Standards of Admissibility for U.S. Intelligence as Evidence in International Criminal Proceedings

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Abstract

International criminal tribunals rely heavily on engaging intelligence services when states harbor evidence critical to trial outcomes. Yet state cooperation through intelligence disclosure is fraught with contradictions, and evidentiary admissibility standards for intelligence remain undefined by any consistent standard in international law. Lack of coherent legal custom on intelligence as evidence across tribunals undermines the judicial process. This study investigates how intelligence is accessed and admitted in international prosecutions, focusing on the influence of the U.S. intelligence community, which exercises more sway over the nature, extent, and timing of admitted evidence than any international body or legal framework. Often, cooperation is contingent on alignment with U.S. national and security interests, or else compromised by the Pentagon's hostility toward international criminal prosecution and its stranglehold over U.S. foreign policy. These factors lead to strategic disclosure or withholding of evidence and contribute to U.S. exceptionalism in global justice. To make use of state-supplied intelligence, tribunals must balance sensitivities regarding disclosure with assessments of authenticity, reliability, legality, and prosecutorial independence which have not yet coalesced into custom.

Tracing political and legal patterns in intelligence-sharing since Nuremberg, this dissertation argues that the mandate to cooperate with the U.S. intelligence community shapes procedural rules around evidentiary disclosure and admissibility. It finds that American intelligence has a primus inter pares impact on how sensitive information arrives before international courts. Standards initially developed to maximize U.S. intelligence disclosure to the International Criminal Tribunal for the Former Yugoslavia were replicated or adapted by subsequent tribunals, while admissibility standards remain ambiguous to maximize cooperation. These standards are likely to shape forthcoming prosecutions, including those for violations of international law in Ukraine. Through archival research and interviews with former U.S. intelligence officials, tribunal prosecutors, judges, defense attorneys, and ICC advisors, this study clarifies current legal custom regarding classified intelligence as evidence and explores how courts can establish neutral, effective standards to safeguard judicial integrity while supporting state intelligence agencies in the protection of their resources.

Abbreviations

- ASPA – American Servicemembers Protection Act
- CIA – Central Intelligence Agency
- CPA – Coalition Provisional Authority
- DIA – Defense Intelligence Agency
- DOD – Department of Defense
- DOJ – Department of Justice
- DPKO – Department of Peacekeeping Operations
- EIT – Enhanced interrogation (torture) techniques
- GCHQ – Government Communications Headquarters
- GRC – Global Rights Compliance
- I&R Unit – Information and Research Unit
- IC – Intelligence community
- ICC – International Criminal Court
- ICTR – International Criminal Tribunal for Rwanda
- ICTY– International Criminal Tribunal for the former Yugoslavia
- IHT – Iraqi High Tribunal (formerly Iraqi Special Tribunal)
- IMINT – Imagery intelligence
- IRMCT – International Residual Mechanism for Criminal Tribunals
- NATO – North Atlantic Treaty Organization
- NIP – National Intelligence Program
- NRO – National Reconnaissance Office
- NSA – National Security Agency
- OSINT – Open-source intelligence
- OTP – Office of the Prosecutor
- RPE – Rules of Procedure & Evidence
- SIGINT – Signals intelligence
- SCSL – Special Court for Sierra Leone
- STL – Special Tribunal for Lebanon
- U.N. – United Nations
- U.S. – United States
- U.S. IC – United States intelligence community

Introduction

Attitudes toward the use of covert intelligence at the United Nations and U.N.-backed courts evolved significantly in patterns difficult to trace and harder to explain. This dissertation examines the legal standards and procedural outcomes that emerged from these shifting attitudes, focusing on the exceptional influence of U.S. intelligence disclosure on international justice. Through archival research and interviews with key actors, this study investigates how cooperation between American intelligence agencies and international criminal

tribunals shapes access to intelligence and its admissibility as evidence. It explores legal precedent governing intelligence-as-evidence in international law, seeking to clarify how various admissibility standards are applied in practice. This dissertation further analyzes how prosecutors at The Hague manage relationships with U.S. agencies and how intelligence-sharing practices evolved in ways which reflect American security and foreign policy interests. This research argues that U.S. intelligence services have a disproportionate impact on international tribunals' evidentiary processes, influencing both the disclosure and evidentiary admissibility of classified intelligence in service of U.S. IC cooperation. By tracing the evolution of these practices from Nuremberg to present-day tribunals, this study reveals the critical role of U.S. cooperation in shaping global justice efforts and highlights the need for neutral and coherent standards to safeguard the integrity of international prosecutions, particularly in forthcoming efforts like those addressing Russian aggression in Ukraine.

The term "intelligence community" refers to internal bureaucratic coordination between federal agencies within a nation's government in acquiring and handling privileged information. The wariness with which international organizations approach collaboration with these communities is understandable given that their distinct commitments and objectives may be at odds. For instance, the U.N. and the U.S. Central Intelligence Agency (CIA) draw on incompatible sources of legitimacy; the former derives public trust from the transparency of its operations, while the latter's imperatives are served by its reputation for utmost discretion. Practitioners of international law and domestic intelligence communities alike routinely recognize state intelligence as self-serving and, at times, extralegal. Illustratively, Special Counsel to the CIA Mitchell Rogovin once defended the practice of espionage overseas at a congressional hearing as "nothing but the violation of someone else's laws."[1] The stated obligation of the National Intelligence Program (NIP) is to support the U.S. intelligence community (U.S. IC) and the executive in the protection of national security.[2] This objective is poised to conflict with the U.N.'s aim of accelerating international cooperation in service of collective security.[3] It is therefore no mystery that international bodies have found reputational cause to distance themselves from such practices. The 1984 U.N. Peacekeeper's Handbook warned that the clandestine nature of intelligence collection would inevitably attract prejudice and suspicion:

> "[Covert intelligence] can damage relations and diminish the trust and confidence that the disputants would wish to have in the Force's impartiality. . . . The U.N. has therefore resolutely refused to countenance intelligence systems as a part of its peacekeeping operations;

1. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 Mich. J. Int'l L. 1071, 1077 (2006).

2. The White House, *National Intelligence Program*, https://obamawhitehouse.archives.gov/node/18277 [https://perma.cc/9JYS-XHWH].

3. United Nations, *Maintain International Peace and Security*, https://www.un.org/en/our-work/maintain-international-peace-and-security [https://perma.cc/96Q4-RPFX].

> intelligence, having covert connections, *is a dirty word.* Instead, the United Nations uses only overt methods for gathering 'information'" (emphasis added).[4]

The distinction drawn between information-gathering and intelligence collection proves to be a murky one. Recognizing that a fully representative and accurate picture of any scenario enhances the likelihood of successful operations, powerful incentives compel international organizations to draw on intelligence proffered by informed member states.

In 1993, the U.N. found cause for an Information and Research (I&R) unit to aid the U.N.'s Department of Peacekeeping Operations (DPKO) which collaborated directly with the intelligence directives of multiple member states.[5] As an alternative to building internal intelligence capabilities, the DPKO I&R unit aimed to disseminate intelligence into U.N. operations from the vast information networks of national governments and their intelligence agencies.[6] Informally operating under the slogan "keeping an eye on the world," the I&R unit supplied the U.N. with warnings on the 1996 conflict in Eastern Zaire and other hotspots, evaluating the motivations of parties, assessing threats, and reporting on assassination plots.[7] From the outset, U.N. Secretary-General Kofi Annan was uneasy about the I&R unit's reliance on U.S. intelligence, and evidence revealed his wariness to be well-founded. One I&R report questioned why U.S. security reports had "failed to address key factors" including "the control of economic assets (minerals, diamonds)," a sensitive issue since American firms were later charged with cutting lucrative deals with the rebels in exchange for "rights" to certain minerals in the region. The U.S. IC also appears to have disseminated disinformation to the DPKO on the number of refugees remaining in camps after U.S.-backed attacks by Zairean rebels.[8]

Annan attempted to create a more substantial Information and Strategic Analysis Secretariat to aid his Executive Committee on Peace and Security following the dissolution of the DPKO I&R in 1999.[9] These efforts were short-lived, as Annan was blocked by a group of non-aligned member states who argued that the use of U.N. funds on gratis personnel unfairly advantaged the developed world. Such roadblocks, however, did not impede the emerging culture of cooperation between the U.N. and state intelligence services, and new avenues for cooperation were simultaneously being made available.

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4. Int'l Peace Acad., *Principles and Procedures for the Mounting of U.N. Peacekeeping Operations*, *in* PEACEKEEPER'S HANDBOOK 39 (Elsevier, 1984), https://doi.org/10.1016/B978-0-08-031921-6.50008-0.

5. *See generally* Walter Dorn, Intelligence at U.N. Headquarters? The Information and Research Unit and the Intervention in Eastern Zaire 1996, 20 INTEL. NAT'L SEC. 3, 440 (2005).

6. *Id.*

7. *See* Dorn, *supra* note 5, at 440; *see generally* WALTER DORN, UNITED NATIONS PEACEKEEPING INTELLIGENCE (2006), https://walterdorn.net/79-united-nations-peacekeeping-intelligence [https://perma.cc/5CMT-MGQ3].

8. *See* Dorn, *supra* note 5, at 458.

9. *See generally* DORN, *supra* note 7.

The 1990s saw the incorporation of state intelligence services into the machinery of international justice through U.N.-backed (and NATO-endorsed) ad hoc tribunals. The U.S. role in pushing for the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) saw an international court and U.S. intelligence in alignment for the first time since Nuremberg, boding well for collaboration relative to intelligence disclosures and the arrest and transfer of fugitives.[10] Moreover, this narrow engagement with U.S. intelligence services in the name of international criminal justice appeared less compromising reputationally than previous efforts to incorporate state agencies into the U.N.'s infrastructure. As was the case for the DPKO in 1993, the tribunal's capacity to collect information through autonomous investigations would be highly limited. Acknowledging this, the ICTY's statute states that its success in gathering evidence and securing convictions would require state cooperation.[11] In years since, intelligence-sharing has retained this essential function for ad hoc tribunals and International Criminal Court (ICC) cases.

From the perspective of prosecutors, it is inevitable that international criminal investigations rely on state cooperation, particularly given that they often commence years after crimes occur.[12] Because states for which tribunals are established are often not nations with expansive intelligence capacities, circumstances frequently dictate that courts utilize disclosures from states uninvolved or indirectly involved in the conflict (although this does not make them neutral parties). The extent of reliance and the nature of prosecutorial efforts to mobilize these disclosures as evidence is a key focus of the present analysis. Literature generally contends that access to sufficient evidence by international criminal tribunals depends on institutional relationship-building and the strategic ability to wield confidential information without undermining intelligence agency interests.[13] In conversation, prosecutors reveal that while the relevance of such factors is evident, establishing such relationships is hardly sufficient if the U.S. does not find cause for cooperation in its national interest. "You do have to build on trust, and respect," David Crane, the founding Chief Prosecutor at the Special Court for Sierra Leone (SCSL) and former assistant general counsel to the U.S. Defense Intelligence Agency, stated. "But I was an American citizen and was in the [U.S.] intelligence community, and they still didn't give me any information, because it was not in the interest of the US."[14]

10. *See generally* Julian Borger, The Butcher's Trail: How the Search for Balkan War Criminals Became the World's Most Successful Manhunt (2016).

11. Intl. Crim. Trib, for the Former Yugoslavia, Resolution 1503 of 28 August 2003, Art. 29, https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf [https://perma.cc/7TQT-EV9G].

12. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (May 5, 2023).

13. Allison Carnegie & Austin Carson, *Incriminating Intelligence: The Strategic Provision of Evidence in War Crimes Tribunals* 11, 36 (2018), https://doi.org/10.2139/ssrn.3272493.

14. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

Disclosure decisions may be based on political assessments of the national interest and the strategic protection of sources and methods. Moreover, tribunals have dual obligations to investigate and to prosecute, and intelligence disclosures are approached distinctly by the U.S. IC with respect to each of these obligations.[15] When intelligence agencies are unwilling to see their sources revealed in open court, that information may still be shared with investigators in limited fashion, such as providing leads on witness interviews or contextual information.[16] Crucially for both the fairness of trials and the intelligence community's calculus, the provision of exculpatory evidence to prosecutors triggers mandatory disclosure clauses which have led to reduced sentencing for defendants and grants of early release.[17] While courts assure defendants access to exculpatory evidence, the fulfillment of this obligation is complicated by the U.S. IC's reluctance to reveal the extent of their knowledge and capabilities to their enemies.

This reality introduces many complexities for international justice that are underexplored in scholarship and unaddressed by international law. One is the notion of "informed state's justice," a concept describing how international and hybrid tribunals are threatened by extrajudicial activism on the part of nations who have monitored the conflict and made self-serving disclosure decisions.[18] Such factors not only compromise the ability of courts to serve impartially but also threaten institutional legitimacy and judicial independence. Lack of cooperation may lead to skewed outcomes, as when cases go under-convicted not due to lack of evidence in existence, but due to a dearth of intelligence-sharing. At times, the Office of the Prosecutor's (OTP) agenda is influenced, for example, not by the scale and gravity of alleged criminal activity but by domestic foreign policy priorities on the basis of feasibility of success given prospects for cooperation.[19] Strengthening scholarship on this arena of special interests and limitations, particularly regarding the decisive power held by informed states with selective resistance to international judicial bodies, is therefore essential to the integrity and impartiality of international criminal law.

Section one examines the historic factors influencing the relationship between the U.S. IC and the international tribunal system, beginning with the Nuremberg Trials in 1946 and examining how norms for cooperation have taken hold and continue to evolve in Nuremberg's successor tribunals of the 1990s and early 2000s. Tracing complications arising for both courts and agencies, it focuses on the posture of the U.S. IC toward the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court. It finds that intelligence disclosure decisions may at times rest on immunity promises made in private between nations and defendants. The ICTY was the

15. *Id*.

16. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (May 5, 2023).

17. *Id*.

18. Carnegie & Carson, *supra* note 13, at 2, 37.

19. Interview with David Crane, *supra* note 14.

first tribunal of its kind to be established in fifty years, and its carefully drawn rules of procedure and evidence (RPE) are worthy of analysis because they have served as a procedural blueprint for subsequent courts.

In section two, I demonstrate that extended U.S. influence on the ICTY's rules can be readily confirmed. Emerging from this analysis is what I term the 'dual exceptionalism' of the U.S. IC in relation to international criminal justice. On one hand is disproportionate impact of U.S. intelligence-sharing on prosecution given its unparalleled scale and the ability to shape outcomes with strategic provision or non-disclosure of evidence. On the other is its insistence on excluding U.S. nationals from international jurisdiction at the ICC and the selective recognition of immunity promises made by the U.S. to defendants.

Section two examines how rules of procedure for intelligence disclosure found form in the foundational documents of various tribunals and in protocols for the customary review of disclosure requests by the U.S. IC. To address this, the article focuses on the amended language of statutes and RPE, examining the practical application of these stipulations and how they emerged in conversation with U.S. agencies to set mutually satisfactory conditions for intelligence-sharing. I also examine the protocols and calculus which shape the U.S. IC'S review of disclosure requests from international judicial bodies.

Section three considers how the admissibility of intelligence as evidence is weighed by courts after it is disclosed. It also asks how assessments of reliability, prosecutorial independence, and legality (including human rights violations and data breaches) interact with the management of relationships with intelligence services.

Section four examines the future of classified intelligence as evidence as of 2023, assessing contemporary attitudes of various factions of the U.S. federal government and IC toward international prosecution. The section then speculates on how these attitudes, as well as the advent of non-state intelligence, are likely to impact prosecution of Russian aggression in Ukraine.

Literature Review

Studies on access to state intelligence at international criminal tribunals and its use as evidence are sparse. Moreover, scholars tend to assess issues of intelligence disclosure and admissibility separately, despite their relationship integrally shaping interaction between intelligence services and international justice. Substantial comparative research focuses on the exclusion of evidence on the basis of its illegality (though not necessarily in relation to intelligence practices) or considers how the increasing flow of data leaks may affect how courts reckon with their admissibility principles.[20] Several studies compare domestic applications of constitutions which prohibit the use of evidence

20. *See generally* Christa M. Madrid Boquín, *The Exclusion of Unconstitutionally Obtained Evidence in Civil Proceedings: A Comparative Analysis between the USA and Spain*, 3 Jurnalul de Studii Juridice 13 (2014).

received through violating federal law.[21] For instance, Colston compared the legal approaches of the U.S., France, and Russia to that of Britain, the latter being an instance where unlawfully obtained evidence is broadly admissible in civil proceedings, raising questions about whether technological advancement will affect the reasoning tribunals use to shape their RPE.[22]

On the disclosure side, others consider how states may provide information strategically to aid their national interest and how confidentiality agreements struck between states and tribunals may undermine provisions for the release of exculpatory evidence.[23] The literature review below places U.S. intelligence practices in relation to international judicial proceedings for the reader. It also shares points of view from selected scholars on the nature of intelligence-sharing multilaterally with allies, locating the strategy and logic shaping such decisions as a point of comparison for how disclosure requests from courts are reviewed by the U.S. IC.

Intelligence-Gathering and Public International Law

The ambiguities and contradictions explored in this paper sit among a broader range of challenges for contextualizing espionage and surveillance practices within an international legal framework. To understand how the U.S. IC and international courts regard their respective interests in cooperating with and obstructing one another, it is necessary to examine scholarship on the legality of various intelligence-gathering practices according to internationally recognized standards and norms.

Covert intelligence collection was once considered incompatible with international law, but the application of certain standards to espionage and surveillance practices is, in theory, relatively straightforward.[24] The doctrine of territorial sovereignty, for instance, prohibits infringements on an independent state's ability to govern free from foreign interference within its borders and renders physical infringements on foreign territory illegal; such limits include airspace surveillance and physically damaging cyber-attacks.[25] Notably, the principle of territorial sovereignty does not prohibit forms of espionage such as satellite imagery of another state, since international law takes outer space to be the "province of mankind."[26] Other limitations to the legality of espionage,

21. *See generally* James H. Boykin & Malik Havalic, *Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration*, 12(5) Transnational Dispute Management 1 (2015).

22. Jane Colston, Olga Bischof, Cameron Moxley & Anna Grishchenkova, *The fruit from a poisoned tree—use of unlawfully obtained evidence*, IBA International Litigation Newsletter 23 (2017).

23. Sara Mansour Fallah, *The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals*, 19 The L. & Practice of Int'l Cts. and Tribunals 147 (2020).

24. For further discussion of such an application, see generally M. E. Bowman, *Intelligence and International Law*, 8 Int'l J. Intel. CounterIntel. 321 (1995).

25. Katherine Fang, Paras Shah & Brianna Rosen, *A Right to Spy? The Legality and Morality of Espionage*, Just Security (2023), https://www.justsecurity.org/85486/a-right-to-spy-the-legality-and-morality-of-espionage/ [https://perma.cc/2WR2-D8GH].

26. *Id*.; *see generally* Małgorzata Polkowska, *Limitations in the Airspace Sovereignty of States in Connection with Space Activity*, 20 Sec. and Def. Q. 42 (2018).

in particular protecting diplomatic and consular missions, are supplied by treaty law.[27] International law tends to approach issues of intelligence-gathering obliquely, with laws of war being one of the few regimes to explicitly address the issue. However, no international requirement serves to compel the U.S. or any other state to provide information obtained by any means to foreign or international courts.

Legal scholars may turn to custom to supplement treaty law, but state practice and *opinio juris* are often in direct conflict. This opposition arises because most domestic legal systems prohibit foreign intelligence-gathering on their soil while simultaneously protecting the rights of their own intelligence agencies to conduct such activities abroad. This creates a paradox where states advocate for the protection of their intelligence operations but resist equivalent activities by others. As a result, states pursue a double standard: they claim the right to gather intelligence internationally but deny the legitimacy of foreign espionage on their own territories. This inconsistency prevents the development of coherent international custom governing espionage, surveillance, and intelligence collection. Without alignment between state practice and *opinio juris*, establishing legal norms on these issues becomes nearly impossible. It is challenging to locate conventional boundaries on intelligence-gathering that states would both accept for themselves and wish to impose on others.[28] This lack of legal custom is critically important for contextualizing how tribunals consider admissibility: there does not exist a generally binding "inadmissibility rule" for intelligence on the basis of legality of acquisition methods, because there is no widely accepted custom to determine procedural rules.

Proponents of stricter evidentiary exclusion in the tribunal system argue that current leniency on admitting illegally obtained evidence that does not violate human rights creates a situation of risky non-regulation, particularly given the modern-day proliferation of intrusions into sovereign spheres through cyberattacks and leaks.[29] Another perspective is that international tribunals must continue to fine-tune methods for evaluating intelligence which safeguard its essential details and do not undermine sources and methods, in this way refraining from imposing a legal handicap on intelligence practices.[30] This position acknowledges that challenges to the procurement of intelligence by these courts are influenced more by the requisite maintenance of relationships than by legal standards. Certainly, agencies are constrained far more by strategic considerations than legal ones in their dealings with one another given that there are few restrictions or obligations imposed on their actions. An examination of scholarship on how these agencies share information multilaterally

27. *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

28. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 Mich. J. Int'l L. 1071, 1074 (2006).

29. Sara Mansour Fallah, *The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals*, 19 The L. & Practice of Int'l Cts. and Tribunals 147, 148 (2020).

30. Allison Carnegie & Austin Carson, *Incriminating Intelligence: The Strategic Provision of Evidence in War Crimes Tribunals* (Nov. 16, 2018), 2, https://ssrn.com/abstract=3272493.

reveals the risks and interests which intelligence agencies review in relation to disclosure decisions more generally and will serve as a point of comparison for their engagements with international prosecutors.

Multilateral Intelligence Collaboration

It is in the interests of countries to arrange mutually beneficial channels through which to share intelligence; mostly, they navigate these relationships outside of domestic and international legal parameters on a diplomatic basis. Multilateral intelligence collaboration involves the exchange of resources, information, data, and analysis across international networks of agencies. Given that the success of such exchanges often depends on their confidentiality, scholars navigate substantial difficulties in investigating intelligence-sharing norms.

Despite these challenges, there is extensive literature on how countries establish mutually beneficial relationships through assurances of discretion and reliability in their intelligence-sharing and on how these diplomatic influences differ from those informing intelligence cooperation with international criminal proceedings. As Janet McGruddy demonstrated, the practice of intelligence-sharing in multinational forums has demonstrably grown.[31] Simon Chesterman's study of intelligence operations and international law elucidates how transnational communities of intelligence professionals emerged organically around overlaps in information-handling protocols, shared trust, and a perceived common history.[32] Access to U.S. intelligence may incentivize nations to capitulate to U.S. interests. Scholarship affirms that nations also strategically withhold intelligence privileges from their allies.[33] Sepper argues that the globalization of intelligence creates an "accountability deficit," whereby behavior is constrained not by international oversight but by the intelligence community's own professional ethos, which in turn poses a threat to the preservation of liberal democracies.[34]

Studies of multilateral collaborative relationships between advanced ICs reveal how norms for information exchanges transform dramatically when "intelligence" becomes "evidence." Where prosecutors might see information as ammunition, intelligence agencies see it as "currency" valued on scarcity: to spend it unnecessarily is wasteful, and to put too much in circulation risks devaluing their savings.[35] Conflict zones may draw governments to collect

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31. Janine McGruddy, *Multilateral Intelligence Collaboration and International Oversight*, 6 J. Strategic Sec. 214 (2013).

32. *See generally* Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 Mich. J. Int'l L. 1071 (2006).

33. Jeffrey T. Richelson & Desmond Ball, *The Ties That Bind: Intelligence Cooperation between the UKUSA Countries*, Am. Pol. Sci. Rev. xviii, 258–259 (1986).

34. Elizabeth Sepper, *Democracy, Human Rights, and Intelligence Sharing*, 46 Tex. Int'l L.J. 171 (2010); Adam D. M. Svendsen, *The Globalization of Intelligence Since 9/11: The Optimization of Intelligence Liaison Arrangements*, 21 Int'l J. Intel. CounterIntel. 672 (2008).

35. Interview with Simon Chesterman, David Marshall Professor & Vice Provost, Nat'l Univ. of Singapore, via Zoom (Apr. 20, 2023).

intelligence in service of their own security interests, meaning that powerful states are often well-informed about circumstances of mass atrocities which provoke an international judicial response. However, these intelligence operatives gather information not to prosecute war criminals but to understand the theater of operations in service of domestic security interests.[36]

From the perspective of international judges and prosecutors, government agencies often think their information is more secret than it really is when reviewing disclosure requests.[37] Scholarship in intelligence studies, meanwhile, sees prosecutors as prone to overestimating the utility of classified disclosures, with "top secret" status leading to dangerous assumptions about credibility.[38] Herein lies another difference in the vantage points from which courts and agencies approach reliability assessments and discretion assurances in their information-sharing. The dearth of scholarship which places the interests and calculus of intelligence services in conversation with those of international prosecutors impedes understanding of these exchanges and their impact on international criminal justice.

I. American Intelligence, International Courts, & Contingent Cooperation

"The United States is quite happy to help create and give teeth to tribunals who cannot investigate {U.S. nationals}. States don't have any problem with tribunals that go after their enemies."[39]

—Professor Kevin Jon Heller, Special Advisor to ICC Chief Prosecutor Karim Khan

The U.S. intelligence community's (IC) significant global presence results in its notable involvement in the machinery of international criminal prosecution, even though it often operates with limited regard for international legal obligations. Though other U.S. agencies and other nations' intelligence services also support tribunals, the singular magnitude of the U.S. National Intelligence Program (NIP) warrants an examination of this influence. To put its impact in proper perspective, domestic spending on American intelligence is larger than the collective defense spending of every nation excluding the U.S., China, and Russia.[40] It receives a "black budget" which increases annually without much explanation, nor does Congress attach public reporting requirements to the NIP's spending practices.[41]

36. *Id.*
37. *Id.*
38. *Id.*
39. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).
40. Zachary Keck, *US Intelligence Community: The World's 4th Largest Military?*, The Diplomat (Aug. 30, 2013), https://thediplomat.com/2013/08/us-intelligence-community-the-worlds-4th-largest-military/ [https://perma.cc/5ZMW-4N53].
41. *Id.*

Because of its size and resistance to external authorities, including (to some extent) its own government, the potential for U.S. intelligence to shape the administration of global justice is immense. U.N. funds allocated to all international criminal tribunals taken together since the establishment of ICTY in 1993 is a fraction of the NIP's spending in a single year: an appropriations request of $72.4 billion was submitted to Congress for 2024, for instance.[42] Through an examination spanning from the 1946 Nuremberg Trials to the establishment of the ICTY in 1993 and the ICC in 2002, this section considers how U.S. intelligence has aided, limited, and informed the agendas of international criminal justice since its earliest applications. U.S. intelligence has retained its *primus inter pares* ability among states to shape the capacities of prosecutors, influence the terms of court statutes, indirectly administer justice through intelligence-sharing decisions, and selectively honor immunity promises all while retaining its own exemption on the outskirts of ICC jurisdiction. These privileges and immunities, particularly in relation to the ICC, remain a feature of the U.S. IC's engagement with international justice.

The Legacy of the Office of Strategic Services at Nuremberg

The entangled history of U.S. intelligence and international law begins with a process-centered look at the Nuremberg Trials. Durable links tying intelligence services to international justice found form in these procedures, setting parameters for how both entities operate and interact. The concurrent expansion of intelligence capacities and international law in the 1940s was not coincidental, as World War II's unprecedented destruction and international coordination presented an opportunity for governments to advance new global projects. Out of these conditions emerged two distinct ventures for the United States. One was to take leadership over formalizing an authoritative framework for collective security through international law, and the other was to legitimize and expand the United States' own intelligence-gathering capacities. Nowhere did these distinct but associated projects resonate better than at Nuremberg.

The U.S. and Allied powers were determined to win the war, bring fascism to justice to prevent future atrocities, and take an authoritative position over the emerging liberal international order. American intelligence was centralized in the form of the Office of Strategic Services (OSS), initially justified by the first of these three aims. The OSS was established in 1942 with the basic mission of obtaining information for the purposes of sabotaging enemy military operations. The perseverance of centralized intelligence directly after the war relied on its ability to service the latter two goals at Nuremberg, especially before Cold War interests began to dictate that intelligence be used to counter the Soviet threat. Thus, the OSS was incentivized to collaborate with Nuremberg investigations and criminal procedures.

42. Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BRIEF 6, 8 (2008).

In 1945, OSS Director William ("Wild Bill") Donovan was appointed Assistant to the Chief U.S. Prosecutor at Nuremberg, Robert Jackson.[43] Donovan, an unorthodox and strong-willed personality regarded as the father of American intelligence, persistently lobbied President Franklin Roosevelt as early as 1943 to establish future arrangements for war crimes prosecutions even as other branches of government reacted to his efforts with indifference.[44] Although virtually all of Donovan's staff became employees at Nuremberg following the OSS's formal dissolution in 1945, by no means was his agency's cooperation all-encompassing. As one example, wartime signals intelligence (SIGINT) obtained by breaking encrypted enemy radio and teleprinter communications ("Ultra") was not shared with the OTP.[45]

Moreover, U.S. intelligence cooperation introduced a range of complications for the independence of criminal proceedings, not least because Nazi war criminals were evidently better positioned to cut deals with intelligence officers than with prosecutors.[46] Scholarship convincingly demonstrates that the OSS secured immunity at Nuremberg for several senior SS officials who had cooperated in clandestine negotiations between Nazi officials and the OSS, resulting in a local surrender agreement of Germany's occupation of Northern Italy called "Operation Sunrise."[47]

When asked which criminals were most aggressively pursued and why, Nuremberg prosecutor Telford Taylor submitted in unindicted war criminal Karl Wolff's 1964 trial that "different reasons, and not only legal considerations" were taken into account by the Trials.[48] SS-Sturmbannführer Heinrich Andergassen, the immediate subordinate of Wolff, confirmed that the OSS promised the Wolff Group immunity for certain war crimes, stipulating in their surrender agreement that "all cases referring to Italian citizens in connection with fighting the enemy handled by the Sicherheitspolizei will not be further investigated."[49] While it is not uncommon for courts to grant certain protections to informants willing to cooperate with legal investigations, the case of the Wolff Group is notable in that it saw an international legal body honoring the private promises of a domestic intelligence agency.

With the declassification of American World War II security files between the 1960s through the 1990s, literature emerged examining the selective support offered by U.S. intelligence officials to prosecutors of Nazi war crimes. In his comprehensive analysis of OSS imperatives and the provision of evidence at the Nuremberg Trials, Michael Salter cautions that scholarship must avoid focusing narrowly on the perspective of either intelligence studies or international criminal law, and that events must be reconstructed and analyzed

43. Michael Salter, Nazi War Crimes, U.S. Intelligence and Selective Prosecution at Nuremberg 125 (2007), https://doi.org/10.4324/9780203945100.
44. *Id.*
45. *Id.*
46. *Id.* at 109–243.
47. *Id.* at 89–108.
48. *Id.* at 26.
49. *Id.* at 13.

under the wider context of relational changes between intelligence agencies and prosecutors.[50]

The legal import of relationship management with U.S. intelligence next emerged decades later at the ICTY (1994) and the ICC (2002). As a result, since Nuremberg, the status of U.S. intelligence in relation to international criminal justice has been exceptional in two senses. First, its agencies and nationals remain immune from international prosecution, and in protecting this immunity the U.S. has sought to limit the jurisdiction of international criminal justice. Circularly, American exceptionalism is cited as justification for this immunity: against all odds, American detractors of ICC jurisdiction describe the U.S. as a city upon a hill with respect to human rights practices to argue against international accountability. Second, because U.S. intelligence services have the ability to be exceptionally helpful to prosecutorial efforts, the U.S. is poised to provide unparalleled assistance to judicial processes while shaping the conditions of such collaboration.

Accessing U.S. Intelligence at the International Criminal Tribunal for the Former Yugoslavia

That the ICTY is understood as an inheritor of Nuremberg's legacy has been one avenue for its legitimation.[51] The tribunal derived its mandate and mechanism of justice from these 1946 trials, and, like Nuremberg, the ICTY had a powerful proponent in the United States. Author and Holocaust survivor Elie Wiesel prompted U.S. Secretary of State Lawrence Eagleburger to suggest putting Serbian politicians on international trial in 1992.[52] Following the adoption of Resolution 808 by the Security Council in 1993, which led to the creation of the ICTY, U.S. Ambassador to the U.N. Madeleine Albright declared the Nuremberg principles "reaffirmed."[53] The success and timing of indictments and convictions which followed appear directly correlated with U.S. support.

The ICTY's earliest defendants were chosen because they were "low-hanging fruit," such as notoriously brutal prison camp guards and war criminals without command responsibility.[54] Eventually, Western spy agencies led a massive manhunt to track down more significant indictments that were crucial to the later successes of the tribunal. Aid in the form of intelligence disclosures arrived late: while the ICTY's precursor (the U.N. Commission of Experts on War Crimes in Bosnia) was permitted to inspect U.S. imagery intelligence (IMINT) of a massacre in Brčko in 1993, it was prevented from publicizing,

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50. *Id*. at 8.

51. Michael Bazyler, *Nuremberg's Legacy: The U.N. Tribunals for Yugoslavia and Rwanda and the International Criminal Court*, *in* Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World 236 (2016), https://doi.org/10.1093/acprof:oso/9780195395693.003.0009.

52. Michael Salter, Nazi War Crimes, U.S. Intelligence and Selective Prosecution at Nuremberg 125 (2007), https://doi.org/10.4324/9780203945100.

53. Julian Borger, The Butcher's Trail: How the Search for Balkan War Criminals Became the World's Most Successful Manhunt (2016); S.C. Res. 808, U.N. SCOR, U.N. Doc S/RES/808, ¶ 1 (Feb. 22, 1993).

54. *Id.*

keeping, or copying this evidence due to concerns over revealing the extent of U.S. intelligence activity and the classified methods by which it had been collected.[55]

The earliest accusations of deliberate evidence-withholding were lodged at the Bush Administration. A 1992 Newsweek story discussed undisclosed evidence of the execution and imprisonment of Muslims and Croats.[56] The extent to which U.S. spy planes above Bosnia saw the events leading up to the fall of Srebrenica, as well as when and whether satellites captured photographs of troop concentrations and re-enforcements around eastern enclaves, remains contested.[57] August 10th, 1995 found U.S. Permanent U.N. Representative Madeleine Albright appearing before the Security Council with images depicting mass grave sites of Bosnian Muslim prisoners. These images, classified at the time, came from a Defense Intelligence Agency (DIA) copy of U-2 film. Albright stated that U.S. intelligence retained sharper IMINT of these same atrocities to protect their "techniques and technology."[58] Such strategic protection of sources and methods would emerge as the major problem faced by prosecutors seeking to extract this evidence.

A former State Department official who handled classified information from Bosnia during the first year of ethnic cleansing described the former Yugoslavia as "the most listened to, photographed, monitored, overheard, and intercepted entity in the history of mankind."[59] Ultimately, the disclosure of such U.S. SIGINT and IMINT was enormously significant for subsequent high-level indictments, although it is not improbable that early non-disclosure and the withholding of certain data delayed or prevented high-level prosecutions.[60] Eventually, information on Serbian military systems and the planning of ethnic cleansing flowed from the U.S. IC to the OTP, and U.S. IMINT became a central pin in the OTP's case in providing indisputable evidence of genocide.[61] Not only had U.S. satellites and reconnaissance planes picked up these images of mass graves, but the CIA was also able to pinpoint the dates on which they were created and the locations of secondary graves.[62] That such crucial information lay in the hands of the U.S. IC, as did discretion to reveal it, is emblematic of U.S. IC's exceptional ability to shape outcomes in criminal courts.

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55. Charles Lane & Thom Shanker, *Bosnia: What the CIA Didn't Tell U.S.*, N.Y. Rev. Books (May 9, 1996), https://www.nybooks.com/articles/1996/05/09/bosnia-what-the-cia-didnt-tell-us/ [https://perma.cc/JBD6-GCU4].

56. Russell Watson, *Ethnic Cleansing': Bosnia's Cry for Help*, Newsweek (Aug. 16, 1992), https://www.newsweek.com/ethnic-cleansing-198300 [https://perma.cc/83ND-APFT].

57. Cees Wiebes, Intelligence and the War in Bosnia, Stud. in Intelligence Hist. v.1., 1992–1995 (LIT Verlag, 2003).

58. *Id*.

59. Lane & Shanker, *supra* note 55.

60. Elaine Sciolino, *US Says It Is Withholding Data From War Crimes Panel*, N. Y. Times (Nov. 8, 1995), https://www.nytimes.com/1995/11/08/world/us-says-it-is-withholding-data-from-war-crimes-panel.html.

61. Ed Vulliamy & Patrick Wintour, *Hawks Smell a Tyrant's Blood*, The Guardian (May 29, 1999), https://www.theguardian.com/world/1999/may/30/edvulliamy.patrickwintour [https://perma.cc/8XMH-S8JT].

62. Allison Carnegie & Austin Carson, *Incriminating Intelligence: The Strategic Provision of Evidence in War Crimes Tribunals* (Rochester, N.Y., Oct. 24, 2018), https://doi.org/10.2139/ssrn.3272493.

The ICTY benefitted from the alignment of U.S. political will with the OTP because it was able to circumvent security and method protection concerns. Ultimately very supportive of the ICTY, the U.S. provided information to Chief Prosecutor Richard Goldstone "fairly easily on request."[63] Crane and others with a view inside the U.S. IC emphasize that the U.S. remains unmatched in its use of IMINT and SIGINT, which contextualizes both its concern over protecting its methods and its unparalleled ability to supply crucial evidence: "we are multiple levels above anybody in the world, and we watch the world entirely," he stated.[64] As scholarship reveals, access to satellite IMINT rests not only on the goodwill of technologically advanced countries, but also on their political alignment with a tribunal's goals.[65] The ICTY sought to form conditions favorable to such disclosure. The latter half of section two will return to rules of procedure and evidence at the ICTY in examining the degree to which negotiations with the U.S. IC shaped mutually acceptable standards for disclosure and reflecting on the impact of these standards for criminal prosecution. Before we delve into these procedures, the final portion of this section explores the exceptional impact that U.S. attitudes to international war crimes prosecution have had on the jurisdiction of the ICC.

Shaping and Evading the International Criminal Court

The ICC is a permanent independent judicial body with the mandate to try individuals for genocide, crimes against humanity, and war crimes. It was established through the Rome Statute, a treaty signed by 160 countries at a diplomatic conference in 1998. The U.S. was one of seven nations to initially oppose the court's creation, and American negotiators in Rome fought fiercely against many states who hoped to see the court have universal jurisdiction over these crimes. Over subsequent years, likely to safeguard American war criminals in the Bush Administration from international prosecution, the U.S. succeeded in limiting the court's scope and independence by insisting on immunity provisions as articulated in the Statute's "Article 98," which provides for states' non-surrender of nationals if they have entered into bilateral immunity agreements with the U.S. or another state.[66] In effect, this prevents the court from requiring states to surrender Americans. There is substantial evidence that to obtain this compromise and these bilateral agreements, the U.S. threatened states with sanctions and offered favorable treatment in exchange for cooperation.[67] In December 2000, U.S. President Bill Clinton signed onto the Rome Statute in a letter which cited America's duty to sustain the "moral

63. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

64. *Id*.

65. Carnegie & Carson, *supra* note 62.

66. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, entered into force July 1, 2002.

67. For more information on diplomatic cables published by Wikileaks revealing U.S. tactics at the Rome Conference, see Linda Pearson, *US War Crimes and the ICC*, *in* The WikiLeaks Files: The World According to U.S. Empire 158, 162 (2015); *see also United States Efforts to Undermine the International*

leadership" exercised at Nuremberg, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR).[68] In the same letter, Clinton raised concerns over the treaty's "significant flaws," namely its ability to exercise authority and claim jurisdiction over states regardless of whether they had ratified it. The President's stated hope was that signing would "enhance [the ability of the United States] to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC."[69] This qualified support for the court did not hold, however, and Clinton did not send his signature to Congress for ratification.[70] Ultimately, his administration surrendered to the Pentagon which had been briefing its allied military attachés on the court's threat to soldiers of the Western alliance.[71]

By then, drafters of the Rome Statute already gave in to a series of American ultimatums, such as the impractical requirement of state consent to surrender nationals to the Court.[72] Although the notion of legal exemption for American war criminals would appear even less defensible to many states after Abu Ghraib, diplomats continued to bribe, sanction, and withhold aid in order to push weaker states toward Article 98's ratification.[73] Then, in 2002, President George W. Bush's Under Secretary of State for Arms Control and International Security, John Bolton, sent a letter to U.N. Secretary General Kofi Annan formally withdrawing the U.S. from the treaty altogether.[74] The Bush Administration's escalation of ICC hostility did not end there; they went to extraordinary lengths to ensure Americans responsible for war crimes remained legally unreachable.

The American Servicemembers Protection Act (ASPA, 2002) formalized the withholding of aid to states party to the Rome Statute regardless of their Article 98 ratification status. The ASPA became known as the Hague Invasion Act for its authorization of the presidential use of "all means . . . necessary" to "protect U.S. IC military personnel and other elected and appointed officials of the U.S. IC government against criminal prosecution by an international criminal court to which the U.S. IC is not party."[75] Congress' December 2004

Criminal Court, Hum. Rts. Watch (last accessed June 8, 2023), https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm [https://perma.cc/X6CQ-WHCQ Edit].

68. U.S. Dep't of State, *President Clinton on Signing of ICC Treaty* (Rome Treaty) (last accessed May 5, 2023), https://archive.ph/5Guk5 [https://perma.cc/P8N9-93WC].

69. *Id*.

70. Charlie Savage, *Pentagon Blocks Sharing Evidence of Possible Russian War Crimes With Hague Court*, N.Y. Times (last accessed June 7, 2023), https://www.nytimes.com/2023/03/08/us/politics/pentagon-war-crimes-hague.html.

71. Geoffrey Robertson, Crimes against Humanity: The Struggle for Global Justice 348 (2002), http://archive.org/details/crimesagainsthum00robe_0 [https://perma.cc/ABX3-28E2].

72. *Id*.

73. The United States and the International Criminal Court, Human Rights Watch (Aug. 2, 2009), https://www.hrw.org/news/2022/01/09/legacy-dark-side [https://perma.cc/U4XT-5XRX]; Pearson, *supra* note 67.

74. U.S. Dep't of State, Bureau of Public Affairs, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

75. American Service-Members' Protection Act, Pub. L. 107-206 (2002) (Feb. 10, 2023), https://www.govinfo.gov/content/pkg/COMPS-3074/pdf/COMPS-3074.pdf.

Foreign Appropriations Bill also included a provision called the Nethercutt Amendment, authorizing even greater aid cuts for ICC states resisting bilateral immunity agreements. The Nethercutt Amendment threatened over fifty governments with cuts to economic support fund assistance programs and led to the withholding of aid to seven ICC state parties including allies like Poland and Jordan, with the most severe cuts to aid in Ecuador and Kenya, among others. Resistance to the ICC eased slightly under President Barack Obama and more recently under President Joe Biden after the Trump Administration had again heightened hostility. Even so, when Obama authorized the publication of Department of Justice (DOJ) memos detailing the war crimes under the Bush Administration, namely the EIT employed by the CIA amounting to torture, he also declared that prosecution need not be the avenue taken by the U.S. or any international body: "This is a time for reflection, not retribution."[76]

The position of U.S. intelligence in relation to the ICC is characterized in equal measure by unequivocal resistance to the extension of the court's jurisdiction to U.S. nationals and a powerful ability to aid select prosecution efforts. This dynamic is complicated by the fact that the same agencies that might assist in informing investigations are themselves culpable for war crimes. Following Bush's authorization of expanded CIA powers under the Patriot Act, the agency carried out interrogations at "black sites" in several states party to the Rome Statute, namely Afghanistan, Romania, Lithuania, and Poland.[77] Open-source intelligence (OSINT) on the CIA's treatment of detainees at these sites points to statute violations pursuant to the Rome Statute's articles on torture, cruel treatment, outrages on personal dignity, and sexual violence.[78] This evidence includes the authorization of "enhanced interrogation techniques" (or EIT, a euphemism for various abuses amounting to torture) signed by CIA Director George Tenet in January 2003, and declassified evidence found in letters from detainees point to conditions at Guantanamo Bay being even graver in practice than those that Tenet expressly authorized.[79] The Senate Select Committee on Intelligence's December 2014 report on the CIA detention and interrogation program corroborates these claims, based on more than six million pages of operational cables, internal memos, and other records which

76. The White House, *Statement of President Barack Obama on Release of OLC Memos* (Apr. 16, 2009), https://obamawhitehouse.archives.gov/realitycheck/node/2480 [https://perma.cc/B9TU-Y5U5].

77. Julian Elderfield, *Uncertain Future for the ICC's Investigation into the CIA Torture Program*, Just Security, https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/ [https://perma.cc/HS7X-AY3K].

78. Laura Pitter, *No More Excuses: A Roadmap to Justice for CIA Torture*, Human Rights Watch (Dec. 1, 2015), https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture [https://perma.cc/R3UW-CFQK]; International Criminal Court Pre-Trial Chamber III, Situation in the Islamic Republic of Afghanistan, 2017.

79. *The Senate Intelligence Committee's Report on the CIA's Detention and Interrogation Program,* Washington Post, https://www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/document/; *see also* Letta Tayler & Elisa Epstein, *The Costs of Unlawful U.S. Detentions and Interrogations Post-9/11,* Human Rights Watch (Jan. 9, 2022), https://www.hrw.org/news/2022/01/09/legacy-dark-side [https://perma.cc/6EP3-DPU9].

go into forensic detail about the horrors of the EIT torture program.[80] Judgements at the European Court of Human Rights also conclude beyond reasonable doubt that there was "a violation of the substantive aspect of Article 3 of the Convention [the prohibition of torture]."[81] Yet, the ICC has refrained from serious attempts at prosecuting these crimes. In 2006, ICC prosecution did engage in preliminary examinations of black sites and of Afghanistan military and intelligence personnel, an effort which was met with great resistance from the United States, garnering unspecified threats of "retaliation."[82] Given the ICC's limited investigative powers, these probes were considerably handicapped by a dearth of intelligence disclosures. Under President Trump, the ICC's top prosecutor again attempted to investigate torture of detainees, resulting in U.S. sanctions against ICC personnel and accusations of corruption lodged by Secretary of State Mike Pompeo.[83] In his first term, President Trump repeatedly threatened to block investigations by the ICC into conduct of U.S. and Israeli nationals in Afghanistan and Palestine; he revoked the ICC prosecutor's visa in 2019 and froze her assets in retaliation for what was then a potential investigation in Afghanistan.[84]

In 2021, ICC prosecutor Karim Khan decided to de-prioritize the ICC's (still "preliminary") investigation into the CIA treatment at Abu Ghraib while resuming investigation into the Taliban and Islamic states.[85] Critics argue the decision fails to stand up to scrutiny given the plethora of damning evidence and the fact that the OTP cited the relative gravity of the alleged crimes as one reason for the de-prioritization.[86] Reports have cited U.S. efforts to "derail" the investigation finally coming to fruition, and others were alarmed by the word choice of Khan's announcement to focus on "terrorist activities of the Islamic State," as terrorism is neither defined by international law nor cited in the Rome Statute.[87] Secondary explanations cited by the court also appear plausible: the "political climate" surrounding the probe and the dim prospects of

80. S. Rep. No. 113-288 (2014).

81. M.C. v. Poland, App. No. 23692/09, holding (Mar. 3, 2015), https://hudoc.echr.coe.int/eng?i=001-152625.

82. International Criminal Court Office of the Prosecutor, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan* (Nov. 20, 2017), https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation; *Factsheet: U.S. Sanctions on the International Criminal Court*, Ctr. for Const. Rts., (Apr. 2, 2021), https://ccrjustice.org/factsheet-us-sanctions-international-criminal-court [https://perma.cc/9VYW-NFMN].

83. *Factsheet: U.S. Sanctions on the International Criminal Court*, *supra* note 82.

84. *Id*.

85. International Criminal Court Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for an Expedited Order under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan* (Sep. 27, 2021), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application.

86. Andrew Hilland & Catherine Gilfedder, *The International Criminal Court and Afghanistan*, Just Sec. (Sep. 3, 2021), https://www.justsecurity.org/78080/the-international-criminal-court-and-afghanistan/ [https://perma.cc/2QNH-AR9S].

87. Alice Speri, *How the U.S. Derailed an Effort to Prosecute Its Crimes in Afghanistan*, The Intercept (Oct. 5, 2021), https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/ [https://perma.cc/LJ2H-FD2P].

the investigation bringing the U.S. to justice.[88] Former DIA Assistant General Counsel David Crane corroborated the view that this de-prioritization was a practical and political decision by the ICC prosecutor, who believed it would have been too distracting to take on the U.S. IC and the coalition of the willing which included the United Kingdom, a great supporter of the ICC.[89] At the time, jurisprudence lacked clarity in ways which have since been corrected. For instance, the legal concept of aggression had not been fleshed out with both a definition and a procedure to prosecute.[90]

As section four addresses in depth, the growing potential of the ICC to prosecute the crime of aggression and the clear culpability of the U.S. for this and other crimes in Iraq and Afghanistan are factors informing the resistance the court faces from the U.S. DOD. With this circumstance in mind, it is useful to summarize the impact of U.S. IC interests on the imperatives and capacities of international prosecution efforts. The basis for U.S. intelligence exceptionalism in international judicial processes derives from twentieth century norms (reinforced and reinvented in the 1990s after finding form at the Nuremberg Trials). Moreover, this section's preliminary examination of the weight and influence of U.S. intelligence at Nuremberg and the ICTY illustrates that the value American intelligence services add to prosecution materials can vastly impact court outcomes and by extension, have consequences for the successes and failures of international justice. Prosecutorial exemptions made for the U.S. and its intelligence services at the ICC are best understood as part and parcel of the broader nature of U.S. engagements with mechanisms of international law. This is especially true for exemptions made in service of contingent cooperation with the justice system when these exemptions shape U.S. IC intelligence-sharing practices.

II. Disclosure & Rules of Procedure for Intelligence-as-Evidence

"The United States was always my problem nation. Others were incredibly supportive related to information-sharing, but the United States was always a problem child."

— David Crane, founding Chief Prosecutor of the SCSL and former Assistance General Counsel to the U.S. DIA[91]

The following section examines how U.S. intelligence attitudes and obligations shaped the terms and conditions of evidentiary disclosure in relation to the OTP. It focuses on (i) internal declassification protocols and intelligence-sharing

88. *Id.*

89. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

90. *Id.*

91. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

standards set by the U.S. IC and (ii) the strategic reformulation of ICC and ad hoc tribunal RPE to quell U.S. IC security and method protection concerns regarding confidentiality and disclosure to the defense. Methodologically, I have scanned and compared the text of several dozen re-issued (amended) ICTY RPE, as well as RPE at the later STL, SCSL, ICTR, ICTY, and ICC, to identify small but significant changes to disclosure provisions. The section concludes with a reflection on the degree to which mutually acceptable standards can overcome lack of U.S. political will for intelligence-sharing.

Inside American Disclosure Decisions & Declassification Protocols

U.S. intelligence-sharing protocols are best understood as inherently conservative, which scholars attribute to the nature of intelligence operations: classified information is seen as a form of currency that depreciates the wider it is circulated.[92] Numerous protocols restrict U.S. agencies from intelligence-sharing, but no counterbalancing international or domestic obligations require disclosure to foreign or international entities, even if the U.S. government has wholly chosen to support an international tribunal. The U.S. IC is bound by law, policy, and regulation to protect the information it acquires and manages.[93] Factors informing intelligence disclosure decisions include classification level, the basis for this classification, which officials within government are currently allowed to access information, and whether statutory or regulatory avenues for declassification are available.[94] Nonetheless, states can be driven to disclose evidence for strategic, political, or altruistic reasons. Only relatively recently has the U.S.'s approach to weighing such considerations been formalized. In 1995, coinciding with his support for the ICTY, President Bill Clinton launched a review of the government's secrecy and declassification procedures and signed an executive order to overhaul the treatment of national security information, establishing an interagency review panel with the power to override agency decisions about classification.[95] The Department of Defense (DOD) also established its own Office of Intelligence Review to coordinate activities of the DOD with agencies such as the NSA, NRO, and DIA, responding to Congressional concerns about the Inspector General's oversight of DOD organizations within the intelligence community.[96]

Intelligence declassification is an ongoing process distinct from protocols for reviewing prosecutors' disclosure requests. In the latter case, procedurally, various components of the U.S. IC and the DOD meet to consider prosecution requests for materials in a process led by I&R, the State Department's

92. Interview with Simon Chesterman, David Marshall Professor & Vice Provost, National University of Singapore, via Zoom (Apr. 20, 2023).

93. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

94. *Id*.

95. Kate Doyle, *US Secrecy and Lies*, 5 Foreign Policy in Focus 1, 1 (2000).

96. U.S. Senate Select Comm. on Intelligence, Publications (May 7, 1998), https://www.intelligence.senate.gov/publications/report-accompany-s-2052-intelligence-authorization-act-fiscal-year-1999-may-7-1998.

intelligence component.[97] A controls officer is designated, and the U.S. IC convenes to consider its response to the matter requested.[98] Through this interagency review, information is accumulated and shared with the State Department to the extent it involves its compartmentalized need for intelligence, and ultimately may be passed on to prosecution in full or with various conditions attached.[99] According to Rapp, this customary review has not deviated significantly from the procedure originally developed in 1996 when the specific terms of the ICTY's non-disclosure provisions—in particular, Rule 70(B)—were negotiated between the tribunal's OTP and the CIA Director at the time.[100]

As Director of the Office of Intelligence Review, David Crane oversaw 80% of the U.S. IC for the Secretary of Defense before going on to serve as SCSL Chief Prosecutor.[101] It is his view that two of the factors determinative of U.S. IC disclosure decisions are political will and the protection of sources and methods. Politically, the decision to disclose intelligence is informed by the President's or declassification authority's perspective on the national interest or on the potential geopolitical outcome of prosecution efforts.[102] Strategically, intelligence professionals evaluate whether revealing the use of classified technology might undermine U.S. relationships. The U.S. IC considers its level of trust in a given court's ability to protect intelligence acquisition methods and its ability to safeguard the identities of informants to the extent necessary. Sources and methods protection is of paramount importance to U.S. intelligence interests, so it can and does take precedence over securing convictions: "Sometimes [the U.S.] will even allow someone to go free, because it's so important not to let the world know we have this ability," stated Crane. "We don't want to let the world know what we can do."[103] Within the federal government, as section four discusses, the DOD is consistently most reluctant to disclose information to tribunals because it is generally hostile to the international prosecution of war crimes. This attitude has followed the DOD from ad hocs such as in Yugoslavia and Sierra Leone to the ICC, Crane confirmed.[104]

The IC's evaluation of these interests and sensitivities may be responsive to legislative action. The Dodd Amendment altered the ASPA in 2010 to qualify assistance to the ICC in support of bringing justice to foreign nationals, making particular reference to "Saddam Hussein, Slobodan Milosovic [sic], Osama bin Laden, other members of Al Queda [sic], leaders of Islamic Jihad,

97. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (May 5, 2023).

98. *Id.*

99. *Id.*

100. *Id.*; Rules of Procedure and Evidence, 1994 I.C.T.Y. Rev. 50, 70(B) (July 8, 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [https://perma.cc/U3AJ-A97G].

101. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Couns. to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

102. *Id.*

103. *Id.*

104. *Id.*

and other foreign nationals accused of genocide, war crimes or crimes against humanity."[105] Opening doors to unprecedented U.S. cooperation with the ICC, this amendment was not a departure from the nation's approach to weighing intelligence-sharing decisions based on interagency calculus of political and security interests. Crane's understanding of these same procedures and priorities informed his investigatory and prosecutorial strategy as founding Chief Prosecutor at the SCSL.

Contextualizing Resistance to Disclosure

The U.S. government has sometimes resisted cooperation with international prosecutions not to service national security interests, but for apparently political, reputational, or even personal reasons. Such decisions raise broader concerns about the role of U.S. foreign policy in international legal proceedings. The Bush Administration's attitude toward the Special Court for Sierra Leone (SCSL) serves as a case study for this type of selective cooperation, particularly while prosecution was under the leadership of former Assistant General Counsel to the Defense Intelligence Agency David Crane.

Crane was the first American since Justice Robert Jackson in 1945 to be named Chief Prosecutor of an international war crimes tribunal. Because of his background, he stepped into his role at the SCSL with direct knowledge of the range and extent of the international community's intelligence on Sierra Leone and West Africa, including classified U.S. intelligence.[106] His clearance level at the DIA had given him access to "sensitive compartmented information" which he had been able to reference in his preparations before leaving the U.S. government for West Africa.[107] Although he could not discuss this information publicly or use it as evidence without securing permission, it aided his thinking and required him to be cautious in discussions with his U.N. colleagues given its confidentiality.[108] Ultimately, his work as chief prosecutor would be guided less by this classified knowledge than by his evolved understanding of U.S. attitudes and mechanisms of intelligence-sharing.

Initially, particularly before he secured the SCSL's indictment of Liberian President Charles Taylor in 2003, Crane believed his connections with the U.S. IC might aid him in accessing the information he needed to build his case. U.S. foreign policy at the time appeared amenable to cooperation: during Crane's tenure at the DIA, the U.S. had made itself helpful to his colleague and friend, ICTY Chief Prosecutor Richard Goldstone.[109] It had also supplied information to the ICTR in recent years and had even facilitated the creation

105. Floriane Lavaud, Ashika Singh & Isabelle Glimcher, *The American Servicemembers' Protection Act and the Dodd Amendment: Shaping United States Engagement with the ICC* (Part II), Just Sec. (Feb. 14, 2023), https://www.justsecurity.org/85121/the-american-servicemembers-protection-act-and-the-dodd-amendment-shaping-united-states-engagement-with-the-icc-part-ii/ [https://perma.cc/T6X5-RL2C].

106. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Couns. to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

107. *Id.*

108. *Id.*

109. *Id.*

of the SCSL.[110] By the time Crane arrived in West Africa, however, the tide was changing. Secretary of State John Bolton had just pulled the U.S. out of the Rome Statute, hostility toward international justice was high, and the IC's disclosure standards had "tightened."[111] As his office repeatedly submitted disclosure requests to the U.S. to no avail, Crane came to realize these efforts would not be rewarded.

Knowing first-hand that the intelligence that the U.S. was reluctant to disclose did not amount to a smoking gun, Crane had already chosen to direct his investigation elsewhere.[112] Other nations' intelligence services, particularly MI6, were "incredibly supportive," and he also started his own intelligence network within the SCSL which succeeded in penetrating the inner circles of several governments including that of President Taylor.[113] Crane attributes the lack of cooperation he received from the U.S. IC to the nation's attitude at the time toward international criminal prosecution in general and toward the Taylor indictment in particular.[114] Taylor, who became the first sitting president in history to be indicted by an international tribunal, had been a former U.S. intelligence asset during his rise as a dictator in the 1980s.[115] "It was my policy not to ask the United States for anything, because I knew that I wasn't going to get it," Crane stated of his prosecutorial strategy. "It turned out I didn't need it anyway."[116]

Following Taylor's indictment, any prospect of receiving U.S. disclosures had evaporated, and the SCSL's relationship with the U.S. became strained, Crane said.[117] Taylor was indicted in the summer of 2003 during a budgetary cycle in which Congress had appropriated $12.5 million to the SCSL.[118] Crane recalls that as the SCSL was getting close to running out of money, Congress began slow-rolling this appropriated spending. According to Crane, this act was a direct response to the indictment: "the anger in the National Security Council at the White House was pretty extreme, as well as the Africa Bureau in the State Department."[119] Others reported that the CIA did provide some

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. Joshua Keating, *US Confirms That Spy Agencies Worked with Ex-Warlord Charles Taylor {Updated}*, Foreign Policy (Jan. 18, 2012), https://foreignpolicy.com/2012/01/18/u-s-confirms-that-spy-agencies-worked-with-ex-warlord-charles-taylor-updated/ [https://perma.cc/E4ZS-AEZ9]. While the Boston Globe has issued an update that they "over-reached" and never received full confirmation of this story, it is also corroborated by Charles Taylor's SCSL testimony, found in Marlise Simons, *Ex-Leader of Liberia Cites C.I.A. in Jailbreak*, N.Y. Times (July 18, 2009), https://www.nytimes.com/2009/07/18/world/africa/18taylor.html [https://perma.cc/T5NJ-NKZR].
116. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Couns. to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).
117. *Id.*
118. H.R. 2673, 108th Cong. (2003), https://www.congress.gov/bill/108th-congress/house-bill/2673.
119. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Couns. to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

information to the court, but that the extent of its intelligence was not particularly useful.[120]

In addition, Muammar Gaddafi went unindicted as a co-conspirator of Charles Taylor due to insufficient evidence disclosed to the OTP.[121] This raises questions as to whether the U.S. refrained from sharing intelligence on his culpability: in 2003, the U.S. was working to normalize diplomatic relations with Libya, a state which presumably would have been an intelligence priority given WMD concerns.[122] According to Crane, information related to Gaddafi's culpability came from witnesses familiar with his direct order to various actors to invade Sierra Leone; those actors were Blaise Compaoré of Burkina Faso, Foday Sankoh of Sierra Leone, and Charles Taylor of Liberia.[123]

Stephen Rapp, who headed the SCSL OTP from 2007 to 2009 following his term as ICTR Chief Prosecutor (2001–2007) and before working for the U.S. State Department, recalls—along with Crane—that the U.S. did not have much information to share on Sierra Leone.[124] Rapp's understanding in both Sierra Leone and Rwanda was that the U.S. IC had not placed a high priority on gathering information in either context, deeming both conflicts far outside primary areas of U.S. interest.[125] Rwanda and Sierra Leone "were not places where the U.S. put a lot of intelligence assets to work. There were requests that we made at the Rwanda tribunal to the U.S. about information that was reported to have been gathered, and the answer was always 'we don't have it.' I don't recall instances of the U.S. providing anything of value in a Rwandan context."[126] In sum, it seems that the SCSL and ICTR did not draw on U.S. intelligence as heavily as did other ad hoc tribunals, despite disclosure provisions including the changes made to the ICTY's RPE Rule 70 in response to U.S. concerns. The section that follows considers how the ICTY's rules on disclosure were reformulated to maximize cooperation with U.S. intelligence.

Negotiations at the International Criminal Tribunal for the former Yugoslavia

Procedure at the ICTY was groundbreaking in numerous ways. For one thing, the tribunal's statute gave its plenary of judges discretion over an evolving set of RPE. This was novel for international justice in its own right and reflected the dearth in international case law available to the chambers

120. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

121. *Charles Taylor Defense: Why Is Gadhafi Not on Trial?*, ABC News (Mar. 25, 2025), https://abcnews.go.com/Blotter/charles-taylor-defense-gadhafi-trial-war-crimes/story?id=13094284.

122. U.S. Dep't of State, U.S.-Libyan Relations, 1786–2008: A Chronology, U.S. Dep't of State (2008), https://2001-2009.state.gov/p/nea/ci/ly/109175.htm.

123. Email from David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency to [recipient] (June 5, 2023) (on file with author).

124. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

125. *Id*.

126. *Id*.

for use as precedent.[127] The 1946 military tribunals at Nuremberg and Tokyo, for instance, had not extensively articulated their RPE, leaving many aspects up to circumstantial discretion.[128] Both considered defendants' right to the production of documents on a case-by-case basis, requiring that they apply for such access in writing to the tribunal. (These courts also left admissibility decisions up to the tribunal president's assessment of relevance and probative value.)[129] Justice Radhabinod Pal criticized the Tokyo charter's RPE for having discarded all national systems devised from "litigious experience and tradition," leaving judges in the challenging position of guiding themselves "independently."[130] The leniency and flexibility of the ICTY and ICTR initially followed in this tradition with deliberately sparse RPE, particularly on evidentiary admissibility rules. Since ongoing armed conflict would limit the ICTY's access to documentary evidence, it was submitted during RPE drafting that the tribunal's admissibility criteria ought not to be "too strict" and that "the inclusion of technical rules would only encumber the judicial process."[131] As the tribunal began its work, various stipulations were found necessary, and the document was routinely amended. Valorizing accounts of the RPE amendment process as a new code of procedure for not just the ICTY but for international law did not intend to describe the quiet but significant impact of U.S. intelligence cooperation on international criminal procedure at the ICTY and beyond—specifically disclosure rules. By 1996, the ICTY'S RPE had undergone an evolution driven by several factors which included a series of CIA advisories on improving the court's prospects for accessing crucial U.S. intelligence.[132] Future courts took cues from the success of these negotiations, and the ICTY's RPE can thus accurately be described as including "a code of procedure" for navigating the range of interaction between informed states and international tribunals.

The solutions and trust emerging from these terms continue to underpin disclosure procedure and have been reproduced in service of other international

127. Gideon Boas, *Admissibility of Evidence under the Rules of Procedure and Evidence of the ICTY: Development of the 'Flexibility Principle,' in* Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald 263–74 (Richard May et al. eds., 2001).

128. Charter of the International Military Tribunal for the Far East: 19 January 1946 (as Amended on 26 April 1946), *in* 2 Substantive and Procedural Aspects of International Criminal Law 61–67 Art. 13 ¶ a (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Bartlomiej Krzan, *Admissibility of Evidence and International Criminal Justice*, 7 Revista Brasileira de Direito Processual Penal 161, 164 (2021), https://doi.org/10.22197/rbdpp.v7i1.492.

129. Krzan, *supra* note 128, at 164.

130. *Id.*

131. Prosecutor v. Delalić et al., Case No. IT-96-21-PT, Decision on the Prosecution's Motion for the Redaction of the Public Record ¶ 41 (Int'l Crim. Trib. For the Former Yugoslavia, June 5, 1997), https://www.icty.org/x/cases/mucic/tdec/en/60605MS2.htm [https://perma.cc/7CE8-JV39]. *See also* Prosecutor v. Simić, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness ¶ 40 (Int'l Crim. Trib. For the Former Yugoslavia, July 27, 1999), https://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm [https://perma.cc/L9KJ-FJ6X] ("In general terms, the Rules establish a regime for the admission of evidence which is wide and liberal.").

132. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

prosecution efforts. The ICTY statute has always expected broad cooperation and judicial assistance from states, such as compliance with any requests "including but not limited to" producing evidence, taking testimony, servicing documents, identifying or locating individuals, and arresting, detaining, or transferring the accused.[133] Rapp, whose State Department background entails direct knowledge of procedures by which the U.S. considers such requests, attests that evaluation on the part of U.S. intelligence continues to rely on the ICTY's amended RPE. According to Rapp, the CIA and the ICTY's OTP (headed by Richard Goldstone) renegotiated procedure on non-disclosure in 1996; the legacy of these negotiations extended to other tribunals.[134] In the absence of public records on the 1996 negotiations, former prosecutors' accounts contextualize the ICTY's 49 public-access revised RPE documents between 1994 and 2013.

The ICTY's original RPE as adopted in February 1994 deemed very few prosecutorial matters "not subject to disclosure or notification."[135] The court's disclosure standards, articulated in Rules 53–70, referenced comprehensive reciprocal transparency obligations and made mention of neither states as informants nor national security exemptions. Rule 70, at the time of its adoption, existed only to exclude a limited set of internal materials from mandated disclosure to the Defense:

> Rule 70: Matters not Subject to Disclosure *(Adopted 11 Feb 1994)*
>
> Notwithstanding the provisions of Rules 66 and 67 [to disclose all potential evidence to the defence], reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.[136]

In the years since, however, several dozen rounds of amendments have been made to the ICTY's RPE regarding disclosure of evidence, several of which reference national security, state interests, the protection of sources, and confidentiality.[137] Specifically, Rapp referenced conversations between the OTP and the Director of the CIA to negotiate the inclusion of Rule 70(B), amending

133. Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 29, May 25, 1993, U.N. Doc. S/25704 (as amended May 17, 2002), https://www.refworld.org/legal/constinstr/unsc/1993/en/30367.

134. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023) (referencing memory of conversation with former CIA Senior Counsel George Jameson, who declined to comment).

135. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 70 (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf. [https://perma.cc/3SAD-8GLD].

136. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, *supra* note 135, rules 44, 46, 66.

137. *Id.*

rules on non-disclosure to secure discretion for the informant (i.e., state intelligence services). The added text reads as follows:

> Rule 70(B): *(Adopted 4 Oct 1994; amended 30 Jan 1995 to mandate disclosure to the accused)*
>
> If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor *without the consent of the person or entity providing the initial information* and shall in any event not be given in evidence without prior disclosure to the accused" (emphasis added).[138]

Thus, while the original text of Rule 70 did not enable informants to withhold information, it was adjusted to give them control over further disclosure of intelligence prior to receiving major U.S. intelligence cooperation.[139] ICTY Chief Prosecutor Louise Arbour, who succeeded Goldstone, called Rule 70 "the only mechanism by which we can have access to military intelligence by any source."[140] Several more modifications to Rule 70 followed the 70(B) amendment and appear similarly designed to ease concerns about further disclosure of covert intelligence shared with the court. For instance, amendments 70(C) and 70(D), adopted 25 July 1997, restrict the ability of the Chamber and OTP to call informants as witnesses and protect their right to decline to respond to questions on confidentiality grounds.[141]

A host of other changes made to the ICTY's procedural rules in this period are similarly amenable to the expressed desire of the IC to protect sources and methods, although it must be noted that their origins and rationale cannot be presumed and that any finite conclusions drawn about the role of U.S. intelligence negotiations would be speculative. Nonetheless, I present several of these amendments below given that their timing and subject matter is suggestive and compatible with the concerns which the CIA brought to Goldstone in 1996. Strikethroughs signify text originally present in the ICTY's RPE in 1994 which has since been removed, while amendments made since are bolded with the date of implementation italicized.[142] Rule 53 concerning non-disclosure standards tellingly redirects confidentiality concerns away from indictments and toward "documents or information":

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138. *Id*. at 66–67.

139. Interview with Dan Saxon, Professor of Int'l Justice, Leiden Univ. Coll., via Zoom (May 21, 2023). Corroborated in interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

140. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 Mich. J. Int'l L. 1071, 1122 (2006).

141. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, *supra* note 135, rules 70(C) and 70(D).

142. Non-substantive amendments, such as the adoption of gender-neutral language in 1997, are excluded from this comparison, defaulting to the more updated version. Less relevant and more technical provisions are excluded for brevity.

> Rule 53: Non-disclosure ~~of Indictment~~ *(Adopted 11 Feb. 1994, amended 25 June 1996)*
>
> **(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.** *(Adopted 25 June 1996)*
>
> (B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused[.] (*Adopted in original, 11 Feb. 1994)*
>
> (C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no ~~public~~ disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is ~~in the interests of justice~~**. required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.** *(Amended 30 Jan. 1995)*
>
> **(D) Notwithstanding paragraphs (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an opportunity for securing the possible arrest of an accused from being lost.** *(Amended 4 Dec. 1998, amended 12 Apr. 2001)*[143]

Rule 53's amendments adjust disclosure standards in two ways, which are each likely to have served cooperative efforts with covert intelligence services. (A) and (C) provide recourse for the prosecution to withhold access to confidential information and documents it has received. (D) facilitates state cooperation in tracking down and detaining the accused, a major channel of cooperation between the ICTY and the intelligence services of several countries including the U.S. IC.[144] As a point of comparison, original RPE provisions on the circumstantial use of closed sessions (Rule 79) suggest that classified intelligence was not a major consideration for the RPE's original drafters: while other courts may turn to private hearings to isolate confidential evidence, this rule justifies excluding press and public to protect victims and witnesses, not sources and methods.

Measures adopted to facilitate intelligence collaboration should not be taken for evidence that the court lost sight of its independence or ceased to act

143. International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence" (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/en/documents/rules-procedure-evidence.

144. *See generally* Julian Borger, The Butcher's Trail: How the Search for Balkan War Criminals Became the World's Most Successful Manhunt (2016).

in service of its mandate. Indeed, several amendments weaken the access and discretion of states. For instance, a 1995 amendment to Rule 54 strengthened the Chamber's power to issue transfer orders of defendants. However, further additions to Rule 54 concerned orders directed at states to produce documents and formalized the prerogative of states to object to the disclosure of documents on the basis of national security:

> Rule 54 *bis (adopted 17 Nov. 1999)*
>
> (A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber.
>
> [. . .]
>
> **(F) The State, if it raises an objection [. . .] on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection [. . .] specifying the grounds of objection [and identifying appropriate protective measures including redactions].** *(Amended 12 Apr. 2001)*[145]

Rule 54 *bis* (F)'s recourse for redacting disclosed evidence on the basis of national security interests demonstrates what prosecutors have corroborated: that the origin of RPE concerning non-disclosure of evidence used by the OTP involved creating methods of gathering information and "sanitizing" it for use in court.[146]

Amendments also contend with the potential for a state to attempt to exercise its power over non-disclosure to limit defendants' access to exculpatory evidence. Rule 68 amendments have seen significant overhaul, most notably concerning disclosure under Rule 70:

> Rule 68: Disclosure of Exculpatory ~~Evidence~~ **and Other Relevant Material** *(Adopted 11 Feb. 1994; amended 30 Jan. 1995, 12 July 2001, 12 Dec. 2003, 28 July 2004)*
>
> **Subject to the provisions of Rule 70,** (i) the prosecutor shall [...] disclose to the defence ~~the existence of evidence known to the Prosecutor which in any way tends to~~ **any material which in the actual knowledge of the Prosecutor may** suggest the innocence or mitigate the guilt of the accused ~~of a crime charged in the indictment~~ **or affect the credibility of Prosecution evidence;**

145. International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence," 44–47 (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [https://perma.cc/3SAD-8GLD].

146. Interview with Simon Chesterman, David Marshall Professor & Vice Provost, Nat'l Univ. of Singapore, via Zoom (Apr. 20, 2023).

> [...]
>
> **(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70(B) and contains [exculpatory material], to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;**
>
> **(iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation [...] to disclose information in the possession of the Prosecutor, if its disclosure may [...] affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential[.]**[147]

The above text of Rule 68(iv) was reproduced in an amendment to Rule 66, extending non-disclosure based on national security to all material held by the prosecutor. Rule 66, referenced in the original text of Rule 70 on non-disclosure, originally referred to broad mandates for "reciprocal disclosure" of evidence between the Prosecution and Defense, which, as this analysis demonstrates, have been weakened significantly by informants' confidentiality concerns.[148] As the ICTY's first chief prosecutor Richard Goldstone has noted, the fact that the U.S. did not wish to see this information produced in open court posed a real dilemma. As the work of the ICTY moved from the investigation to trial phase, U.S. intelligence disclosed confidentially became less useful, as it had been made available on a "leads only" basis under Rule 70 and would not be permitted for use in trial.[149]

ICTY trials served as testing grounds for these rules' effect on U.S. intelligence-sharing and the securing of convictions. During the trial of Serbian defendant and war criminal Radovan Karadžić, for instance, Karadžić's defense counsel issued nine motions requesting access to confidential statements of witness testimony which were protected under Rule 70 and denied by U.S. intelligence sources.[150] In particular, the Karadžić defense sought to enforce its right to access allegedly exculpatory evidence likely in the control of U.S. intelligence, such as an alleged immunity promise made in exchange for Karadžić's support of the Dayton Accords.[151] The U.S. denied having made this promise

147. International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence" (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/en/documents/rules-procedure-evidence.

148. *Id*. at 63.

149. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

150. "Decision on the Accused's Ninth Motion for Order Pursuant to Rule 70 (United States of America)," 2014. For a complete list of Karadzic's motions to this effect, see "Search Results | International Criminal Tribunal for the Former Yugoslavia," accessed June 1, 2023, https://www.icty.org/en/search-results?as_q=karadzic+rule+70+motion+USA [https://perma.cc/69FV-9C88].

151. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023); *see also Karadzic Claims Evidence of Immunity Deal with Holbrooke*, FRANCE 24 (May 25, 2009), https://www.france24.com/en/20090525-karadzic-claims-evidence-immunity-deal-with-holbrooke-.

despite Karadžić's insistence, while the trial chamber ruled that in any case, it would not be bound to honor such an agreement.[152] Today, his former counsel Kevin Heller believes that "it probably does exist, but will never see the light of day."[153]

Conversely, the U.S. also demonstrated a willingness to circumstantially waive its protections under Rule 70(B). It did so in relation to a 2003 testimony from former NATO commander Gen. Wesley Clark which proved the most instrumental piece of evidence linking Milošević to the knowledge and intention of genocide in Srebrenica.[154] This decision to waive the confidentiality aspects of Rule 70(B) U.S. made Clark's testimony public without any modifications from the Bush Administration.[155]

In many respects, the ICTY prosecution benefited from the fact that the U.S. had an interest in sharing information about alleged war crimes—investigation and prosecution served their ends by delegitimizing certain actors. Later tribunals and the ICC adopted or reformulated several of the ICTY's original and amended provisions. These rules, and their effect on the ability of courts in garnering cooperation from U.S. intelligence, are assessed in the following section.

The Procedural Evolution of Intelligence Disclosure at International Tribunals & the ICC

With its apparent success at increasing U.S. intelligence cooperation with investigations, ICTY rule 70(B) allowing for state discretion over the use of shared intelligence was incorporated for use by several later courts. The ICTR and SCSL's RPE use almost the same text, with the SCSL also providing for the use of closed sessions expressly in the interest of national security.[156] However, the SCSL appears to have defaulted to the mandatory disclosure of exculpatory evidence from the ICTY's original RPE, excluding its later national security exemptions. The ICTR's RPE also does not explicitly mention national security concerns, possibly because it was drafted prior to the Rome Statute or because prosecutors did not have as much to glean from U.S. intelligence.[157] Whether the absence of such provisions informed the reported lack of useful evidence submitted by U.S. intelligence to these two courts is a matter worthy

152. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).

153. *Id.*

154. *Clark Says Milosevic Knew of Massacre*, NBC News (Dec. 18, 2003), https://www.nbcnews.com/id/wbna3747227.

155. *Transcript for the Testimony of General Wesley Clark Available Now on the ICTY Website | International Criminal Tribunal for the Former Yugoslavia* (last accessed June 1, 2023), https://www.icty.org/en/content/general-wesley-clark [https://perma.cc/X274-PAVH].

156. Special Court for Sierra Leone, "Rules of Procedure and Evidence" (4 Dec. 2013, Rev. 7, 16 Dec. 2021), http://www.rscsl.org/Documents/RSCSL-Rules.pdf [https://perma.cc/EW69-WU2F]. *See also* International Criminal Tribunal for Rwanda, "Rules of Procedure and Evidence" (12 Jan. 1996), http://www.rscsl.org/Documents/RPE.pdf [https://perma.cc/EMV4-MX7T].

157. *Id.* (demonstrating the absence of any reference to national security concerns).

of further study. The International Residual Mechanism for Criminal Tribunals (IRMCT), which houses residual ICTY and ICTR cases, does use such provisions.[158] Its RPE give informed states an avenue for objection to disclosure on the grounds that it would prejudice national security interests, merely requiring them to identify, "as far as possible," the basis for this claim, and much like the ICTY and Rome Statute gives avenues for requesting protective measures such as the submission of redacted documents or an order that no transcripts be made and no records kept.[159] Rules interpreted similarly to the ICTY's 70(B) are also found in RPE of the Special Tribunal for Lebanon (STL) established in 2009 and the ICC's 1998 Rome Statute, indicative of their strategic desire to address the confidentiality concerns of informants. As the next few paragraphs will elaborate, several provisions which facilitate access to classified intelligence are found in procedural rules at the ICC and STL.

The process of incorporating these ICTY rules at ad hoc tribunals was "generally uniformly following the successful ICC process," which had increased the level of assistance the U.S. offered the ICC's first chief prosecutor, Luis Gabriel Moreno Ocampo, after the implementation of the Dodd Amendment in 2010.[160] While the Rome Statute reproduced the ICTY's original requirements for the disclosure of exculpatory evidence, it also stipulated flexibly that in the case of doubt as to the rule's application, "the court shall decide."[161] This discretion for non-disclosure of confidential exculpatory evidence at the ICC has been criticized since the court's first trial, *Lubanga* in 2008, in which the OTP was accused of violating the condition of using confidential evidence on a leads-only basis. The Appeals Chamber found that failure to supply the defense with this evidence constituted a threat to fair trial. Ultimately, undisclosed evidence was submitted to the Chamber for review, and an agreement was established that the safety of confidential information providers could be ensured and that the evidence could be disclosed.

The Rome Statute includes several direct references to states' national security interests which, in addition to taking cues from the ICTY, may also have been influenced by negotiations with American delegates at the Rome Conference.[162] I will summarize several of these to illustrate the extent to which the ICC's rules appear designed to maximize intelligence cooperation by pushing for intelligence-sharing and giving recourse for the protection of intelligence sources and methods. First, the ICC reserves a state party's ability to deny a

158. International Residual Mechanism for Criminal Tribunals, "Rules of Procedure and Evidence," Rule 73 (9 Dec. 2020), https://www.irmct.org/sites/default/files/documents/MICT-1-amend-7-en.pdf [https://perma.cc/XUL6-4CQG].

159. International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence" (11 Feb. 1994, Rev. 50, 8 July 2015), Rule 54 bis, https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [https://perma.cc/3SAD-8GLD].

160. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023)

161. Rome Statute, *supra* note 66, Art. 67 ¶ 2.

162. Geoffrey Robertson, Crimes against Humanity : The Struggle for Global Justice 370 (New York New Press, 2002), http://archive.org/details/crimesagainsthum00robe_0 [https://perma.cc/7V25-73EY].

request for assistance "only if" the request concerns the "production of any documents or disclosure of evidence which relates to its national security."[163] Note that nonparty states are not protected under this rule, nor is there any ability to mandate their cooperation. Such national security exemptions do, however, take a hard line aimed at pushing state parties to disclose as much information as possible. Like the ICTY's RPE, it posits *in camera* and *ex parte* disclosure of evidence as potential means to reach an agreement with informed states. Taking an ICTY case as precedent (*Prosecutor v. Blaškić*), the statute urges for "cooperative means" to bring about negotiations to reach a resolution between the court and an informed state.[164] Barring the success of this cooperation, a state party's refusal to share intelligence must be accompanied by "specific reasons" why supplying it would prejudice its national security interests.[165] If the state submits such a refusal but the evidence in question is nonetheless deemed crucial for the establishment of guilt or innocence, the matter may be referred to the Assembly of State Parties; in this way, the ICC lacks powers to coerce intelligence disclosure but can pass the issue on to the U.N. Security Council.[166]

The STL, whose establishment was supported by the U.S. alongside the U.N. following the 2005 assassination of former Lebanese Prime Minister Rafiq Hariri, represents an unusual case for intelligence engagement in international prosecution. The degree to which intelligence advisories shaped the STL's RPE is not publicly known, but certain aspects of its disclosure provisions go further than other courts' in the protection of national security interests, sources, and methods. For instance, it is the only court other than the SCSL which provides for the use of closed court sessions in the interest of states' national security interests, and anonymous witnesses may also be called upon if their identity is under national security protection.[167] Its disclosure of indictment rules are similar to those of the ICTY, and STL Rule 53 expands the circumstances under which an indictment is permitted to be disclosed to states.[168] Where the ICTY's amendments permitted the disclosure of an indictment to a state "to prevent an opportunity for securing the possible arrest of an accused from being lost," the STL articulates a more general necessity "for the

163. Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/9 Art. 93 ¶ 2.

164. *Id*. Art. 72 ¶ 2. For a discussion of Blaškić, see Chesterman, *supra* note 1, at 1123.

165. *Id*. Art. 72 ¶ 5.

166. *Id*. Art. 72 ¶ 7.

167. Special Tribunal for Lebanon, "Rules of Procedure and Evidence" (Rev. 7, 9 December 2020), https://www.irmct.org/sites/default/files/documents/MICT-1-amend-7-en.pdf [https://perma.cc/4ME7-9MHS]; *Id*. at Rule 137 (closed court sessions); *see also* Special Court for Sierra Leone, *supra* note 156, Rule 79 (*same*); Special Tribunal for Lebanon, *supra* note 167, Rule 93 (*anonymous witnesses*).

168. Special Tribunal for Lebanon, "Rules of Procedure and Evidence" (Rev. 7, 9 December 2020), https://www.irmct.org/sites/default/files/documents/MICT-1-amend-7-en.pdf.

purpose of an investigation or prosecution" as sufficient.[169] Such alterations suggest that accommodating interested parties with information could be offered in exchange for assistance with investigatory work or intelligence collaboration. The STL's comparatively thorough rules on non-disclosure and national security reflect the degree to which it foresaw aid from intelligence services.

The ICTY provided successor courts with a blueprint not only for procedural rules on non-disclosure of evidence and national security exemptions, but also for their amendment. According to current prosecutors, the internal process for amending RPE at most courts is as follows: the OTP may recommend to a plenary of judges that a particular rule should be adjusted for an array of reasons, including to maximize intelligence cooperation and provide justification for the change. Judges meet annually or, in the case of residual tribunals, every two years, to determine whether such changes should be implemented.[170] The ICC's Rome Statute is unusual in its banning of amendments for seven years after its implementation, but as we have seen, this is counterbalanced by its extensive provisions on disclosure and admissibility drawn from the ICTY's successes. As section three will discuss, tribunal RPE on the admissibility of evidence may also be amended, though have been less frequently. They are, however, more broadly flexible to interpretation in ways which may be even more responsive to the need for collaboration with U.S. intelligence.

III. Integrity of Proceedings: Admissibility and Intelligence in Criminal Trials

"Various states are interested; one just has to deal with that. Similarly, in any criminal case you might have to rely on people who work for banks, are members of the mob, et cetera. Those are going to be matters that have bias, and you have the necessity of corroboration, but more information is better. More collaboration is better for people interested in knowing the truth."

— Stephen Rapp, former U.S. State Department Ambassador for Global Justice and ICTR & SCSL Chief Prosecutor[171]

Once information has been shared with a court, a novel set of considerations regarding the prosecutorial use of intelligence arises: its chambers are tasked with assessing whether to admit the disclosed material into trial as criminal evidence.[172] These legal principles that determine if evidence can be presented

169. *Compare id. with* International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence" (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [https://perma.cc/T89S-5L4A].

170. Interview with Jim Johnson, Chief Prosecutor, Residual Special Court for Sierra Leone, via Zoom (May 16, 2023).

171. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

172. *See generally* Megan A. Fairlie, *Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop*, 39 Int'l Law. 817 (2005), https://scholar.smu.edu/til/vol39/iss4/3.

in a court proceeding are termed "admissibility standards."[173] Attitudes and expectations surrounding intelligence cooperation are by no means rendered irrelevant at this juncture, and admissibility principles appear to be as varied as the disclosure provisions outlined in section two. I will demonstrate that they are generally also more flexible in their application.[174] This flexibility may be particularly advantageous for the admissibility of intelligence as evidence.

Admissibility is assessed through the case-by-case evaluation of several factors which differ across international criminal tribunals but generally focus on ensuring the "integrity of the proceedings."[175] This condition typically requires evidence to be of "probative value," which necessitates, at minimum, *prima facie* reliability and authenticity.[176] Other potential factors for intelligence admissibility which individual tribunals have valued differently are the legality of acquisition methods—including human rights violations—as well as the less addressed issue of prosecutorial independence which has been raised by the defense counsel.[177] Intelligence-sharing introduces novel complications for all three of these factors. First, the intelligence breaches provide a useful point of comparison for how courts weigh these admissibility concerns.

Reliability & Intelligence Breaches: Wikileaks at the Special Tribunal for Lebanon

The use of classified media, such as Wikileaks' U.S. diplomatic cables leak, is on the rise in international judicial proceedings, as demonstrated in cases at the STL, ICTY, and ICC.[178] Admissibility tests for leaked intelligence reflect a focus on reliability as a component of probative value. STL protocol enacted on the admissibility of Wikileaks cables raises important questions about how leaked intelligence is treated, particularly when a state either acknowledges its authenticity or prosecutes based on the breach. Such actions may implicitly affirm the reliability of the data, challenging tribunals to weigh its legitimacy more favorably. Given that state intelligence services engage with information and courts in a political and strategic manner, it is necessary to scrutinize such

173. *See, e.g.*, Nathan Wiebe, *Regarding Digital Images: Determining Courtroom Admissibility Standards*, 28 Manitoba L. J. 61, 61 (2000).

174. "ICC: A Cautious Beginning with Mixed Signals from the Prosecutor," Wikileaks Public Library of US Diplomacy (Netherlands The Hague, July 15, 2003), ¶¶ 6–7, https://wikileaks.org/plusd/cables/03THEHAGUE1806_a.html.

175. International Criminal Court, Rules of Procedure and Evidence (Rev. 9, 5 April 2021), Rule 49, https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf; *see also* International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence," Rule 95 (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [https://perma.cc/T89S-5L4A].

176. Sara Mansour Fallah, *The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals*, 19 The L. & Prac. of Int'l Ct. & Trib. 147, 161 (2020).

177. *See generally id.* On prosecutorial independence, see generally Decision on Sesay—Motion Seeking Disclosure of the Relationship Between the Governmental Agencies of the United States and the Office of the Prosecutor, Special Court for Sierra Leone (May 2, 2005), http://www.rscsl.org/Documents/Decisions/RUF/363/SCSL-04-15-T-363.pdf [https://perma.cc/5R49-ZBT3].

178. *Id.* at 161.

actions and disclosures rigorously, balancing reliability with the potential for manipulation.

Rule 149(D) of the STL'S RPE allows for discretionary exclusion of evidence if its "probative value is substantially outweighed by the need to ensure a fair trial."[179] Rules 89 (C), (D), and (E) of the ICTY's Rules of Procedure and Evidence are identical to the STL's Rules 149 (C), (D), and (E).[180] In the admissibility stage, *prima facie* reliability and authenticity, and not definitive proof, is all that is required of evidence. The ICC's Rome Statute has had varied interpretations assessing authenticity more strictly, and the ICTR did not adopt ICTY's rule 89(D).[181] However, like the STL, it did reproduce the ICTY's mandatory exclusion of evidence in cases where admission was deemed antithetical to "the integrity of the proceedings."[182] The integrity of leaked intelligence has faced stricter scrutiny than that supplied by states.

In 2015, the STL ruled that for the Wikileaks cables to be admissible as evidence, their authenticity and reliability needed to be "officially acknowledged" by the original source of documents, namely the U.S. government, but the U.S. government did not provide this assurance to the prosecutor.[183] The STL decision proceeded by examining the application of Rule 149(D) in ICC and ICTY cases. The defense held that in 2012, the ICTY held in *Gotovina et al.* that diplomatic cables had sufficient indicators of credibility to meet the *prima facie* reliability standards for admission.[184] In *Milošević*, ICTY prosecutors sourced allegations of interference in the administration of justice from WikiLeaks documents and did not raise admissibility flags on their reliability or authenticity.[185] The ICC, the STL found, had employed its admissibility rules slightly differently within its own chambers: in *Lubanga,* the ICC held that in the absence of demonstrable reliability, the Chamber must either exclude the evidence "at the outset" or evaluate its merits at the end of a case.[186] In *Katanga*, however, admissibility concerns led to the rejection of evidence at the outset when relevance, probative value, and authenticity were not sufficiently demonstrated.[187] The STL Trial Chamber assessed the authenticity of the WikiLeaks documents based on the *Lubanga* decision and chose to exclude it from evidence.[188] In doing so, the court functionally determined it would defer to the U.S. IC's stated estimations of reliability to safeguard the integrity of its proceedings—a tall order when White House officials were meanwhile

179. Special Tribunal for Lebanon, *supra* note 167.

180. *Compare id. with* International Criminal Tribunal for the former Yugoslavia, *supra* note 169.

181. International Criminal Tribunal for Rwanda, "Rules of Procedure and Evidence" (12 January 1996).

182. Rome Statute, *supra* note 66, Art. 67 ¶ 7.

183. Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision on the Admissibility of Documents Published on the Wikileaks Website ¶27 (May 21, 2025).

184. *Id.* at ¶ 24. The defense's claim could not be verified through publicly available information on Gotovina et al.

185. *Id.*

186. *Id.* ¶ 12.

187. *Id.*

188. *Id.* ¶ 13.

calling the website "not an objective news outlet but rather an organization that opposes U.S. policy in Afghanistan."[189]

This STL decision touched on the question of illegality only briefly; it had already derived from international and domestic court cases the conclusion that Wikileaks documents should be judged based on probative value.[190] No international law prohibits the act of whistle-blowing, and violation of national laws by no means necessarily implies criminal wrongdoing by international standards any more than mass state surveillance programs do.[191] To ask the U.S. IC to verify the authenticity of intelligence the court had obtained independently would not have been unprecedented; the State Department had been useful to the STL in confirming, by way of comparison with its own SIGINT, information the court had received from commercial phone lines.[192] Despite no official acknowledgement provided to the court, the U.S. government never denied the provenance of the WikiLeaks documents, and its State Department has since acknowledged their authenticity.[193]

The STL's admissibility decision invites novel considerations: if a state acknowledges the legitimacy of data leaked to the media or initiates criminal prosecution on breached data, might this constitute an acknowledgement of authenticity, or even be grounds for reliability? Knowing that state intelligence services interact with courts strategically and politically (as several Wikileaks cables themselves make evident, along with U.S. breaches of international law), should their intelligence disclosures be treated with the same level of scrutiny? The potential implications of the STL's legality and reliability standards for admitting evidence are abundant. As the next section discusses, evidence obtained through torture intersects both standards by introducing concerns for both reliability and human rights law.

Contending with Illegality of Acquisition Methods

For the STL, torture is an unusual case in which legality standards trump reliability, though both are cited as a basis for excluding evidence obtained in violation of human rights.[194] This standard, while potentially highly relevant to the admissibility of U.S. intelligence, has not seen a great deal of practical application. Other provisions for admissibility on the basis of legality, including violations of international human rights, have weakened over time.

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189. *The War Logs: Reaction to Disclosure of Military Documents on Afghan War*, N.Y. Times At War Blog (July 25, 2010, 5:24 PM), https://archive.nytimes.com/atwar.blogs.nytimes.com/2010/07/25/the-war-logs/ [https://perma.cc/P6US-GU8F].

190. Ayyash, *supra* note 183, ¶ 20.

191. Fallah, *supra* note 176, at 160.

192. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

193. *Remarks to the Press on Release of Purportedly Confidential Documents by Wikileaks*, U.S. Department of State (last accessed Mar. 28, 2025), //2009-2017.state.gov/secretary/20092013clinton/rm/2010/11/152078.htm.

194. Interview with Dan Saxon, Professor of Int'l Justice, Leiden Univ. Coll., via Zoom (May 21, 2023).

The following section explores standards, and lack thereof, for the exclusion of illegally obtained evidence. It then considers the implications of these developments for intelligence cooperation.

While U.S. and other domestic court systems stipulate that information must be obtained legally if it is to be admissible as evidence in a criminal trial, the criteria of international tribunals are less strict. Many courts' RPE, starting with the ICTY's, are vague about what sort of evidence is inadmissible (if any), referencing the exclusion of material threatening "integrity of proceedings" subject to interpretation.[195] On the other hand, the SCSL RPE states point-blank that "a Chamber may admit any relevant evidence."[196] One exception which is prohibited expressly in the STL RPE is evidence obtained by torture, and it is generally considered inadmissible by all tribunals.[197] Beyond this, evidence admitted into trial reflects that these courts find the acquisition methods of informants largely irrelevant, reasonably enough as international law has little claim to the regulation of intelligence methods.[198] There is precedent for leniency in international law regarding the legality of acquisition methods: for instance, the International Court of Justice's 1949 *Corfu Channel Case* saw evidence obtained in violation of state sovereignty admitted into evidence.[199] The applicability of this standard to the internal breach of intelligence materials and other forms of illegally obtained evidence is subject to debate.[200]

"Integrity of proceedings" clauses are common across tribunals' procedural RPE (ICTY, ICTR, STL, ICC, MICT), and the STL's Rule 162(B) goes further to specify the exclusion of evidence "obtained in violation of international standards on human rights, including the prohibition of torture."[201] Notably, given the confirmed impact of intelligence relationships in shaping the ICTY's RPE, its provisions for exclusion of evidence on the basis of human rights violations were removed and replaced with reliability clauses in 1995 and 1997:

> ICTY Rule 95: **Exclusion of Certain** Evidence ~~Obtained by Means Contrary to Internationally Protected Human Rights~~ *(Adopted 11 Feb. 1994; text amended 30 Jan. 1995; title amended 12 Nov. 1997)*[202]
>
> ~~Evidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be admissible.~~ **No evidence shall be admissible if obtained by**

195. International Criminal Tribunal for the former Yugoslavia, "Rules of Procedure and Evidence," Rule 95 (11 Feb. 1994, Rev. 50, 8 July 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

196. Special Tribunal for Lebanon, *supra* note 167.

197. Dan Saxon, *supra* note 194; *see* Special Tribunal for Lebanon, *supra* note 167.

198. *See* literature review, "Intelligence-Gathering and Public International Law."

199. Fallah, *supra* note 176, at 148.

200. *Id*.

201. Special Tribunal for Lebanon, *supra* note 167.

202. International Criminal Tribunal for the former Yugoslavia, *supra* note 195.

> **methods which cast substantial doubt ~~on~~ its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.**[203]

In November 1997, Rule 95 was re-titled "Exclusion of Certain Evidence," removing the express prohibition of evidence obtained by means contrary to internationally protected human rights.[204] The modifications to this rule lend ambiguity to its application, which could conceivably extend to confessions extracted by torture and paid or intimidated witnesses. Unlike human rights standards or legality standards, reliability is a measure of admissibility which favors the use of intelligence over eyewitnesses. It was on this basis that the ICTY's *Kupreškić* case saw three defendants go free despite the presence of eyewitnesses, while highly reliable invasions of privacy including bugging, telephone-tapping, and trespassing have not faced admissibility scrutiny on the basis of their legality.[205] These standards reflect that intelligence cooperation is embedded into the admissibility principles of tribunals to facilitate the often crucial use of disclosed material.

Prosecutorial Independence

At the Revolutionary United Front Trial after the Sierra Leonean Civil War (1991-2002), three senior leaders of the Liberian-backed rebel group were found guilty of various crimes against humanity and war crimes by the SCSL. In November 2004, the defense counsel filed a motion "seeking disclosure of the relationship" between U.S. intelligence and the OTP's Investigations Department, alleging a "symbiotic relationship" and claiming the OTP had been working "at the behest" of the U.S. Federal Bureau of Investigation (FBI).[206] The basis for the accusation was that prosecution funds had allegedly been used for FBI vetting procedures, that the OTP had assisted U.S. agencies in relocating the accused and their family members, and that previous interviews between the court's chief of investigations and the FBI had not been disclosed. It claimed that Article 15 of the court's statute had been violated, specifically the provision that the prosecutor "not seek or receive instructions from any Government or from any other source."[207] The defense also submitted that it would be impossible to evaluate the evidence, verify witness testimonies, or determine whether the Prosecution had

203. *Id.*
204. *Id.*
205. Geoffrey Robertson, Crimes against Humanity: The Struggle for Global Justice 322 (New York: New Press, 2002), http://archive.org/details/crimesagainsthum00robe_0 [https://perma.cc/GNT6-SHFB].
206. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Decision on Sesay—Motion Seeking Disclosure of the Relationship Between the Governmental Agencies of the United States and the Office of the Prosecutor, Special Court for Sierra Leone, (May 2, 2005), https://www.rscsl.org/Documents/Decisions/RUF/363/SCSL-04-15-T-363.pdf [https://perma.cc/5R49-ZBT3].
207. *Id.* ¶ 2.

complied with its disclosure obligations, without indication from the OTP about the extent of its relationship with the American government and the FBI. It was argued that "[t]he involvement of the latter may have affected the evidence obtained."[208] In response, the prosecution relied on the *Blaškić* decision at the ICTY which upheld the need for international tribunals to "rely on the cooperation of States."[209]

This case demonstrates that prosecutors who engage U.S. intelligence agencies in the provision of sensitive information have occasionally opened themselves up to legal action by the defense counsel alleging that the integrity of proceedings had been compromised by these relationships. Tribunals have generally not found these accusations to be meaningful grounds for determining evidence inadmissible because they have failed to prove any impact of intelligence agency interests on prosecutorial independence.[210] Still, they raise important questions about what the parameters of such a relationship ought to be.

External support from intelligence services is frequently vital during investigations and significantly differs from being instructed by these entities. As such, the Court ruled that the defense had failed to establish a legitimate "master-servant" relationship between U.S. intelligence and the OTP.[211] Asked about the SCSL defense counsel's claims that collaboration between the FBI and the OTP had compromised judicial independence, former SCSL Chief Prosecutor Stephen Rapp described how vested interests of state intelligence do not threaten the autonomy of U.N.-backed courts because there will always be the "necessity of corroboration."[212] Crane, who headed the OTP at the time, responded that "the prosecutor is bound by both law and ethics," and that "if information is given to him with conditions, then he has to abide by those conditions, or not use that evidence."[213] Prosecutors indicated that concerns such as these are why they do not take a source's word without independent corroboration, and also that the defense's job is to raise questions interrogating the accuracy of sources and information. Nonetheless, the flexibility of reliability and legality standards for admitting evidence have seemed to direct courts toward evaluations which maximize their ability to collaborate with the U.S. IC.

208. *Id*. ¶ 4.

209. *Id*. ¶ 10.

210. *See generally id*.; Blaškić v. Prosecutor, Case No. IT-95-14-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

211. *Id*. ¶ 43.

212. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

213. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

IV. Prosecuting Russia's Illegal War: Prospects for U.S. Intelligence Under Biden[214]

"The whole discussion as to whether or not to have a tribunal on aggression {for Russia} is, in my mind, sort of schizophrenic when you have the twentieth anniversary of the U.S. invasion of Iraq coming up."

— Katherine Gallagher, who represented U.S. torture victims in *Al Shimari v. CACI* following her work on the ICC's shuttered investigation into crimes committed in Afghanistan[215]

Presently, Europe is witnessing the largest land war on its soil since WWII and consequently could expect to face an iteration of international criminal legal procedure on a scale not experienced since 1946.[216] Moreover, perhaps also not since the Second World War has the U.S. IC been given such cause for monitoring and publicizing atrocities in Europe perpetrated by a hostile power (with the possible exception of Serbia during the collapse of Yugoslavia). NATO interests lend themselves to support for international Russian war crimes prosecution, and criminal justice for the Ukrainian people remained an American foreign policy priority for the duration of Biden's term.[217] U.S. intelligence support would still be informed by how prosecution efforts take shape in the near future and may depend on which judicial mechanisms the international community ultimately mobilizes. Some predict that a U.S. Democratic administration would be willing to cooperate with any court, including the ICC or a newly

214. This paper was written a year prior to the attacks by Hamas on October 7, 2023. U.S. political and military support for Israeli aggression against Palestine and Lebanon had not reached its current apex, nor had the ICC sought arrest warrants for Israeli officials and Hamas leaders. Although Washington continued to demonstrate strong willingness to support the investigation and prosecution of Russian aggression in Ukraine under President Biden, especially through backing the International Criminal Court (ICC) and other mechanisms, its stance on determining Israel's culpability for war crimes contrasted sharply. Given its longstanding diplomatic protection of Israel in international forums, including vetoes at the U.N. Security Council, the likelihood of U.S. IC cooperation in such investigations remains exceedingly low. Israel, moreover, is also not party to the Rome Statute. However, there is evidence that Biden, Trump, and the U.S. IC have helped coordinate and fund Israeli war crimes in Palestine to the extent that these parties may share command responsibility with Netanyahu and his Defense Ministers. It is therefore reasonable to predict that methods of coercion similar to those seen at the 1998 Rome Conference (where bribes and threats of sanctions were lodged at developing nations) might be used at forthcoming negotiations to influence the scope and jurisdiction of an international response. The same may become true of Russian criminal prosecution under President Trump.

The volatility and politicization of U.S. support for international prosecution is evidenced by the dramatic and near immediate shift in U.S. foreign policy toward Russia in these early months of President Trump's second term. Whether the U.S. will miss the window to collaborate on an international response to Putin's criminal aggression is likely to depend on when the war ends, the extent of democratic backsliding over the next four years, and the ability of European nations to bring Putin and others to justice in the face of what are likely to be costly and painful bullying tactics by the current U.S. presidential administration.

215. Alice Speri, *Biden Administration Splits on Prosecuting Russia for War Crimes in Ukraine*, The Intercept (Mar. 15, 2023), https://theintercept.com/2023/03/15/war-crimes-russia-ukraine-iraq-icc/.

216. Andrew Osborn, *Russia's Invasion of Ukraine Plunged Europe into 'Biggest Land War' since WWII, Says Report*, ThePrint (Dec. 6, 2022, 08:33 PM), https://theprint.in/world/russias-invasion-of-ukraine-plunged-europe-into-biggest-land-war-since-wwii-says-report/1251272/ [https://perma.cc/D5WA-H32S].

217. Jennifer Hansler, *US Announces It Supports Creation of Special Tribunal to Prosecute Russia for 'Crime of Aggression' in Ukraine*, CNN (Mar. 28, 2023), https://www.cnn.com/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html [https://perma.cc/8Q7R-TYB7].

established body with aggression jurisdiction in Ukraine, to prosecute Russian President Vladimir Putin.[218] The U.S.'s position on structuring prosecution under Biden was to call for the establishment of a special tribunal to prosecute aggression in Ukraine, although Biden had voiced broad commitment to supporting Putin's prosecution without mentioning a particular channel.[219] This section examines available avenues for such prosecution, evaluates prospects for intelligence cooperation and disclosure, from state intelligence services and nonstate actors, and speculates on the implications of this cooperation for the future of global justice investigations. It does not evaluate the dramatic shifts in U.S. foreign policy toward Russia, NATO, and international prosecution which have occurred in the early months of Trump's term.

Recourse for Prosecuting War Crimes and Aggression

An international legal response to Russia's actions could feasibly proceed in several ways: it may involve the creation of an international tribunal in the style of the ICTY, the use of universal jurisdiction at the ICC, the establishment of an internationalized domestic or hybrid tribunal in Ukraine, some combination of these mechanisms, or it may take an entirely new form.[220] Investigations into Russian war crimes at the ICC are underway, but the comparative extent of the Court's role is undetermined, and its jurisdiction complex.[221] Although the ICC may handle war crimes and crimes against humanity, it does not have the power to prosecute the crime of aggression on Ukraine's territory.[222] Much like John Bolton's conspicuously timed letter withdrawing the U.S. signature of the Rome Statute in 2002 following the invasion of Afghanistan, Russia unsigned the statute in 2016 after annexing Crimea.[223] Ukraine is also not a signatory, nor has either state ratified the ICC's 2010 aggression amendments.[224] However, Ukraine has several times exercised its prerogative to accept the ICC's jurisdiction over crimes in its territory.[225] The first instance was its approval of a 2013 ICC investigation into Crimea, and the second a 2014 extension of this jurisdiction to encompass ongoing crimes throughout

218. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).

219. Jennifer Hansler, *US Announces It Supports Creation of Special Tribunal to Prosecute Russia for 'Crime of Aggression' in Ukraine,* CNN (Mar. 28, 2023) https://www.cnn.com/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html [https://perma.cc/AY9G-QE4Y].

220. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).

221. Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms. Maria Lvova-Belova, International Criminal Court (Mar. 17, 2023), https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin.

222. *Id.*

223. *Shaun Walker and Owen Bowcott, Russia Withdraws Signature from International Criminal Court Statute*, The Guardian (Nov. 16, 2016), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute [https://perma.cc/6T5Z-JAAM].

224. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023). This changed on August 24, 2024 when Zelenskyy made Ukraine a signatory of the Rome Statute.

225. *Id.*

its territory which granted the Court this investigatory power on an open-ended basis.[226]

In February 2022, ICC Chief Prosecutor Karim Khan opened a war crimes investigation in response to the invasion and issued an arrest warrant for President Vladimir Putin and Commissioner for Children's Rights Maria Lvova-Belova.[227] Most states in the West support aggression prosecution alongside war crimes investigations, and nations such as Ukraine, Liechtenstein, Luxembourg, and Poland are particularly vocal on aggression.[228] Many Balkan and Eastern European states are especially keen to see Putin tried by an ad hoc international tribunal for the crime of aggression.[229] Khan, who does not particularly like the idea of a separate ad hoc investigation for aggression, believes such an undertaking would fragment efforts to hold Russian leaders accountable.[230] On whether a hybrid or international tribunal instilled with the power to prosecute the crime of aggression might operate in tandem with ICC war crimes investigations, Khan personally wishes the international community would table these costly efforts to prosecute aggression in order to focus on lending its support to the ongoing work of the ICC.[231] However, failure to prosecute Russia's criminal aggression altogether would be unfortunate and impossible to ignore, as aggression is Putin's most incontrovertible crime, and one which his political enemies also find worthy of attention. Putin himself made it clear that he ordered the special military operation which invaded and occupied Ukraine on February 21, 2022.[232] The ICC distinguishes aggression from other crimes under its jurisdiction in that it may only be attributed to leadership in a position to "control or direct" a state's political or military action.[233] Politically and legislatively, the U.S. is unusually poised to cooperate with aggression prosecution, though this cooperation faces both barriers and risks.

Reckoning with an American-Led Tribunal

In considering how the U.S. IC stands to influence any future international prosecution efforts, it is useful to examine how recent U.S.-led international justice projects have looked in practice. Procedural trends across other special tribunals established by the U.S. without U.N. support, such as military

226. *Id*.

227. Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms. Maria Lvova-Belova, International Criminal Court (Mar. 17, 2023), *supra* note 220.

228. Joana de Andrade Pacheco, *Where Do States Stand on Official Immunity Under International Law?,* Just Sec. (Apr. 19, 2024), https://www.justsecurity.org/94830/where-do-states-stand-on-official-immunity-under-international-law/ [https://perma.cc/7XS4-8GSJ].

229. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).

230. *Id*.

231. *Id*.

232. "Address by the President of the Russian Federation," The Kremlin (Mar. 25, 2025), http://en.kremlin.ru/events/president/news/67843.

233. Nikola Hajdin, *The Nature of Leadership in the Crime of Aggression: The ICC's New Concern*, 17 Int'l Crim. L. Rev. 543, 545 (2017).

commissions for the War on Terror and Guantanamo Bay, are worthy of closer examination but will be set aside for this discussion other than to note that the Supreme Court's *Hamdan v. Rumsfeld* found these commissions to violate U.S. domestic law and the 1949 Geneva Conventions. The Iraq High Tribunal (est. 2003) provides a salient case study of American-led international criminal justice.[234]

Outrage from American leaders that the ICC might provide legal recourse to their torture victims was particularly bold given that concurrently, Americans were seizing jurisdiction over Ba'athist crimes in occupied Iraq.[235] In 2003, the U.S.-led interim government independently established its own "hybrid" special court from scratch to try Saddam Hussein and other Ba'athist Iraqi nationals for human rights offenses.[236] American leader of the Coalition Provisional Authority (CPA) and de facto head of state of Iraq, Paul Bremer, created this body by decree, originally calling it the "Iraqi Special Tribunal."[237] This name selection would be the first of many challenges to the court's legitimacy: realizing that the CPA's own Constitution, written one year prior, had an express prohibition of "special tribunals," the body was awkwardly renamed the "Iraq High Tribunal" (IHT).[238] Not only were Ba'athist Iraqis denied access to seats as judges, but the tribunal's jurisdiction was limited to the exact dates during which the Ba'athist Party held power in Iraq: July 17th, 1968, to May 1st, 2003.[239] In setting these jurisdictional parameters, the IHT granted blanket immunity to U.S. soldiers and officials for war crimes in Iraq after 2003.

Technically a hybrid court, the IHT statute used domestic Iraqi law selectively as license for its more draconian standards which ICC procedural rules and even U.S. domestic law expressly forbid. For instance, it permitted capital punishment but did not mandate that guilt be proven beyond reasonable doubt.[240] Notably, the IHT Statute also provided that the tribunal's president "be guided by the Iraqi Criminal Procedure Law" on evidentiary admissibility, in contrast to the ICC and other ad hoc tribunals with more flexible rules of procedure and evidence (RPE) explored in section three.[241] In these years, the appetite of the United States for admitting fabricated evidence into proceedings had been tested by Colin Powell's infamous presentation of doctored

234. For further reading, see Richard J. Wilson, *Military Commissions in Guantanamo Bay: Giving Full and Fair Trial a Bad Name*, 10 Gonzaga J. Int'l L. 63, 63 (2007); *see also generally* Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345 (2002).

235. John Laughland, A History of Political Trials: From Charles I to Saddam Hussein, Past in the Present (2008).

236. *Id*.

237. *Id*.

238. *Id*.

239. *Id*.

240. Iraq: Iraqi Special Tribunal—Fair Trials Not Guaranteed, Amnesty International 33–34. (Jul. 14, 2005).

241. Statute of the Iraqi High Tribunal, sec. 5, Art. 16 (Oct. 9, 2005), https://www.legal-tools.org/doc/70f869/pdf/.

statements regarding the presence of WMDs in Iraq, an intentional effort to deceive the U.N. Security Council.[242]

A similar inclination to maneuver around international protocol is also traceable in the CPA's lack of concern for U.N. criticism directed at the IHT. For instance, U.N. Human Rights Chief and former ICTY and ICTR Chief Prosecutor Louise Arbour found the court's imposition of the death sentence to be "cruel, inhuman or degrading treatment or punishment," thus prohibited under international law.[243] Nonetheless, the CPA-backed court continued to impose the death penalty even as U.N. organs were unwilling to continue to play a role in appointing IHT judges. Further examination of the CPA's: disregard for U.N.-backed mechanisms of international justice and de-prioritization of international human rights law over (Iraqi) domestic law with regards to both punishment and evidentiary admissibility may shed light on how American influence, isolated from international oversight, could translate into international criminal proceedings.

Political Will for Intelligence Cooperation under President Biden

American policies and attitudes on supporting international prosecution have shifted more than once since the IHT and remain inconsistent. Under the Dodd Amendment's substantial reduction to the ASPA's limitations, U.S. policy is far more amenable to ICC support under certain conditions.[244] Nonetheless, this legislation continues to bar assistance with not only the prosecution of U.S. nationals but also the crime of aggression, despite the latter conflicting with the Biden Administration's indications of support for a special tribunal to this end.

A December 2022 appropriations bill allows the U.S. to help the ICC with "investigations and prosecutions of foreign persons for crimes related to the situation in Ukraine."[245] Although the *New York Times* awards this provision high significance, its legal impact appears negligible.[246] In effect, it reproduces aspects of the Dodd Amendment, and has no significant impact beyond signaling political support for international prosecution.[247] It made no mention of

242. Jon Schwarz, *Lie After Lie: What Colin Powell Knew About Iraq 15 Years Ago and What He Told the U.N.*, THE INTERCEPT (Feb. 6, 2018), https://theintercept.com/2018/02/06/lie-after-lie-what-colin-powell-knew-about-iraq-fifteen-years-ago-and-what-he-told-the-un/ [https://perma.cc/U3B8-ZEAG].

243. Sinan Salaheddin, *Saddam Aide Sentenced to Hang*, THESTAR.COM (Feb. 13, 2007), https://www.thestar.com/news/2007/02/13/saddam_aide_sentenced_to_hang.html [https://perma.cc/RLH9-BYBE].

244. Floriane Lavaud, Ashika Singh & Isabelle Glimcher, *The American Servicemembers' Protection Act and the Dodd Amendment: Shaping United States Engagement with the ICC (Part II)*, JUST SECURITY (Feb. 14, 2023), https://www.justsecurity.org/85121/the-american-servicemembers-protection-act-and-the-dodd-amendment-shaping-united-states-engagement-with-the-icc-part-ii/ [https://perma.cc/7WTH-4JA2].

245. H.R. Res. 2617, 117th Cong. § 7073 (2022).

246. Charlie Savage, *Biden Orders U.S. to Share Evidence of Russian War Crimes With Hague Court*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/us/politics/biden-russia-war-crimes-hague.html.

247. Charlie Savage, *Pentagon Blocks Sharing Evidence of Possible Russian War Crimes With Hague Court*, N.Y. Times (Mar. 8, 2023), https://www.nytimes.com/2023/03/08/us/politics/pentagon-war-crimes-hague.html [https://perma.cc/7BY5-E9J6].

expanding recourse for cooperation to include aggression prosecution, which in any case would not fall under ICC jurisdiction because Russia is not party to the Rome Statute.[248] The provision may serve to further protect officials cooperating with the Court from retaliation, but notably makes mention of Russia's aggression only in terms of funding for Ukrainian victims and refers to it not as a crime, but as a "harm."[249]

Bluster over ICC jurisdiction should not overshadow the level of cooperation the U.S. has afforded the ICC in recent years, particularly at times when the nation has perceived a consonance of interests.[250] As one example, the U.S. State Department allocates significant spending in support of tracking down fugitives from international justice.[251] In 2013, its War Crimes Reward Program was expanded to offer monetary incentives in exchange for information leading to the arrest of non-U.S. nationals wanted by the ICC.[252] Prior to 2013 and since its creation in 1998, the program had been limited to indicted individuals wanted by three ad hoc tribunals which the U.S. had supported: the ICTY, the ICTR, and the SCSL.[253] Under current legislation, existing channels of support for prosecuting Russia may be combined with the provision of further funding, manpower, intelligence, and witness-protection services to the ICC or an ad hoc tribunal. There is reason to believe that a commitment to assisting with Putin's prosecution will translate into expanding these avenues of support.[254] However, clandestine internal tensions within the U.S. government and its agencies make predictions difficult.

The Biden Administration's support for the international prosecution of Putin also rekindled a long-standing rift between the U.S. government and its agencies, specifically the Pentagon.[255] Biden's support for prosecution was prompted by the harrowing images broadcast in April 2022 of mass graves and bound civilians shot at close range in Bucha, Ukraine.[256] The president voiced his commitment to gathering information and supplying it to a war crimes tribunal in the same breath that he committed the U.S. to the ongoing

248. H.R. Res. 2617, 117th Cong. (2022). On March 4, 2023, the European Union created the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) to address this gap in prosecution.

249. H.R. Res. 2617, 117th Cong. § 1708 (2022).

250. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).

251. Interview with Stephen Rapp, Former U.S. State Dep't Ambassador for Global Justice & ICTR & SCSL Chief Prosecutor, via Zoom (Apr. 11, 2023).

252. *Expanded U.S. Program Includes Rewards for Information Leading to Arrest of ICC Suspects*, International Justice Resource Center (Apr. 22, 2013), https://ijrcenter.org/2013/04/22/expanded-u-s-program-includes-rewards-for-information-leading-to-arrest-of-icc-suspects/ [https://perma.cc/339F-GSQ5].

253. *Id*.

254. *Id*.

255. Charlie Savage, *Pentagon Blocks Sharing Evidence of Possible Russian War Crimes With Hague Court*, N.Y. Times (Mar. 8, 2023), https://www.nytimes.com/2023/03/08/us/politics/pentagon-war-crimes-hague.html [https://perma.cc/7BY5-E9J6].

256. Brian Bennett, *Joe Biden Faces Pressure to Stop—and Document—Russian Atrocities in Ukraine*, Time (Apr. 7, 2022), https://time.com/6164972/biden-russia-war-crimes-document/ [https://perma.cc/WD8E-84F3].

support of Ukraine's military. Whereas the Pentagon is supportive of the latter initiative, it has maintained its uncompromisingly hostile stance toward cooperating with international prosecutors out of concern that if non-state parties are prosecuted by the ICC, it too could face prosecution in the future.[257] In March 2023, the *New York Times* reported that it had received information from officials that the Pentagon would block the Biden Administration from sharing intelligence with the ICC concerning Russian atrocities in Ukraine.[258] This misalignment had become less relevant in years prior given President Trump's vocal hostility to and action against ICC cooperation on the part of the United States, but Biden's war crimes ambassador Beth Van Schaack was pushing consistently for greater cooperation with international justice despite Pentagon resistance.[259] Van Schaack found precedent for U.S. support of aggression prosecution in the United States-led Nuremberg prosecution of "crimes against peace."[260] She also provided more specificity on the nature of U.S. support for a tribunal, announcing in March 2023 that the U.S. supports, in particular, "the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine."[261]

Potentially, the Biden Administration believed that by supporting an internationalized domestic court rather than an international criminal tribunal on the scale of ICTY, it was protecting itself and its military personnel from replication or expansion of jurisdiction over the crime of aggression, which could address concerns from the Pentagon and DOD.[262] Yet if this option is the interagency stance on supporting war crimes prosecution, it is based on a false premise: the misguided belief that sharing evidence of Russian criminality with the ICC poses more risk to Pentagon personnel than internationalized domestic alternatives.[263] Even if the U.S. were to sign onto the Rome Statute at some point in the future, its ratification of the Court's aggression provisions is unimaginable.[264] Meanwhile, for the U.S. to accommodate aggression prosecution domestically introduces precedent for a cheaper, quicker, and "endlessly replicable" model facing toward universal jurisdiction.[265] In contrast to a genuinely international tribunal requiring U.N. General Assembly support,

257. *Id.*
258. *Id.*
259. Interview with Kevin Heller, Special Advisor to ICC Chief Prosecutor Karim Khan, via Zoom (May 23, 2023).
260. Jennifer Hansler, *US Announces It Supports Creation of Special Tribunal to Prosecute Russia for 'crime of Aggression' in Ukraine*, CNN (Mar. 28, 2023), https://www.cnn.com/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html [https://perma.cc/J3Y8-J5LC].
261. Rebecca Hamilton, *An Assessment of the United States' New Position on An Aggression Tribunal for Ukraine,* Just Security (Mar. 29, 2023), https://www.justsecurity.org/85765/an-assessment-of-the-united-states-new-position-on-an-aggression-tribunal-for-ukraine/ [https://perma.cc/JN2R-QKQD].
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*

an ad hoc tribunal consists of an aggrieved state and a sufficient number of supporting states, rendering the divisive issue of ICC state parties irrelevant.[266]

The international community is eager for intercepted material evidencing Putin's command responsibility of war crimes, evidence which is highly likely to be harbored by intelligence services. Whether or not state intelligence disclosures will be necessary in proving aggression alongside crimes against humanity, such intelligence could be made eminently accessible with or without U.S. support. Several more of the most advanced intelligence-gathering countries of the world appear well-positioned and willing to aid investigations, including Australia, the United Kingdom, New Zealand, and France, all of whom are parties to the Rome Statute.[267] It is likely that American intelligence services will have potentially useful material toward this end. Crane said in reference to the American intelligence community: "we watch everything Russia does. And North Korea. Kim Jong Un throws a piece of paper out the window: we know that."[268] Former prosecutors report that the most useful forms of intelligence have been SIGINT and IMINT, such as intercepted phone calls admitting culpability or a series of satellite photographs such as those of mass graves at Srebrenica.[269]

Following the 2022 invasion, the Biden Administration made the collection of evidence of Russian criminality an intelligence priority as part of a multipronged approach launched alongside European allies.[270] By April 2022, a U.S. intelligence team was being staffed to document and analyze war crimes.[271] American intelligence services swiftly declassified details of Russia's military plans, seeking both to aid future prosecutors and to heighten global shame of commanders and units involved in Putin's Ukraine plot.[272] This declassification work, which employed the ICTY-era protocols established under President Clinton, was an act of transparency-as-strategy (although the CIA's hope that publicizing these atrocities would "shame Russia into de-escalating" has clearly faded).[273] Imagery which could have only been sourced from U2 spy planes in the past is today being released by Google Maps.[274] Barring full

266. *Id.*

267. *See, e.g.*, Aubrey Allegretti, *ICC Launches War Crimes Investigation over Russian Invasion of Ukraine*, The Guardian (Mar. 3, 2022), https://www.theguardian.com/world/2022/mar/03/icc-launches-war-crimes-investigation-russia-invasion-ukraine (the U.K.).

268. Interview with David Crane, Former Chief Prosecutor of the SCSL & Former Assistant Gen. Counsel to the U.S. Def. Intel. Agency, via telephone (May 5, 2023).

269. *Id.*

270. Brian Bennett, *Joe Biden Faces Pressure to Stop—and Document—Russian Atrocities in Ukraine*, Time (Apr. 7, 2022), https://time.com/6164972/biden-russia-war-crimes-document/ [https://perma.cc/5LYU-VFXY].

271. Barbara Starr, *US Believes It Can 'Identify the Russian Units' That Carried Out Bucha Atrocities, Official Says*, CNN (Apr. 6, 2022), https://www.cnn.com/europe/live-news/ukraine-russia-putin-news-04-06-22/index.html [https://perma.cc/UYR6-GERZ].

272. Phillip Elliot, *Why the CIA Director Is Declassifying Material on Russia's Ukraine Plot*, Time (Feb. 16, 2022), https://time.com/6148791/william-burns-cia-russia-declassify/ [https://perma.cc/S38A-8K32].

273. *Id.*

274. *Id.*

cooperation from the Pentagon and the DOD, U.S. State Department support for intelligence-gathering has been channeled through non-governmental organizations toward investigations in Ukraine.[275] In particular, the U.S. has recently begun directing its support toward building legal infrastructure to aid Ukraine's potentially internationalized domestic prosecution.[276]

The U.S. IC's contingent cooperation with international criminal proceedings can be seen as part of a larger picture involving U.S. interest in narrative control as a condition of their engagement with international justice. In declaring Putin a "war criminal" absent any judicial process, for instance, Biden risked personalizing the conflict and "creating perverse incentives for Putin to stay the course," even as he positioned the U.S. to cooperate with future prosecution.[277] Similarly, that Congress' December 2022 legislation opening Russian crimes up to domestic prosecution came before an official commitment to aid the ICC's investigations may indicate a preference to prosecute on its own terms rather than to contribute to an internationalized or Ukrainian-led legal project.

Mobilizing Non-State Investigations

NGO support for Ukraine's national judiciary began in 2014 with limited notice from the international community.[278] On the frontline of these efforts has been Global Rights Compliance (GRC), a not-for-profit law firm which received funding from the U.S. State Department under Biden. It specializes in international human rights and criminal law and operates an investigations arm which has directed its efforts toward documenting Russian war crimes in Ukraine.[279] GRC's investigation and monitoring efforts support national criminal trials as well as international courts. Its founder, former ICTY defense attorney Wayne Jordash, lamented the lack of support from the international community by pointing out the contrast between the large-scale investigatory assistance provided to the STL in 2014 following the Hariri assassination and, until recently, the lack of attention to the Ukrainian judiciary's capacity-building after the Crimea annexation.[280]

GRC is one of several non-state actors investigating the extent of atrocities in Ukraine; its hope is to someday hand the evidence it has gathered to a judiciary with the power to try Russia for aggression and war crimes.[281] The viability

275. Interview with Dan Saxon, Professor of Int'l Justice, Leiden Univ. Coll., via Zoom (May 21, 2023).

276. *Id.*

277. David E. Sanger, *By Labeling Putin a 'War Criminal,' Biden Personalizes the Conflict*, N.Y. Times (Mar. 17, 2022), https://www.nytimes.com/2022/03/17/us/politics/biden-putin-war-criminal.html; *see also* Deborah Pearlstein, *Should We Worry That the President Called Putin a 'War Criminal' Out Loud?*, Just Sec. (Apr. 8, 2022), https://www.justsecurity.org/81050/should-we-worry-that-the-president-called-putin-a-war-criminal-out-loud/ [https://perma.cc/V6MR-HWZN].

278. Thierry Cruvellier & Wayne Jordash, *It All Comes down to Show That Ukraine Has the Law on Its Side*, JusticeInfo.net (Mar. 11, 2022), https://www.justiceinfo.net/en/88618-wayne-jordash-ukraine-has-the-law-on-its-side.html [https://perma.cc/TQA5-AHM2].

279. MATRA-Ukraine Project, *Global Rights Compliance* (June 7, 2023), https://globalrightscompliance.com/project/matra-ukraine-project/ [https://perma.cc/U8PZ-FLKF].

280. Cruvellier, *supra* note 278.

281. *Id.*

of OSINT for international prosecution was first demonstrated in August 2017 when the ICC relied on evidence all derived from social media posts to issue an arrest warrant accusing Libyan citizen Mahmoud al-Werfalli of 33 murders.[282] Bellingcat is one such organization which collects, verifies, and archives digital evidence of war crimes in Ukraine.[283] A mission of Bellingcat's is to demonstrate the viability of such information as credible evidence, as the use of OSINT in criminal proceedings is relatively new.[284]

Where Bellingcat was initially providing its own assessments of its own level of confidence in reliability, it has drawn away from this practice as courts understandably wish to implement their own reliability tests.[285] As with state intelligence disclosures, any international body tasked with investigating war crimes in Ukraine should approach the use of non-state intelligence and leaked information carefully, given that such sources may pose challenges related to credibility, verification, and impartiality. The hesitancy with which courts have evaluated OSINT in the past along with their decisions assessing the admissibility of *Wikileaks* at the STL and ICC, among others, demonstrate international chambers' strong understanding of these risks. Nonetheless, the NGO intelligence collaboration and OSINT supplied by organizations discussed in this section are potentially highly probative: there is a strong ability to corroborate such information and these organizations are often willing to cooperate with courts to reinforce, not qualify, the independence of the judiciary.[286] These attitudes, in addition to the investment in success of fair criminal prosecution, provide strong basis for the admissibility of such evidence.

State intelligence services also have strategic, political, and altruistic reasons to ensure that the intelligence they disclose is accurate and probative. Nonetheless, there is clear basis for courts to be wary of cooperation from an intelligence community which has a record of institutionalized deception, indifference to human rights, and hostility to international law.[287] Equally crucial to assessments of disclosed state intelligence admissibility is the demonstrated ability of the U.S. IC to deceive an array of powerful parties including their own government, and the public resistance of several U.S. intelligence components to international prosecution.

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282. *How a Werfalli Execution Site Was Geolocated*, Bellingcat (Oct. 3, 2017), https://www.bellingcat.com/news/mena/2017/10/03/how-an-execution-site-was-geolocated/ [https://perma.cc/8GAU-FA8X].

283. *How Bellingcat Collects, Verifies and Archives Digital Evidence of War Crimes in Ukraine*, Reuters Institute for the Study of Journalism (June 7, 2023), https://reutersinstitute.politics.ox.ac.uk/news/how-bellingcat-collects-verifies-and-archives-digital-evidence-war-crimes-ukraine [https://perma.cc/UQY4-WZFZ].

284. Video interview with Nick Waters (May 10, 2023).

285. *Id*.

286. Federica D'Alessandra & Kirsty Sutherland, *The Promise and Challenges of New Actors and New Technologies in International Justice*, 19 J. Int'l Crim. Just. 14 (Mar. 1, 2021), https://doi.org/10.1093/jicj/mqab034.

287. *See* Philip Alston, *The CIA and Targeted Killings beyond Borders*, 2 Harv. Nat'l Sec. J. 283 (2011); *see also George Bush, Barack Obama, and the CIA Torture Cover-Up*, The Intercept (Dec. 4, 2019), https://theintercept.com/2019/12/04/george-bush-barack-obama-and-the-cia-torture-cover-up/; Ralph W. McGehee, Deadly Deceits: My 25 Years in the CIA (2015), https://www.perlego.com/book/2393835/deadly-deceits-my-25-years-in-the-cia-pdf.

The Senate Select Committee's declassified report on Intelligence's CIA detention and interrogation program came to several conclusions about the CIA's actions which amounted to not only high-level administrative oversight of crimes against humanity, but also to intentional efforts to mislead the American public, the White House, policymakers, Congress, and the DOJ.[288] The Senate admitted that the CIA gave "inaccurate information" and made "false claims" to mislead policymakers, the DOJ, and its own inspector general about the use of EIT. This also hindered oversight and decision-making by the White House and Congress.[289] The report also cited one interrogator who told a detainee that he would never go to court, because "we can never let the world know what I have done to you."[290] Courts are cognizant of these serious risks and value corroboration of intelligence disclosures of all kinds. In today's developing intelligence climate, courts will want to take care not to undervalue the development of relationships with and capacities of non-state information sources. These sources stand to play an unprecedented and crucial role in international prosecution, with or without the full cooperation of the U.S. IC.

This emerging sort of intelligence-sharing for criminal proceedings has expansive implications. Where state intelligence services openly prioritize the secrecy of their proprietary sources and methods over the fairness of trials, non-state OSINT groups seek to incorporate their methods into the infrastructure of courtroom procedures. According to Bellingcat's open-source analyst Nick Waters, many legal systems do not include this kind of information as evidence, and a major aspect of Bellingcat's mission has been training ICC judges in OSINT techniques and methodologies for the procurement of evidence to corroborate these methods internally for the procurement of evidence.[291] Bellingcat has worked to submit open-source intelligence to demonstrate breaches of international humanitarian law in Yemen. Presently, it is conducting investigations regarding events in Ukraine which it plans to make available to prosecutors on a national and international level.[292] Ideally, Bellingcat hopes to see tribunal investigators reproducing their methods internally to confirm credibility: tracing geolocation of online images, conducting assessments of whether an image has been manipulated, and generating other indicators of reliability.

Conclusion

This paper argues that U.S. intelligence services and their imperatives have played a central, often determinative role in shaping certain evidentiary standards and procedures at international criminal tribunals, superseding the

288. S. Rep. No. 113-288 (2014), https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf [https://perma.cc/5PER-NZCJ].

289. *Id*. at xiii–xiv.

290. *Id*. at xiii.

291. Interview with Nick Waters, Open-Source Analyst, Bellingcat, via Zoom (May 10, 2023).

292. *Ukraine Open Source Investigations*, Glanlaw, https://www.glanlaw.org/ukraine-investigations [https://perma.cc/6XEK-FVM2].

sometimes ambiguous legal framework for the admissibility of intelligence as evidence. Typically, an "admissibility standard" is a legal provision designed to assess whether permitting information into evidence is in service of the administration of justice. For international tribunals, the term's purview should be understood as far broader; these courts' own legal standards for evidentiary admissibility have frequently had less impact on the sum of admitted evidence in their trials than have U.S. IC interests and subsequent decisions on intelligence disclosure and cooperation. Thus, at the heart of this paper is the proprietary nature of governmental intelligence and the control of protocols essential to state cooperation in tribunals and international courts.

Historical examination of U.S. IC cooperation with international criminal proceedings in section one established the extent to which prosecutorial investigations benefit from U.S. intelligence collaboration. This helps explain why tribunals are compelled to indulge the array of contingencies that the U.S. IC attaches to intelligence-sharing, up to and including efforts to shape the ICC's jurisdiction and evade international prosecution of U.S. war crimes. The attitudes and obligations of the U.S. IC informing these contingencies have themselves translated to traceable impacts on court procedure.

These impacts are visible in non-disclosure protections for confidentially shared evidence discussed in section two, and in the flexible admissibility principles of section three which allow illegally obtained evidence to be admitted into trial, even when U.S. informants have broken the same laws which the court seeks to uphold in obtaining such intelligence. Analysis of how tribunal judges apply admissibility standards to non-state and leaked intelligence has been useful in contextualizing U.S. IC intelligence-sharing by analogy: courts have applied stricter scrutiny of reliability to U.S. intelligence breaches than to U.S. intelligence disclosures, as seen in the STL decision on Wikileaks cables, which, reasonable or not, may be practical in service of U.S. IC relationship management. Meanwhile, the strategic, political, and at times hostile nature of U.S. IC interaction with international justice is under-evaluated as a reliability concern.

With this understanding, prospects for using U.S. intelligence in the prosecution of Russian aggression and war crimes in Ukraine become clearer, but questions remain. As seen at the ICTY, the SCSL, the ICC, and elsewhere, components of the U.S. IC (namely the Pentagon and the DOD) may obstruct prosecutors seeking access to U.S. SIGINT and IMINT relative to the conflict. But when the DOD's self-protective hostility to international criminal justice aligns with the interests of the executive branch, it becomes harder to assess how decisive the positioning of the DOD alone is on evidence disclosure. In the last year of his term, President Biden sharply criticized the request for an arrest warrant for Israeli Prime Minister Benjamin Netanyahu.[293] In his first term, Trump responded to the subject of Putin's criminal aggression by reminding

293. *Biden Rebukes ICC Request for Netanyahu Arrest Warrant*, YouTube (last accessed Mar. 29, 2025), https://www.youtube.com/watch?v=sfrWHDkO8dY.

Fox's Bill O'Reilly that the U.S. is not "so innocent," and has since said they went through "a hell of a lot together."[294,295]

With respect to both these investigations, prosecutors have an opportunity to mobilize non-state investigators in new ways while chambers may set new precedent for admissibility and disclosure. Setting such standards must be approached with a clarified understanding of the U.S. IC's procedural impact on international justice which accounts not only for its immunity from prosecution, but also for its exemptions and privileges as an informant; the impact of this exceptionalism on disclosure and admissibility rules of procedure and evidence is worthy of further evaluation as non-state intelligence is positioned to become an increasingly powerful tool for prosecution.

Tribunals' evidentiary standards have indisputably shifted in ways which aid collaboration with the U.S. IC: courts have shifted the text of mandatory disclosure provisions to prioritize national security interests, and evidentiary admissibility concerns have shifted away from international human rights law and toward reliability assessments. Scholars might make use of the lack of consistency across tribunal RPE concerning these standards for comparative analysis of their efficacy, such as more systematic review of how various provisions discussed in sections two and three related to national security, non-disclosure and admissibility may have informed levels of intelligence cooperation in practice. While it is generally believed that courts garner further cooperation from intelligence services and secure indictments through the inclusion of rules on non-disclosure and confidentiality, quantitative analysis of this privileged information could help assess how much "leads-only" intelligence sharing benefits the securing of convictions. Moreover, analyzing the decision structures of other nations' intelligence communities with regard to intelligence-sharing would help isolate the relative extent to which these courts have a "United States" problem or an "intelligence community" problem.

The practices of U.S. intelligence services may evade international law's purview, but they are also embedded in the machinery of international criminal justice. Parameters for intelligence use have been drawn and redrawn, largely behind closed doors, to maximize the willingness of U.S. IC cooperation and the disclosure and admissibility of probative evidence. With comparatively weak admissibility principles at tribunals on the basis of intelligence's legality and reliability, and major incentives to maximize collaboration with U.S. intelligence services, the chief determinant of what evidence is admitted into criminal trials is not these courts, but state estimations of their own and others' intelligence interests. Absent any universalized legal custom on intelligence as evidence, U.S. IC engagements with the justice system can threaten the ability of courts to fulfill procedural mandates surrounding fairness of

294. *Asked about Putin, Trump Says U.S. Isn't 'so Innocent,'* PBS NEWS (Feb. 5, 2017), https://www.pbs.org/newshour/politics/asked-putin-trump-says-u-s-isnt-innocent.

295. *'Went through a Hell of a Lot with Me': How Trump Boasts about Putin Ties*, FRANCE 24 (Mar. 9, 2025), https://www.france24.com/en/live-news/20250309-went-through-a-hell-of-a-lot-with-me-how-trump-boasts-about-putin-ties.

trials, integrity of proceedings, and independence in the administration of justice. This paper does not attempt to invent this custom where it does not exist but seeks viable alternatives for arriving at neutral and effective standards for engagements with evidentiary intelligence cooperation, particularly in regard to bringing standards for reliability and legality to bear across all disclosed intelligence, regardless of the source. Recognizing that there are significant political incentives for selective U.S. cooperation with international justice, such as the Biden Administration's support for a tribunal for Ukraine, strengthened admissibility standards may also serve as an avenue to indirectly bring U.S. IC intelligence acquisition methods into compliance with international law. Doing so could only serve to legitimize the courts' intelligence relationships; certainly, standards in line with human rights norms are not incompatible with the effective use of disclosed intelligence, but rather a necessary condition of its responsible use in international criminal law.