

A Global Court Quandary for the President

By John B. Bellinger III
Monday, August 10, 2009

Secretary of State Hillary Clinton [said](#) in Kenya last week that it is a “great regret” that the United States is not a member of the International Criminal Court, the international tribunal established in The Hague to prosecute war crimes, genocide and crimes against humanity. The Bush administration was vilified by the international community and by human rights groups for a perceived hostility toward the court during its first term, but U.S. reservations about the ICC predated President George W. Bush and are likely to continue under President Obama. Although the Obama administration will undoubtedly make greater efforts to engage with the court, the United States is unlikely to join the ICC anytime soon.

The Clinton administration tried to have it both ways. Its officials helped negotiate the [Rome Statute](#) -- the 1998 treaty that created the ICC -- but were unable to persuade other countries to address concerns of the U.S. military that its members might be subjected to politicized prosecutions. President Bill Clinton ultimately authorized U.S. signature of the Rome Statute on Dec. 31, 2000 -- the last day the treaty was open for signature -- but promptly expressed concerns about the treaty’s “significant flaws” and said, “I will not and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”

U.S. policy toward the court evolved significantly during the Bush administration. In May 2002, Bush, noting his objections to the ICC’s purported coverage of U.S. nationals, authorized the “un-signing” of the Rome Statute. He later signed the [American Servicemembers Protection Act](#), which criticized the ICC and cut off foreign assistance to its members. ICC supporters blamed Bush for this harsh legislation, but it was drafted by House Republicans and supported by many Democrats, including then-Sen. Hillary Clinton.

In its second term, the Bush administration pursued a more pragmatic approach toward the ICC, first agreeing to the U.N. Security Council’s March 2005 referral of the Darfur atrocities to the court for investigation and later offering support to the ICC prosecutor. The president waived the statutory restrictions on foreign assistance to ICC members, and last fall [Secretary of State Condoleezza Rice even threatened](#) to veto efforts by some Security Council members, including China and France, to defer the ICC’s arrest warrant for Sudanese President Omar Hassan al-Bashir, earning plaudits from human rights groups.

The Obama administration has done little so far to engage with the court, to the disappointment of ICC supporters who had hoped that Obama would immediately reverse the “unsigning” of the Rome Statute. This inaction may change as more political appointees are confirmed. But it may also reflect Obama’s cautious approach toward an international court that could be used to prosecute U.S. soldiers during a time of war. The White House will have a hard time convincing the U.S. military of the merits of joining

the ICC unless the flaws identified by both Presidents Clinton and Bush are resolved, and it is highly unlikely that 67 senators would approve the treaty without such changes.

Obama can support the court in ways that would not involve joining the Rome Statute, such as participating in its governing bodies and providing diplomatic, intelligence and logistical support for the court's ongoing prosecutions of egregious war crimes and human rights atrocities in Darfur, Northern Uganda, Congo and the Central African Republic. Such support would demonstrate U.S. leadership in international justice and human rights. The administration should immediately begin participating in the ICC working group that is drafting the definition of the crime of "aggression," an offense within the court's jurisdiction that was left undefined in the Rome Statute.

The thorniest issue for Obama will be how to approach the Rome Statute Tenth Anniversary Review Conference scheduled for next summer in Uganda. The president almost certainly has to take the position that the United States is not prepared to join the ICC unless the treaty is amended in some way that provides stronger protections for Americans. The ICC needs U.S. support, but many court members may resist amendments to avoid bowing to American pressure. The conference could turn especially nasty -- and put the administration in a very awkward position -- if ICC ideologues try to adopt a broad definition of "aggression" that would apply to ICC non-parties such as the United States but do not agree to changes that would allow the United States to join or opt out of the treaty.

Secretary Clinton is right that U.S. non-participation in the ICC is regrettable, especially given the long-standing U.S. commitment to international justice. Yet non-participation also reflects an unfortunate but deep-seated American ambivalence toward international institutions that the Obama administration, despite its support for international law, is unlikely to be able to change.

The writer, a [Washington lawyer](#), is an adjunct senior fellow in international and national security law at the [Council on Foreign Relations](#). He was legal adviser to Secretary of State Condoleezza Rice from 2005 to 2009.

<http://www.washingtonpost.com/wp-dyn/content/article/2009/08/09/AR2009080902093.html>