

The United States and the International Criminal Court: Where We've Been and Where We're Going

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I'd like to thank Dean Weissenberger, Professor Bassiouni, and DePaul University for the invitation to address this conference. The 10th anniversary of the Rome Statute provides a useful occasion to assess developments related to the International Criminal Court (ICC), and I'm happy to have the opportunity to share my thoughts on the views and policy of the United States toward the ICC.

Now it may strike some as a bit ironic that a senior U.S. Government official would speak at a conference "celebrating" the tenth anniversary of the International Criminal Court, given that the U.S. Government's concerns about the Court are so well known. But I welcome this opportunity to appear to share the U.S. Government's views. Indeed, I will tell you up front that one of my main themes is that even if we disagree over the means chosen by the Rome Statute – and I believe that this is a disagreement that is likely to continue under future U.S. Administrations unless U.S. concerns are addressed – nevertheless we do not disagree over the Statute's end goals, and we are prepared to work with those who support the Court in appropriate circumstances.

I don't plan to use my remarks to attempt to assess the activities or performance of the ICC as an institution to date. In my view it's too early to draw many meaningful conclusions in this regard. The ICC's first prosecutor has been in office for less than five years. The court has yet to hold its first trial or to execute its first sentence, though it has opened investigations in four separate cases and issued 10 public indictments. We believe that the Court acted appropriately and responsibly in dismissing requests that it investigate issues arising from the Iraq war, and expect that it will do the same in connection with other politically motivated petitions it receives. All this said, the ICC most substantial efforts to date have focused on building the institution itself, hiring a staff, and beginning to assemble its judicial and investigative capabilities. All parties need to give the ICC more of an opportunity to perform in a judicial role before attempting to make significant assessments of the ICC as a judicial institution.

Instead, I'd like to make some observations about the views of the U.S. government toward the ICC during the past decade, and offer some thoughts about issues that will likely affect U.S. policy toward the ICC over the next decade. In a nutshell, I will argue that the United States' fundamental concerns about the ICC have been remarkably consistent across successive Administrations and Congresses controlled by both Democrats and Republicans. And in the absence of significant changes to the Rome Statute to address these concerns, it is unlikely that the United States will become a party to the Rome Statute any time in the foreseeable future. Accordingly, the future of the relationship between the United States and the ICC will be defined mainly by the extent to which the United States and ICC supporters can agree to disagree about the Rome Statute and find constructive and practical ways to work together to advance our shared interest in promoting international criminal justice.

Ten years ago, U.S. negotiators from the Clinton Administration went to Rome with the goal of achieving agreement on a statute for the International Criminal Court that would advance the cause of international criminal justice and that the United States could join. The United States had long been a proponent of the idea of a permanent international criminal court, just as it had played a lead role in the Security Council's establishment of ad hoc criminal tribunals to address large scale crimes committed in the former Yugoslavia and in Rwanda. The United States viewed

the Rome Conference as presenting a historic opportunity to build an institution that in symbol and in substance would embody the international community's commitment to ensuring accountability for those responsible for crimes of international concern.

In the period leading up to Rome, however, the United States stressed that establishing an international criminal court was not an end in itself. The ability of such a court to make effective contributions to justice and to peace, and to win the support of the United States, would depend on the powers given to the Court and the ways in which those powers were integrated into the existing international system for maintaining peace and security. In addition, it was important that the Court's arrangements provide appropriate protections for the interests of states who would be called on to cooperate with the Court, as well as for the rights of those who might be investigated or prosecuted by the Court.

As early as 1990, the U.S. Congress passed legislation stating that the United States should "explore the need for the establishment of an International Criminal Court". The Congress emphasized, however, that such a Court "should not derogate from established standards of due process, the rights of the accused to a fair trial and" – I want to emphasize this – "the sovereignty of individual nations." The U.S. Senate passed similar legislation in 1994 supporting the establishment of an international criminal court, but emphasizing that the U.S. Senate would not consent to ratification of a treaty establishing such a court unless, among other things, the treaty ensured that rights of American citizens under the U.S. Constitution would be protected.

At Rome, U.S. representatives stressed that the ICC must operate in coordination, not in conflict, with the UN Security Council. They opposed proposals to give the court's prosecutor the authority to commence investigations on his own initiative, without a referral from the Security Council or the government of a state that was a party to the Court. They emphasized that the United States and other governments participate together in military alliances and peacekeeping operations around the world, and that the soldiers undertaking these important tasks needed to be able to do their jobs without exposure to politicized prosecutions from the court. They also expressed concerns with proposals to have the court exercise jurisdiction over crimes, such as a crime of aggression, which had not already been clearly established and defined in international law.

U.S. negotiators worked hard at Rome to secure agreement on a treaty that would meet these objectives. They tried to persuade delegations of the wisdom of an approach to the ICC that would have allowed the United States to join and that likely could have commanded wider support from the international community as a whole. This approach was rejected in favor of a narrower approach embraced by a smaller group of like minded nations. Some among this group objected to what they viewed as assertions of "exceptionalism" in the positions taken by the United States, and the consensus at Rome appears to have been that engaging with the United States and accommodating our concerns was too high a price to pay. The result is a court that on paper makes more expansive claims of power, but that enjoys a narrower base of political and material support, and that may be less able to effectively investigate crimes, apprehend suspects, bring cases to trial, and execute sentences. It remains to be seen how well this decision will serve the interests of the ICC and of international criminal justice.

From the U.S. perspective, while the result at Rome achieved some U.S. objectives, it failed to produce acceptable terms in a number of areas that the Clinton Administration considered critical. Shortly after the conference, Ambassador David Scheffer, the head of the U.S. delegation to the Rome Conference, outlined these areas in a hearing before the U.S. Senate Committee on Foreign Relations. He said the United States opposed the proposal to give the ICC prosecutor authority to initiate investigations and prosecutions without a referral by the Security Council or by a government that is party to the Rome Statute, which he said risked "embroil[ing] the court in controversy, political decision-making, and confusion." Scheffer also expressed concern about the Rome Statute's treatment of the crime of aggression, in particular its failure to guarantee that any future rules require that ICC jurisdiction in particular cases be linked directly to a prior UN

Security Council decision that a state had committed aggression. In addition, he objected to the Rome Statute's claim of jurisdiction over nationals of countries that are not parties to the statute. This, he said, could inhibit the ability of the United States to engage in multinational military operations, including humanitarian interventions.

These concerns were the core of the position President Clinton took when he announced in December 2000 that the United States would sign the Rome Statute, but would not submit it to the U.S. Senate for ratification. President Clinton stated: "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." President Clinton emphasized that signing the Rome Statute would allow the United States to remain "in a position to influence the evolution of the Court", and would "enhance our ability to further protect U.S. officials from unfounded charges."

It is not my purpose in reciting this history to reopen old debates about the Rome Statute. Rather, what I want to emphasize is that the concerns about the Rome Statute expressed by our negotiators at Rome and by President Clinton remain the core of U.S. policy toward the ICC. To be sure, there have been differences – sometimes sharp ones – in the tone and means by which these concerns have been advanced at different points and by different U.S. officials. But the substance of U.S. views about the Rome Statute and the ICC has been essentially unchanged.

In 2002, Under Secretary of State Marc Grossman, on behalf of the Bush Administration, announced that the United States was writing to the UN Secretary-General to express formally that we did not intend to become a party to the Rome Statute. Some have misunderstood this action, believing that it was done to express in aggressive or confrontational terms U.S. rejection of the ICC. In fact, its central motivation was to avoid any confusion whether, as a matter of treaty law, the United States had residual legal obligations arising from its signature of the Rome Statute not to take steps inconsistent with the treaty's "object and purpose". Since the scope of any such obligations was not fully clear, and since it was important to the United States to take appropriate steps to prevent assertions of jurisdiction over U.S. persons by the ICC, the United States took this step to clarify its legal status in relation to the Rome Statute.

Under Secretary Grossman's explanation of this action, and the Bush Administration's policy toward the ICC, reflects the same basic concerns expressed by the Clinton Administration. Under Secretary Grossman's remarks emphasized concern about the potential for politicized prosecutions by the ICC against members of the U.S. military, and the impact this risk would have on the unique role and responsibility of the United States to help preserve international peace and security. He expressed concern about aspects of the Rome Statute that diluted or usurped the authority of the UN Security Council. He also cited the inadequacy of external oversight of the functions of the ICC Prosecutor.

Under Secretary Grossman also emphasized a principle that remains central to our approach to the ICC: "the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court." Consistent with this approach, we have engaged with other states to promote acceptance of our decision to stay outside the Rome Statute regime, including by concluding bilateral agreements recognized under Article 98 of the Rome Statute to ensure that U.S. persons are not surrendered to the ICC without our consent. In taking this approach, we have not foreclosed the possibility of practical forms of cooperation with the ICC and ICC supporters, consistent with U.S. law, to advance our common goals, and I'll have more to say about this later in my remarks. But the starting point for such cooperation is recognition of the firmly held and consistent concerns of the United States about the ICC and our decision not to become a party to the Rome Statute.

To summarize the discussion to this point, a relatively straight line runs from the positions on the ICC taken by our Congress in 1990, to those of U.S. negotiators in Rome, to President Clinton's

decision not to seek Senate ratification of the Rome Statute and to recommend the same to his successor, and to the current position of the Bush Administration. I'd like now to offer some thoughts about what the next decade is likely to hold for the relationship between the United States and the ICC, and to suggest some ways in which parties and non-parties to the Rome Statute can best advance their shared interests in promoting international criminal justice.

A principal conclusion suggested by this history is that, regardless of the outcome of the 2008 election, the next U.S. administration – even if it wanted to support the ICC – is likely to share the same basic concerns about the Rome Statute that its predecessors expressed. These core U.S. concerns are not partisan in nature, and the basis for them is not ephemeral. They reflect the unique role and interests of the United States as a global military power and as a permanent member of the Security Council, as well as our historically rooted suspicions of institutions with unchecked powers. The increased scrutiny of, and legal challenges to, the actions of U.S. and other military forces in recent years is likely only to deepen concerns about the impact the ICC could have on U.S. interests.

It is, of course, possible that the views of Rome Statute parties about these U.S. concerns could evolve over time. As the ICC is now finding, political, financial, intelligence, military, and other resources are essential to an effectively functioning court, and in many cases these are resources that the United States is uniquely able to provide. Practical experience may lead Rome Statute parties to reassess the decision they made at Rome that the interests of international justice were best advanced by establishment of a permanent international criminal court that did not take into account significant concerns expressed by the United States and others. But absent changes to address fundamental U.S. concerns, it is highly unlikely that the United States will become a party to the Rome Statute anytime in the foreseeable future.

Even if a future President were to advocate U.S. accession to the Rome Statute, he or she could very well face a skeptical reaction in the U.S. Senate. It's worth bearing in mind that the American Servicemembers' Protection Act – legislation that was not sought by the Bush Administration and that includes a range of restrictions on U.S. support for the ICC – passed the Senate in 2002 by a vote of 75-19, including the affirmative votes of Senators Clinton and McCain, as well as those of the current Senate Majority and Minority Leaders, Senators Reid and McConnell.

A reasonable supposition, then, is that for the foreseeable future the United States will remain outside the Rome Statute. ICC supporters may find this to be an uncomfortable reality to accept. It is inconsistent with the fervent hope of some that if the ICC stays on its best behavior long enough and if its supporters pressure the United States hard enough, some (in their view) more enlightened future U.S. administration will eventually be converted to the ICC cause. It goes against the policy of the Assembly of States Parties to the Rome Statute to pursue universal accession to the Rome Statute and against their aspirations that the ICC embody the united efforts and will of the entire international community. It also means that the ICC will enter the next crucial phase of its efforts to build an effective judicial institution without a realistic claim on the support and resources of the United States to help achieve this objective.

But it is counterproductive for ICC supporters to deny this reality. It leads them to waste energy and effort trying to persuade the United States to accede to the Rome Statute. It suggests that ICC supporters consider support for the ICC to be the only way for states to demonstrate their commitment to advancing international criminal justice. It diverts attention from more productive efforts to identify areas where the United States and ICC supporters can agree and find practical ways to work together. And it alienates many in the United States who are committed to advancing international criminal justice but have honest and good faith objections to the Rome Statute regime.

To be sure, there are also realities about the ICC that the United States must accept. Any who thought that the ICC could or should be prevented from coming to existence must acknowledge

that the ICC is a reality and will remain so for the foreseeable future. Similarly, the United States must acknowledge that the ICC enjoys a large body of international support, and that many countries will look to the ICC as the preferred mechanism for addressing serious crimes that cannot be addressed at the national level. In addition, the United States must also recognize that, in some cases such as Darfur, the ICC's success in investigating and prosecuting serious crimes may advance goals we share, and that in such cases we may have an interest in facilitating the ICC's work.

My key point is that ICC supporters and the United States have more to gain by focusing on our shared values and commitment to advancing the cause of international justice than by trying to persuade each other to change our views about the ICC. The sooner both sides respectfully agree to disagree about the ICC as an institution, the sooner we will be able to focus on finding practical and constructive ways to cooperate in advancing our common goals.

I believe the United States has made genuine efforts to address these issues in recent years. As I noted earlier, we've emphasized as a core principle of our policy our respect for the decisions of other states to join the ICC. Moreover, the Administration has acknowledged that the Court has a valuable role to play in certain cases. In 2005, in one of the first major policy decisions of Secretary Rice's tenure at the State Department, the United States accepted the decision of the UN Security Council to refer the Darfur situation to the ICC. We have said that we want to see the ICC's Darfur work succeed and that if the ICC were to make a request for appropriate assistance from the United States in connection with the Darfur matter, we would be prepared to consider it consistent with applicable U.S. law. We have also waived restrictions under U.S. law on assistance to a number of countries that have not signed Article 98 agreements with the United States and we've made clear that we do not seek to prevent other countries from deciding to become parties to the Rome Statute.

These efforts led the Wall Street Journal several years ago to print an article entitled "U.S. Warms to Hague Tribunal." While I think this overstates the case, it is true that we have expressed our sincere desire to develop a practical approach on ICC issues. We agree in this regard with Javier Solana, the European Union's High Representative for Foreign and Security Policy, who has spoken of the need for a "modus vivendi" on ICC issues between Europe and the United States. Such an approach, in our view, must start with each side accepting practical realities.

We've been surprised that ICC supporters have so far been unwilling to take this critical first step toward a more constructive relationship. As an example, for three years we have urged ICC supporters to include language in the annual UN General Assembly resolution on the ICC acknowledging the decisions of some states not to become parties to the Rome Statute. Each time, our proposals have been rejected. This makes it appear to us that ICC supporters are more interested in fighting ideological battles than they are in finding common ground.

We also find this approach counterproductive. ICC supporters clearly recognize that it is in the interest of the ICC as an institution to develop a constructive relationship with the United States. But at the same time ICC supporters refuse to accept our position, they are actively urging the United States to engage with and support the ICC. But such a relationship cannot develop in a climate where the United States is consistently chastised for not joining the ICC. To use an old expression that I suspect translates into all languages, "one catches more flies with honey than with vinegar." ICC supporters will ultimately have to decide which they value more: hewing to an idealistic commitment to universality or pursuing practical efforts to build an effective court.

It is important that we put aside our differences on these issues because the next decade poses challenges that will require our collective efforts as well as pitfalls that risk further inflaming tensions over ICC issues. Let me now discuss a few issues that I think will shape the relationship between the United States and the ICC in the coming years.

A first area relates to the response to large scale and horrific crimes in Darfur. Absent a decision by the ICC to pursue an investigation or prosecution against a U.S. person, the outcome of the ICC's Darfur work is likely to do more than any other factor in the near term to shape U.S. perceptions of the role and impact of the ICC. There is deep concern not only within the U.S. Government, but among the American people at large about the tragedy in Darfur, and a desire to find effective responses.

Now that the United States accepted the decision of the UN Security Council to refer the Darfur situation to the ICC, we want to see the ICC's work succeed. We have said that we would be prepared to consider an appropriate request from the ICC for assistance in its Darfur work consistent with applicable U.S. law. This is not to say that responding to such a request would be straightforward or easy. There are restrictions in U.S. law on assistance to the ICC, including under the American Servicemembers' Protection Act. Caution would also be necessary given that the ICC's procedures for cooperation and the protections they provide for the interests of cooperating states are new and untested. But Darfur is nonetheless a good example of an area where, with respect and goodwill on all sides, there may be opportunities for constructive cooperation.

Darfur also provides a useful illustration that, even in cases where it has an important role to play, the ICC cannot be the sole answer to addressing large scale crimes. Even under the best of circumstances, the ICC will pursue only a handful of prosecutions in Darfur for crimes that have resulted in more than 200,000 deaths and the displacement of more than two million people. Its policy of pursuing cases only against those it deems "most responsible" for crimes under the Rome Statute, while based on understandable practical considerations, inevitably means that many who bear responsibility for horrific crimes will not face accountability through the ICC's processes. Thus, even where the ICC process works as intended, there will remain a need to address accountability for those who fall beneath the ICC's radar. Meeting this challenge presents an important opportunity outside the ICC context where both parties and non-parties to the Rome Statute need to be able to cooperate to advance our common goals.

A second more general area that will shape U.S. views and policy toward the ICC in the coming years will be the impact of the ICC's work on the UN Security Council. As I noted earlier, preserving the role and authority of the UN Security Council has been a consistent and central concern of the United States from the earliest days of discussions about an international criminal court. Now that the ICC is a reality, it will be important to the United States to ensure that the work of the ICC complements the work of the Council to maintain international peace and security.

These issues may arise in a variety of contexts. One reason the United States opposed giving the ICC Prosecutor the authority to initiate cases without a request by the UN Security Council was our view that, where serious crimes occur in connection with large scale armed conflict, decisions about the role and timing of accountability measures should not be made in isolation from decisions about how to resolve the conflict as a whole. The UN Charter vests the Security Council with primary responsibility for maintaining international peace and security, and these decisions should be taken by the Council. As the ICC proceeds to investigate and prosecute cases under the Rome Statute, the Security Council must be prepared to act if and when necessary to ensure harmony between the ICC's work and the Council's broader efforts.

The interests of the Council will also be implicated by suggestions that the Council should lend its authority and resources to assist the ICC in its work. Some have suggested a role for the Council with respect to the so-called "enforcement pillar" of the Rome Statute, including the arrest and surrender of suspects and the protection of victims and witnesses. The Council will need to be cautious in the face of such suggestions. Where proposals involve roles for UN peacekeeping forces, the Council will need to consider carefully the impact of such roles on the core missions of peacekeepers and on their ability to act as neutral and trusted parties in the countries where they

operate. If UN peacekeepers are viewed as policemen with a mandate to arrest government officials and deliver them to The Hague, they are less likely to be accepted and may actually be in greater personal danger. In any case, what role, if any, the Council should play in facilitating the work of the ICC must turn on the consistency of such a role with the Council's efforts to maintain international peace and security.

A final area that will shape U.S. views and policy toward the ICC is the outcome of the upcoming Rome Statute review conference, now scheduled for 2010. If Rome Statute parties were interested in trying to address the core U.S. concerns about the ICC, the Review Conference could provide an opportunity to do so. These issues aside, a principal focus of work of the conference will likely relate to proposals to define a crime of aggression over which the ICC could exercise jurisdiction.

At Rome, U.S. representatives expressed a number of concerns about efforts to create a crime of aggression over which the ICC would exercise jurisdiction. They noted that the UN Charter gives the Security Council the responsibility to determine when an act of aggression has occurred, and stressed that ICC jurisdiction over any case of aggression must be directly linked to a prior Security Council determination to this effect. They also noted that any definition of aggression for Rome Statute purposes must be consistent and coextensive with existing customary international law, and clear and specific enough to meet basic principles of legality and due process.

These principles are as important today as they were a decade ago. Achieving a definition that satisfies them is a difficult, and possibly insurmountable task, and one that the current proposals under consideration by the Assembly of States Parties do not come close to fulfilling. Judgments about whether a particular use of force amounts to an act of aggression are particularly susceptible to political considerations. This makes it especially critical that there be effective safeguards beyond those currently contained in the Rome Statute to prevent politically motivated investigations and prosecutions for aggression. ICC parties should consider these issues carefully as their discussions proceed. A poorly conceived regime for aggression would be far more damaging to the ICC as an institution than the adoption of no regime at all.

Efforts to design an aggression regime for the ICC will also need to address the regime's applicability to countries that are not parties to the Rome Statute. As I have noted, a core principle of our ICC policy is that, as we acknowledge the decisions of other states to join the Rome Statute and to submit to its jurisdiction, we ask that other states accept our decision not to do so. In this context, should Rome Statute parties seek to make an aggression regime they adopt applicable to non-parties, they will almost certainly provoke a serious new crisis in the ICC's relationship with a new U.S. Administration. Article 121(5) of the Rome Statute provides that the ICC shall not exercise jurisdiction over nationals of states parties to the Rome Statute that have not accepted amendments such as those that would establish the definition of aggression. It would be entirely illegitimate for the ICC to claim jurisdiction over nationals of countries that were not parties to the Rome Statute, while permitting Rome Statute parties to shield their nationals from such jurisdiction.

The issue of the treatment of non-parties to the Rome Statute returns me to the central theme of my remarks. The core concerns of the United States about the Rome Statute have not been resolved during the past decade, and are unlikely to be resolved in the next decade, unless the Statute is changed. Accordingly, as we look forward, the United States will very likely remain outside the Rome Statute regime. This is a reality that ICC supporters should accept. Agreeing to disagree about the ICC is the essential first step toward developing a more mature and productive relationship that can effectively advance our shared goal of promoting international criminal justice. This will involve seizing opportunities for cooperative efforts where they exist and avoiding pitfalls that risk reigniting past tensions. We should be guided in our efforts by the premise that the ends we seek are far more important than the means by which we seek them. The United States and ICC supporters can do more to prevent impunity for serious crimes by

working together than either can achieve on their own, and it is in our mutual interest to develop a relationship that recognizes this.

Source: <http://www.state.gov/s//rls/104053.htm>