

America's Stand On International Court

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On March 16, the Government of Kenya deposited its instruments of ratification of the Rome Treaty on the International Criminal Court with the UN secretariat in New York, thereby fully acceding to ICC membership.

Long before then, my government began discussions with the Government of Kenya about concluding a non-surrender agreement (also called Article 98 agreement).

Under the terms of this agreement, each country would agree not to surrender a national of the other country to the ICC, or any international tribunal, without the permission of that national's country.

Kenyan newspapers have since published several inaccurate commentaries on this issue. Let me clarify what the US seeks - and dispel the fiction contained in these articles.

The US believes in justice and the rule of law. We believe those who commit serious crimes of concern to the international community should be punished. We also believe that states, not international institutions, have the primary responsibility for ensuring justice in the international system. Now, to set the record straight.

Fiction: A non-surrender agreement is prohibited under the Rome Treaty and international law. Fact: Article 98 (2) of the Rome Treaty specifically allows for bilateral non-surrender agreements. The Article reads:

"The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can obtain the co-operation of the sending State for the giving of consent for the surrender."

For the same reason, a non-surrender agreement would not contravene, as some have argued, Article 18 of the Vienna Convention on the Law of Treaties.

The bilateral agreement we are discussing will do neither more nor less than what Article 98(2) explicitly permits. In fact, 99 countries - most of them ICC signatories - have already decided to invoke Article 98(2) by concluding a non-surrender agreement with the US. In other words, more states have actually signed non-surrender agreements (99) than ratified the ICC itself (98).

Fiction: A non-surrender agreement would grant immunity to Americans who commit crimes against humanity. Fact: American law-breakers remain subject to US law as well as to the laws of the country in which those crimes are committed.

In addition, both the US and Kenya would reaffirm in any non-surrender agreement their intention to investigate and prosecute nationals of both countries who commit genocide, crimes against humanity and war crimes. They would just agree not to surrender each other's nationals to the ICC without consent.

Fiction: The US opposes the prosecution of war criminals. Fact: We believe that war criminals should face justice, in the first instance, through national judicial systems. If no such systems exist, war criminals should be tried through international tribunals established by the United Nations Security Council.

To this end, no nation has done more than the US in establishing, financing and staffing the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court in Sierra Leone.

Fiction: A non-surrender agreement would turn Kenya into a haven for American fugitives. Fact: In addition to the commitments reaffirmed above, the US and Kenya already share an extradition treaty by which fugitives could be returned to the US to face prosecution.

Fiction: US policy is seeking to sabotage the ICC. Fact: The US respects the sovereign right of Kenya and other countries to become parties to the ICC. However, the ICC, unlike the special tribunals mentioned above, is an institution of unchecked power. The special tribunals were created by, and are answerable to the UN Security Council. The Rome Treaty, in contrast, has a self-initiating prosecutor answerable only to the ICC itself. This will, we believe, inevitably lead to politicised prosecutions.

Nor is this just a theoretical concern: More than one dozen such politically-motivated criminal complaints against American officials have been filed since 2002 before Belgian and German courts under national laws designed to emulate the ICC. The Belgian law was so egregiously abused, in fact, that the Belgian Government finally rescinded it.

Fiction: The US opposes the ICC so it won't be held accountable for acts of "aggression." Fact: The Rome Treaty creates an as-yet-to-be defined crime of "aggression", empowers the court to decide what constitutes aggression, and lets ICC prosecutors investigate and prosecute individuals for this undefined crime.

This was done despite the fact that the UN Charter gives the Security Council primary responsibility for maintaining international peace and security and empowers only the Security Council to decide when a state has committed an act of aggression (Chapter VII, Art. 39).

Yet an ICC prosecutor, free of any oversight from or responsibility to the Security Council, can now make this judgment against individuals – including heads of state.

Fiction: It is only the US that objects - this is just another example of American "unilateralism". Fact: During the Rome Treaty's negotiations, a number of countries insisted on broad, if ambiguous, immunity of their nationals from exposure to international tribunals in exchange for their support.

Article 124 of the Rome Treaty provides signatories with a period of several years in which they can decide not to accept the jurisdiction of the court with respect to war crimes alleged to have been committed "by its nationals".

At least one European state has availed itself of this immunity provision. Many countries also required non-surrender protections before sending their military and aid workers to Afghanistan.

In conclusion, let me stress that the US values its relations with Kenya and respects its sovereign decision to become a party to the ICC. We ask only that Kenya exercise its right, under Article 98(2) of the Rome Treaty, to conclude a non-surrender agreement with the US.

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