ICC cannot claim to act on behalf of a global community, their legitimacy becomes precarious, particularly when their actions affect states that have not consented to their authority.

## II. CASE-BY-CASE JUSTICE

The Obama Administration’s rhetoric is not devoid of references to global justice values. For instance, President Obama stated that, “those who intentionally target innocent civilians must be held accountable.”<sup>6</sup> This statement can be read as an implicit acknowledgement of a global norm requiring accountability for the war crime of targeting civilians. The U.S. President has also hinted that accountability for serious international crimes is generally in U.S.

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6. NATIONAL SECURITY STRATEGY, *supra* note 1, at 48.

interests. For example, as a presidential candidate he stated that, “it is in America’s interests that these most heinous of criminals, like the perpetrators of the genocide in Darfur, are held accountable.”<sup>7</sup>

Nonetheless, the Administration’s policy is to support supranational accountability efforts only in cases that align with U.S. national interests. In particular, the Administration seems to regard accountability in Africa as aligning with U.S. interests. The U.S. provided U.S. military personnel to assist in the capture of notorious war criminal, Joseph Kony, who is wanted by the ICC,<sup>8</sup> and adopted legislation supporting prosecutions of crimes of sexual violence in the Democratic Republic of Congo.<sup>9</sup> President Obama called for Kenyan support of ICC prosecutions in that country,<sup>10</sup> and the U.S. facilitated the transfer to the ICC of Bosco Ntaganda, a warlord wanted for crimes committed in the DRC.<sup>11</sup>

In contrast, the U.S. has not provided public support to the ICC’s efforts to encourage national justice in Colombia. Likewise, the U.S. has resisted Palestinian efforts to involve the ICC in that situation.<sup>12</sup> Despite earlier official statements supporting states’ decisions to join

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7. *Statements of Barack Obama on the International Criminal Court: October 6, 2007 responses to candidate questionnaire*, AMICC.ORG (Apr. 18, 2011), <http://www.amicc.org/docs/Obama%20on%20ICC.pdf> [<http://perma.cc/ZU5T-5QWJ>].
  8. Lord’s Resistance Army and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010); Helene Cooper, *More U.S. Troops to Aid Uganda Search for Kony*, N.Y. TIMES (Mar. 23, 2014), [http://www.nytimes.com/2014/03/24/world/africa/obama-is-sending-more-resources-for-joseph-kony-search.html?\\_r=0](http://www.nytimes.com/2014/03/24/world/africa/obama-is-sending-more-resources-for-joseph-kony-search.html?_r=0) [[perma.cc/ERN6-6XSL](http://perma.cc/ERN6-6XSL)]; see also Douglas Dunbar, *The Obama Administration’s Evolving Policy Towards the International Criminal Court*, AMICC.ORG (June 29, 2011), <http://www.amicc.org/docs/ObamaPolicy.pdf> [<http://perma.cc/FQ6X-S7J5>].
  9. Dunbar, *supra* note 8.
  10. President Obama, Statement on the International Criminal Court Announcement (Dec. 15, 2010) (transcript available at <https://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement> [<http://perma.cc/9X5M-9XFD>]) (“ . . . I urge all of Kenya’s leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation.”).
  11. *Suspected War Criminal Surrenders in Rwanda*, CNN (Mar. 18, 2013), <http://www.cnn.com/2013/03/18/world/africa/congo-war-crimes/> [<http://perma.cc/K2G8-7S7K>].
  12. Andrew Novak, *Why Palestine Has No Chance at the International Criminal Court*, DAILY BEAST (Apr. 17, 2015), <http://www.thedailybeast.com/articles/2015/04/17/why-palestine-has-no-chance-at-the-international-criminal-court.html> [<http://perma.cc/97SS-GCBD>].

the ICC,<sup>13</sup> the U.S. condemned the decision of Palestine's President Mahmoud Abbas to sign the Rome Statute, calling it "counter productive"<sup>14</sup> and asserting that it does "nothing to further the aspirations of the Palestinian people for a sovereign and independent state."<sup>15</sup> Indeed, the U.S. has gone so far as to threaten to withhold funding from Palestine if Palestine pursues ICC action.<sup>16</sup> As Professor John Cerone notes, "[t]he US has tended to support international criminal courts where the US government has (or is perceived by US officials to have) a significant degree of control over the court, or where the prosecution of US nationals is either expressly precluded or otherwise remote."<sup>17</sup> This case-by-case policy signals that the U.S. is not always interested in accountability for international crimes.

Of course, the most notable example of the U.S. withholding support from supranational justice efforts is its failure to become a party to the ICC. Indeed, the case-by-case policy effectively precludes U.S. membership in the ICC, since membership would require unconditional support of the Court's work. The U.S. justifies remaining outside the ICC regime, which has now attracted 123 member states, on the grounds that the U.S. is the world's largest provider of military assistance around that world, and that ICC membership would unduly expose U.S. personnel to ICC jurisdiction.<sup>18</sup> This argument is further evidence of the U.S. government's failure to

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13. Dunbar, *supra* note 8.

14. Dunbar, *supra* note 8.

15. Ruth Eglash & Carol Morello, *Palestinian Leader Mahmoud Abbas Moves to Join International Criminal Court*, WASH. POST (Dec. 31, 2014), [https://www.washingtonpost.com/world/israel-thanks-us-for-abstaining-on-security-council-resolution/2014/12/31/9b84cfa8-90d2-11e4-a412-4b735edc7175\\_story.html](https://www.washingtonpost.com/world/israel-thanks-us-for-abstaining-on-security-council-resolution/2014/12/31/9b84cfa8-90d2-11e4-a412-4b735edc7175_story.html) [<http://perma.cc/D99V-5JP6>].

16. Daa Hadid & Somini Sengupta, *Palestinians to Seek War Crimes Charges Against Israel at Hague Court*, N. Y. TIMES (Jun. 24 2015), [http://www.nytimes.com/2015/06/25/world/middleeast/palestinians-to-accuse-israel-of-war-crimes-in-international-court.html?\\_r=0](http://www.nytimes.com/2015/06/25/world/middleeast/palestinians-to-accuse-israel-of-war-crimes-in-international-court.html?_r=0) [<http://perma.cc/KMN3-H6SW>] (noting that the United States "provides the Palestinian Authority with about \$400 million annually"); Benny Tsododo, *US Threatening Global Justice*, HERALD (Jan. 26, 2015), <http://www.herald.co.zw/us-threatening-global-justice/threatening-global-justice/> [<http://perma.cc/7VG2-FG4K>] (noting the United States' plan to withhold this funding); see Mark Kersten, *The US and the ICC: Towards a Closer Relationship?*, JUST. IN CONFLICT (Apr. 10, 2011), available at <http://justiceinconflict.org/2011/04/10/the-us-and-the-icc-towards-a-closer-relationship/> [<http://perma.cc/K5HF-JNHJ>] (providing examples of selective US involvement).

17. John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals*, 18 EUR. J. INT'L L. 277, 315 (2007).

18. President Barack Obama, *supra* note 10.

endorse global community values. If the U.S. shares the values of the global community in matters of supranational criminal justice, it should implement those values in our national system. It should also be open to the possibility that a failure to implement global values nationally will be remedied through ICC action.

In sum, by supporting international criminal justice only when such justice aligns with U.S. national interests, and never for crimes committed by U.S. nationals, the U.S. has positioned itself as an international justice donor rather than a member of the global justice community. The next section examines how this approach fits into current understandings of the role of supranational criminal law institutions.

### III. INTER-NATIONAL OR GLOBAL JUSTICE?

One way to understand the work of international criminal courts, in particular the ICC, is as a vehicle for promoting national justice in the states most affected by the crimes at issue. Accordingly, international courts serve as back-ups for unavailable or inadequate national justice systems and should seek to address the justice needs of national communities.<sup>19</sup> Alternatively, international criminal courts can be viewed primarily as vehicles for global criminal justice. This option assumes the existence of a global community with values shared by a large portion of the world. The enforcement of these global values has merit independent of the needs or desires of the communities most affected by the crimes.

These two depictions of the nature of supranational criminal justice are not mutually exclusive. Indeed, the Rome Statute of the ICC reflects an intention to promote both national and global justice. The Statute's preamble suggests that the Court aims to "put an end to impunity" for "crimes [that] threaten the peace, security and well-being of the world," while various other provisions indicate that the Court seeks to address the needs of victims of particular crimes.<sup>20</sup>

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19. Scholars of transitional justice often advance this view. *See e.g.*, Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach* 32 MICH J. INT'L L. 1, 24 (2010) (arguing that 'internationalized criminal courts . . . have not fared well in the eyes of local populations. The ad hoc tribunals' failure to incorporate local preferences into their design process led to widespread rejection of these courts by members of the affected societies.'). *See also* Jaya Ramji-Nogales, *Bespoke Transitional Justice at the International Criminal Court*, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS, 106-21 (Christian DeVos et al. eds., 2015).
20. Rome Statute of the International Criminal Court, pmbl., arts. 15 (3)(a), 43(6), 54(3)(b), 68(3), 75(3), 82(4), U.N. Doc. A/CONF.183/9 (1998).

Resource limitations, however, require international criminal law institutions to prioritize one of these objectives much of the time. For instance, the ICC must choose whether to prosecute a wide range of crimes and perpetrators to satisfy the greatest possible number of victims, or to prosecute select crimes that best represent the global values most in need of expression.<sup>21</sup>

The rhetoric of state actors articulating policies related to supranational criminal justice often reflects their views of the dominant role of the relevant institutions. For instance, in a statement of support for the ICC, a representative from Norway stated, “we believe that the ICC, by combating impunity, will provide the international community long term peace making dividends.”<sup>22</sup> Similarly, in recommending ratification of the Rome Statute, parliamentarians in the Dominican Republic highlighted the role of the ICC in helping to “consolidate the cause of international justice.”<sup>23</sup>

In contrast, the U.S.’s case-by-case support policy suggests that the U.S. views supranational justice as a backstop for unavailable national justice systems—a justice aid program. When it is in U.S. national interests, or at least not contrary to those interests, the U.S. is willing to provide assistance to ensure that justice is done for mass crimes committed overseas. As one commentator notes: “[The U.S.] supports ad hoc international criminal justice by special courts and tribunals on an ad hoc basis, but is fundamentally opposed to the cosmopolitan aspirations of a standing court with a global reach.”<sup>24</sup> If

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21. See generally Margaret deGuzman, *Choosing to Prosecute: Expressive Selection in the International Criminal Court*, 33 MICH. J. INT’L L. 265 (2012) (for a discussion on the selection of cases at the ICC).
  22. EXCERPTS FROM THE 6TH COMMITTEE DISCUSSION OF ITEM 164: ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT/56TH ASSEMBLY OF THE UNITED NATIONS (Nov. 12, 2001), available at <http://www.iccnw.org/documents/Norway6thComm12Nov01.pdf> [<http://perma.cc/9WHC-DRL6>].
  23. Nat’l Cong. Dom. Rep., *Santo Domingo Plan of Action on the Rule of Law & the ICC* (October 30-31, 2008), [http://www.iccnw.org/documents/SantoDomingoPlanAction31Oct08\\_en1.pdf](http://www.iccnw.org/documents/SantoDomingoPlanAction31Oct08_en1.pdf) [<http://perma.cc/3ZFD-JRDH>].
  24. KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 147 (2006), excerpt available at [https://books.google.com/books?id=Pdgg0EDp-Q4C&pg=PA180&lpg=PA180&dq=great+britain+global+justice+international+criminal+law&source=bl&ots=7LmRhWokH8&sig=14YRxUU\\_zWLiGDiaM4DHwwwKugc&hl=en&sa=X&ved=0CB4Q6AEwAGoVC\\_hMIm9egns\\_WxwIVhTw-Ch3Tngoa#v=snippet&q=%22united%20states%22&f=false](https://books.google.com/books?id=Pdgg0EDp-Q4C&pg=PA180&lpg=PA180&dq=great+britain+global+justice+international+criminal+law&source=bl&ots=7LmRhWokH8&sig=14YRxUU_zWLiGDiaM4DHwwwKugc&hl=en&sa=X&ved=0CB4Q6AEwAGoVC_hMIm9egns_WxwIVhTw-Ch3Tngoa#v=snippet&q=%22united%20states%22&f=false) [<http://perma.cc/2DEX-JBM9>]; see also David Forsythe, *The United States and International Criminal Justice*, 24 HUM. RTS. Q. 974,

the U.S. considered itself part of a global justice community, it would view all violations of that community's values as threats to the wellbeing of the community. It would therefore treat all efforts to remedy such violations as being in the national interest.

If supranational justice is most appropriately understood as a form of international assistance to national justice systems, current U.S. policy does not threaten the viability of the regime. If, on the other hand, supranational criminal law is an effort to build a global community and promote its values, the case-by-case policy both threatens that project and undermines the U.S.'s reputation as a global leader.<sup>25</sup>

#### IV. CONSEQUENCES OF SELECTIVE SUPPORT FOR GLOBAL JUSTICE

The U.S.'s case-by-case policy threatens the global justice project in a number of ways. First, it calls into question the very existence of a global community of shared criminal justice values. The idea of a global criminal justice community hinges on a presumption in favor of accountability for all international crimes. This is not to say that criminal prosecutions are mandatory in all cases, but that such prosecution is at least considered to be an important interest of the global community that should only give way to other interests under exceptional circumstances. The U.S. position that accountability for international crimes is only sometimes in its national interest undermines the cosmopolitan claim of the global justice community.

Second, providing selective support based on U.S. interests, without subjecting U.S. citizens to the ICC's jurisdiction, suggests that international justice is a tool of the powerful against the less powerful. This is perhaps the most persistent and damaging accusation facing the ICC.<sup>26</sup> The problem of selectivity has particular

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974(2004) (arguing that "US exceptionalism and commitment to power politics" shape the US' approach to international criminal justice.).

25. Tsododo, *supra* note 16 ("By seeking to block Palestinians from accessing justice and also threatening the existence of the ICC, the US has proved to be a dimming beacon of democracy that is morphing into an albatross around the neck of international justice.").
26. Moses Kuria, *Why Was CJ So Soft on USA And ICC?*, STAR (Oct. 13, 2012), <http://www.the-star.co.ke:8080/article/why-was-cj-so-soft-usa-and-icc> [<http://perma.cc/8KY9-X7K2>]; see David P. Forsythe, *'Political Trials'? The UN Security Council and the Development of International Criminal Law*, ASHGATE RES. COMPANION INT'L CRIM. L. 496 (William Schabas et al. eds., 2013) ("[D]ouble standards obviously persist. China, Russia and the United States refuse to ratify ICC arrangements that would legally regulate them, but push the ICC on others. Particularly, the United States, which has been a major advocate for such measure as the UN *ad hoc* courts and the Special Tribunal for Lebanon, has sought

force in fueling claims that the ICC is biased against Africans.<sup>27</sup> Indeed, some critics invoke charges of selectivity in urging African states to withdraw from the ICC.<sup>28</sup> According to one commentator: “[i]ts name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are U.S. adversaries and ignored actions the United States doesn’t oppose . . . effectively conferring impunity on them.”<sup>29</sup>

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to turn American exceptionalism into legal exceptionalism.”); Richard Goldstone, *Is the International Criminal Court an Institution with an African Agenda?*, INT’L JUD. MONITOR (Winter 2012), available at [http://www.judicialmonitor.org/archive\\_winter2012/globaljudicialperspective.html](http://www.judicialmonitor.org/archive_winter2012/globaljudicialperspective.html) [<http://perma.cc/PE2Y-NLKT>] (“It is not in the interests of international justice that the ICC should have jurisdiction over the nationals of the small and weak nations but not those of the large and powerful”).

27. Nick Mangwana, *AU- Contradictions and Duplicity of the West*, HERALD (Feb. 3, 2015), <http://www.herald.co.zw/au-contradictions-and-duplicity-of-the-west/> [<http://perma.cc/FK8X-6FMH>]; Duncan Miriri, *Uganda’s Museveni Calls on African Nations to Quit the ICC*, REUTERS WORLD NEWS (Dec. 12, 2014), <http://www.reuters.com/article/2014/12/12/us-africa-icc-idUSKBN0JQ1DO20141212> [<http://perma.cc/D2TU-EVD4>]; see also Zaya Yeebo, *Pan African perspectives on the ICC, African elections, and Western ire*, PAMBAZUKA NEWS (Aug. 6, 2014), <http://www.pambazuka.net/en/category.php/comment/92741> [<http://perma.cc/7QUJ-GCCX>] (referring to the ICC as an example of imperialism and Western domination as well as stating “[the ICC] has been hijacked by the west, and as a result, is nothing less than a neocolonial instrument of manipulation... To put it mildly, the ICC as currently constituted, is the stick for African leaders who refuse to become willing tools”).
28. Dr. David Hoile, *Why Africa May Leave the ICC*, NEW TIMES (July 28, 2015), <http://www.newtimes.co.rw/section/article/2015-07-28/191046/> [<http://perma.cc/HQ84-8Z4K>] (“Broader Western hypocrisy is all too evident. The United States has forcefully pointed out that the ICC is a kangaroo court, a travesty of justice open to political influence and that no American citizen will ever come before it.”); Miriri, *supra* note 27; Peter Kagwanja, *How ICC and Security Influenced Foreign Policy*, DAILY NATION (Dec. 31, 2014), <http://mobile.nation.co.ke/blogs/ICC-Cases-Kenya-Uhuru-Kenyatta-William-Ruto/-/1949942/2574922/-/format/xhtml/-/m7w7uf/-/index.html> [<http://perma.cc/FK8X-6FMH>] (noting Museveni “criticised the ICC for continuing with Ruto’s case despite an African Union (AU) resolution that no sitting African Head of State or deputy should be tried at the court. ‘I will bring a motion to the African Union’s next session... I want all of us to get out of that court of the West’”); Mangwana, *supra* note 27 (noting that Zimbabwe President Mugabe put “pulling out of the ICC on the agenda of the June 2015 Summit”).
29. Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: counteracting the crisis*, 91:1 INT’L AFF. 37, 42 (2015), [http://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_publication\\_docs/INTA91\\_1\\_03\\_Ainley.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/field/field_publication_docs/INTA91_1_03_Ainley.pdf) [<http://perma.cc/7P56-7Q73>];

The ICC is thus charged with being “a neo-imperial project set up to try the enemies of the United States, or the inhabitants of Africa.”<sup>30</sup> Accusations of Western manipulation lead some commentators to conclude “that the ICC is an inept, corrupt, political court.”<sup>31</sup>

More generally, commentators assert that by withholding its full support from the ICC, the U.S. undermines the Court’s legitimacy. As one author writes:

Without US participation, the ICC will not only lack the support of the most powerful nation on the planet, it will lack the legitimacy in international politics that the United States could grant with its predominant role in the international arena, and a history of being the most vocal proponent for human rights within the last century.<sup>32</sup>

At a practical level, the absence of U.S. support in enforcing ICC arrest warrants undermines the Court’s effectiveness.<sup>33</sup> A notable example is the failure to arrest Sudanese President Omar al-Bashir who is the subject of an ICC indictment.<sup>34</sup>

The case-by-case policy also undermines the U.S.’s reputation as a global leader. Since members of the global justice community view membership as a moral imperative, they are less likely to trust and

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*see Kersten, supra note 16* (“Where the ICC is useful to the US’s political aims, it is used. When it becomes an obstacle or exhausts its utility, the US administration has not hesitated to not only reduce its engagement but undermine the mandate of the court”).

30. Ainley, *supra* note 29, at 50 (internal footnotes omitted); Henry J. Richardson, *African Grievances and the International Criminal Court*, AFR. & FUTURE INT’L CRIM. JUST. 81, 109 (Vincent O. Nmehielle ed., 2013).
31. Hoile, *supra* note 28; *see also* David Chuter, *The ICC: A Place for Africans or Africans in their Place?*, AFR. & FUTURE INT’L CRIM. JUST. 161, 179 (Vincent O. Nmehielle ed., 2012) (“The result of high-level politics of international criminal justice...is that it is likely that the only real action the ICC is likely to be able to undertake will be against small, poor, friendless states, especially in Africa.”).
32. Megan E. Lantto, *The United States and the International Criminal Court: A Permanent Divide?*, 31 SUFFOLK TRANSNAT’L L. REV. 619, 638 (2008).
33. *See* Jonathan Bracewell, *Will it Float? The ICC Without the United States*, 6 REGENT J. INT’L L. 483, 506-07 (2008) (discussing the obstacles and requirements for ICC enforcement power).
34. *See e.g.*, Norimitsu Onishi, *Bid by Omar al-Bashir of Sudan to Avoid Arrest Is Tested in South Africa*, N. Y. TIMES (June 14, 2015), <http://www.nytimes.com/2015/06/15/world/africa/bashir-sudan-international-criminal-court-south-africa.html> [<http://perma.cc/4ZUX-VW8Q>].

respect states, like the U.S., that remain outside the community.<sup>35</sup> If the U.S. does not unequivocally support an institution aimed at ending impunity for crimes that “threaten the peace, security and well-being of the world,” how can it be trusted to lead the world in other areas of moral importance, such as respect for human rights?

#### V. IS A GLOBAL JUSTICE POLICY POSSIBLE IN THE U.S.?

Supporters of a global justice agenda sometimes suggest that although the case-by-case policy may not be ideal, it is the best the U.S. can do in light of current national political realities.<sup>36</sup> This may be true. Moreover, it is also true that the Obama Administration’s selective support for the ICC is far better than the prior Administration’s early active opposition to the Court.<sup>37</sup>

Nonetheless, there is some reason to believe that a global justice policy is possible for the U.S. In particular, surveys of Americans consistently show a high level of support for joining the ICC.<sup>38</sup> Admittedly, as one organization supportive of the ICC states: while “instinctive support for the Court is broad-based,” such support remains “shallow and untapped.”<sup>39</sup> Most Americans support the general idea of an ICC but are fairly uninformed about the nature of

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35. Amanda C. Grayson, *Is ICC Submission in the Best Interest of US National Security? A Cost-Benefit Analysis*, 1 GLOBAL SECURITY STUD. 130, 138 (2010); Roseann M. Latore, *Escape Out the Back Door or Charge in the Front Door: U.S Reactions to the International Criminal Court*, 25 B.C. INT’L & COMP. L. REV. 159, 170 (2002); Christopher “Kip” Hale & Manasa K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOBAL STUD. L. REV. 581, 582 (2013).
36. Lambert, *supra* note 2 (noting the political roadblocks still present in the US’s engagement with the ICC).
37. Lambert, *supra* note 2.
38. MARSHALL M. BOUTON ET AL., CONSTRAINED INTERNATIONALISM: ADAPTING TO NEW REALITIES, RESULTS OF A 2010 NATIONAL SURVEY OF AMERICAN PUBLIC OPINION (2010), <http://www.thechicagocouncil.org/sites/default/files/Global%20Views%202010.pdf> [<http://perma.cc/XEP8-5EGR>]; DINA SMELTZ ET AL., FOREIGN POLICY IN THE NEW MILLENNIUM, RESULTS OF THE 2012 CHICAGO COUNCIL SURVEY OF AMERICAN PUBLIC OPINION AND U.S. FOREIGN POLICY (2012), [http://www.amicc.org/docs/2012\\_CCS\\_Report.pdf](http://www.amicc.org/docs/2012_CCS_Report.pdf) [<http://perma.cc/HZA7-5E9H>]; *About the CAICC*, CHI. ALLIANCE INT’L CRIM. CT., <http://www.iccchicago.org/about.html> [<http://perma.cc/89LS-HHU9>] (last visited Aug. 6, 2015).
39. *American Public Support for the ICC*, AMICC.ORG, available at <http://www.amicc.org/usicc/opinion> [<http://perma.cc/5TAZ-RJAZ>] (last visited Aug. 6, 2015).

the ICC and the current level of U.S. involvement.<sup>40</sup> According to a December 2014 study, 64% of Americans know nothing about the ICC, as opposed to 15% who know a “great deal or fair amount;” and 59% do not know whether or not the U.S. is a member.<sup>41</sup> Of the slightly informed, 63% believe the U.S. is a member of the Court.<sup>42</sup> Nonetheless, the majority of those surveyed who are even slightly knowledgeable about the ICC support increased U.S. involvement.<sup>43</sup> Moreover, those who are highly knowledgeable about the ICC are often very supportive of the institution.<sup>44</sup>

This generally high level of support for the ICC—an institution with global reach and mandatory jurisdiction—suggests that many Americans would support a policy more consistent with global justice values. It may, therefore, be time to challenge the assumption that insufficient domestic support exists for joining the ICC, and the global justice community more broadly.

## VI. CONCLUSION

With a new U.S. Administration coming into office next year, the time is ripe to reconsider U.S. policy toward the ICC and other international criminal justice institutions. The U.S. should signal full membership in the global justice community by joining the ICC and providing unequivocal support for all efforts to address serious international crimes.

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40. *Id.*

41. *Americans Continue to Support Involvement with the International Criminal Court (ICC)*, IPSOS (Dec. 16, 2014), available at <http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=6697> [<http://perma.cc/9PUA-BAJ2>].

42. *Id.*

43. *Id.*

44. See e.g., *Resolution adopted by the Assembly of the Minnesota State Bar Association, Minneapolis, Minnesota*, AMICC.ORG (Sept. 17, 2010), <http://www.amicc.org/docs/MSBA09172010.pdf> [<http://perma.cc/22RM-SYRG>] (urging the United States “to take steps towards ratification of the Rome Statute by expanding and broadening United States interaction with the International Criminal Court, including cooperation with the Court’s investigations and proceedings.”); see also CAICC, *supra* note 38 (“Recent polls indicate that Americans strongly favor the ICC, and our alliance was created to allow Chicago individuals and organizations to make it clear to our elected officials that our government’s present obstruction of the Court is inconsistent with our core values, and that our appreciation for freedom and the protection of human rights demand that the U.S. ratify the Rome Statute and become an active participant in the ICC.”).