

DEMARCHE ON THE US GOVERNMENT POLICY ON THE INTERNATIONAL CRIMINAL COURT FROM SECRETARY OF STATE TO AMBASSADORS

NOTIFICATION OF THE UN

On May 6, 2002, the U.S. Government will notify formally the UN Secretary General in his capacity as treaty depositary, that it has no intention of becoming a party to the Rome Statute, which will nullify any adverse legal effects of the previous U.S. Government signatures of the treaty. This will relieve the U.S. of its responsibility not to take actions that defeat the object and purpose of the treaty.

BACKGROUND

President Bush has stated the creation of an International Criminal Court, under the terms of the Rome Statute, is not in the interest of the United States. Although President Clinton authorized signature, he stated that the treaty was significantly flawed and recommended that his successor not submit the treaty to the Senate for its advice and consent to ratification. Because the United States will not become party, it will formally notify the UN Secretary-General, as depositary for the Rome Statute of that fact and thereby make clear it has no legal obligation as a result.

WHY THE ROME STATUTE IS AGAINST U.S. INTERESTS

The U.S. position is that the Rome Statute is ill conceived and that it contains many significant defects. The ICC threatens principles of national sovereignty, is very likely to be susceptible to political pressures and creates potential for conflict with the UN Charter.

The U.S. strongly objects to the ICC's claims of jurisdiction over the nationals, including government officials and servicemembers, of states not party to the treaty. The ICC treaty would adversely affect aspects of U.S. sovereign rights without our consent. As a matter of international law, the parties to the Rome Statute cannot establish obligation for the United States, as a non-party. The United States will reject as illegitimate any attempt by the court or any state on behalf of the ICC to assert the jurisdiction of the Rome Statute, directly or indirectly, over U.S. nationals, including current or former members of the U.S. armed forces, or other U.S. officials, without the prior express consent of the United States.

We also strongly object to the ICC's claim to be able to judge whether an investigation or prosecution of an alleged crime has been made in good faith under the appropriate laws of the state concerned. The ICC's claim extends even to states not party to the treaty. The ICC cannot be permitted to decide on the genuineness of criminal investigations or trials held in non-party states.

Differences in domestic judicial systems and traditions accentuate this concern. For example, although we generally agree with other countries on certain basic principles or procedures, other, such as plea-bargaining and the U.S. exclusionary rule (prohibiting the use in trial of evidence obtained contrary to constitutional requirements), are unheard of in some systems. Release of a defendant because key evidence cannot be used at trial might be viewed by persons from another legal tradition as a failure to prosecute.

The United States is also concerned that the lack of accountability over the ICC and its prosecutor could result in politically motivated investigations and prosecutions. More specifically, the prosecutor is not responsible to an elected body or to the UN Security Council, and the court lacks fundamental checks and balances. The prosecutor will be free to examine allegations by NGOs, the media and private persons, and those choices will be influenced by his or her own personal, national and regional biases. The United States cannot accept an unaccountable international prosecutor empowered to investigate individuals with minimal oversight. The ICC prosecutor retains broad discretion to override the decisions taken by sovereign states regarding the disposition of particular allegations. This lack of positive political control over the ICC will ultimately erode confidence in the rule of law and detract from the international community's ability to deal with war crimes effectively.

THE ICC AND FOREIGN POLICY

The ICC also poses a significant threat to the effective conduct of foreign policy worldwide. The United States government believes the ICC could hamper the participation of the U.S. and other nationals in allied military operations because of a hesitancy to deploy forces in situation where its military personnel could be subject to the risk of investigation or prosecution by the ICC.

The USG further believes the impact of an unyielding ICC process could be the reverse of that intended by its parties. It is likely to encourage autocratic leaders to cling to power if domestic amnesty or other domestic legal processes will not protect them from the risk of prosecution by the ICC. More importantly, an ICC would impede the ability of sovereign states or the UN Security Council to determine how to deal with difficult periods in a particular state's history, whether through formal trial, through truth commissions combined with amnesty, through political processes, or in exceptional cases through special tribunals.

CONFLICT WITH THE UN CHARTER

The potential impact of the ICC on the role of the UN Security Council is another significant flaw in the treaty. The UN Charter provides that the Security Council is to determine when an act of aggression occurs. By paving the way for the inclusion of crimes of aggression within the jurisdiction of the ICC, the Rome Statute provides an opening for the ICC to undermine the role of the Security Council in determining when a state has committed an act of aggression, thus bringing it into potential conflict with the UN Charter.

Some proposals for the exercise of the ICC's jurisdiction over aggression provide a mechanism for the ICC to act even in the absence of a Security Council determination that a state has committed an act of aggression. As the history of the United Nations has shown, such a determination is a complex policy judgement not suitable to judicial determination and claims of aggression are often politically motivated.

The Rome Statute's provision giving the ICC jurisdiction over acts of aggression threaten the Security Council's responsibilities and role in the international community and are unacceptable. The U.S. will continue to oppose any definition of aggression that does not recognize

that the UN Security Council is the only international body that may determine whether aggression has taken place.

A SPECIAL EXCEPTION

The Rome Statute allows the parties to exempt themselves from all crimes added by amendment, which will include the definition of crimes of aggression, yet purports to subject nationals of non-parties to prosecution for such crimes without the ability to opt out. This is unacceptable.

OUR APPROACH: WORK ON SOVEREIGN INSTITUTIONS

Although we find the treaty establishing the ICC to be unworkable and unacceptable, the U.S. government is fully committed to preventing and punishing crimes of international concern. The USG will continue to be a forceful advocate for the principles that there must be accountability for war crimes, genocide and crimes against humanity.

Our view is that accountability is obtainable by primarily relying on sovereign states and the Security Council (for example, to create ad hoc tribunals such as the International criminal tribunals for the former Yugoslavia and Rwanda). To that end, and in the interests of preserving stability across the world, the U.S. is committed more than ever to promoting the rule of law and helping to bring perpetrators of war crimes, genocide and crimes against humanity to justice, wherever the violations may occur.

In bringing to justice those who perpetrate war crimes, genocide and crimes against humanity. The US government position is that the international practice should be to promote domestic accountability and to encourage and support sovereign states seeking accountability domestically. The interference of an unaccountable ICC prosecutor could undermine the judgements made by states seeking to end conflicts.

The sovereign state is best positioned to balance the interest of peace, justice, democratic principles and societal stability against the need for prosecution and other alternative mechanisms such as truth and reconciliation commissions. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability in a manner determined by a sovereign state for war crimes which respecting the rule of law must be encouraged and promoted at all times.

When domestic justice is not possible for war crimes to a failed state or a seriously dysfunctional judicial system, it is our policy that the international community must be prepared to assist in creating the capacity to address the violations.

The USG supports the establishment of creative ad hoc mechanisms throughout the international community, such as one-time tribunals and hybrid processes - where there is a division of labor between the sovereign state and the international community - as well as alternative justice mechanism such as truth and reconciliation commissions in appropriate cases.

In situations where violations are grave and the political will of the sovereign state is weak, the international community should work, using any influences it has, to strengthen that will. In a case where the

violations are so horrendous and the political will does not exist in the affected state, we are prepared to not exist in the affected state, we are prepared to consider UN Security Council action. The presence of the ICC makes this constructive approach more difficult.

ACTION: DEMARCHE

The following demarche is for all governments informing them of the delivery of a note to the UN Secretary-General regarding the U.S. government's decision not to become a party to the treaty establishing the ICC. Please deliver at the earliest opportunity on May 6. The Ambassador should make the demarche to the highest level in the host government possible. Please advise if post believes it would be inappropriate to deliver this demarche as a result of special local circumstances. This text should not/not be left as a non-paper.

-- Today May 6, 2002, The United States Government sent a formal notice to the Secretary-General of the United Nations, as depositary for the Rome Statute, declaring the United States will not become a party to the treaty establishing the International Criminal Court.

-- With this action, there can be no doubt the United States does not intend to become a party and has no obligations as a signatory.

-- The United States strongly objects to the ICC's claims to jurisdiction over the nationals, including governments officials, of states not party to the treaty. The Rome Statute infringes on U.S. national sovereignty by exposing U.S. military personnel and public officials to the threat of prosecution by an artificial international body, whose jurisdiction we have not consented to.

-- We will continue to meet our obligations as a member of the international community to seek justice, but we believe the ICC does not advance this cause.

-- We believe accountability is obtainable by primarily relying on sovereign states and the Security Council.

-- Our policy is to encourage states to pursue credible justice primarily within their own sovereign institutions rather than abdicating their sovereign responsibility and in appropriate circumstances through the UNSC.

-- The U.S. government supports justice, but not the seriously flawed ICC. We believe our policy on the ICC is consistent with the history of our policies on human rights. The rule of law and the validity of democratic institutions.

-- For example, we have been a major proponent of the special court in Sierra Leone because it is grounded in sovereign consent, combines domestic and international participation in a manner that will generate a lasting benefit to the rule of law within Sierra Leone, and interfaces with the truth and reconciliation commission to address accountability for a wide range of perpetrators.

-- We will continue to be a forceful advocate for the principle of accountability for war crimes and other serious violations of international humanitarian law.

-- However, the ICC will hinder the ability of the U.S. and other nations to use military forces to put an end to war crimes in areas where they are being committed.

-- Also the existence of the ICC, which claims jurisdiction over American servicemembers, will necessarily complicate the U.S. military cooperation with friends and allies who are parties to the Rome Statute.

-- The United States would reject as illegitimate any attempt by the court or any state on behalf of the ICC to assert the jurisdiction of the Rome Statute, directly or indirectly, over U.S. nationals, including current or former members of the U.S. armed forces, or other U.S. officials, without the prior express consent of the United States.

-- We need to address the concerns our Congress has already expressed over the participation of U.S. forces in peace operations without appropriate safeguards.

-- We want to work together with our friends and allies to avoid any disruptions that might be used by the treaty. The treaty itself provides for such arrangements.

-- We all desire justice for criminals, while we may have honest disagreements with other nations on the means, building sovereign institutions to strengthen the rule of law is a common aim.

-- The United States is interested in your country's views on ways in which we might work together to strengthen sovereign mechanisms to prevent and prosecute serious international crimes.

NEXT STEPS

Under Secretary Marc Grossman will make a major policy address on the ICC on the same day as the delivery of the letter to the UN Secretary-General. The separate public diplomacy cable will provide information regarding the appropriate website for access to the text of this address

If pressed to discuss such agreements, posts can use the following points:

-- We are interested in your view regarding bilateral agreements recognized under Article 98 of the Rome Statute that could be used to provide protection for nationals from both of our countries from the reach of the ICC.

If a host government offers directly to undertake such an agreement, post can use the following point:

We would be interested in discussing your offer further at the moment we are considering our next steps and should have a decision very soon. I will report our conversation to Washington and I expect we will have a response for you shortly.