American Foreign Policy and the International Criminal Court

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As Prepared

Good morning. Thank you for that kind introduction.

It's an honor to be here today. I would like to thank CSIS for hosting this discussion of American foreign policy and the International Criminal Court.

Let me get right to the point. And then I'll try to make my case in detail:

Here's what America believes in:

- We believe in justice and the promotion of the rule of law.
- We believe those who commit the most serious crimes of concern to the international community should be punished.
- We believe that states, not international institutions are primarily responsible for ensuring justice in the international system.
- We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom.

We have concluded that the International Criminal Court does not advance these principles. Here is why:

- We believe the ICC undermines the role of the United Nations Security Council in maintaining international peace and security.
- We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power.
- We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty.
- We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.

President Bush has come to the conclusion that the United States can no longer be a party to this process. In order to make our objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, the President believes that he

has no choice but to inform the United Nations, as depository of the treaty, of our intention not to become a party to the Rome Statute of the International Criminal Court. This morning, at the instruction of the President, our mission to the United Nations notified the UN Secretary General in his capacity as the depository for the Rome Statute of the President's decision. These actions are consistent with the Vienna Convention on the Law of Treaties.

The decision to take this rare but not unprecedented act was not arrived at lightly. But after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it is our only alternative.

Historical Perspective

Like many of the nations that gathered in Rome in 1998 for the negotiations to create a permanent International Criminal Court, the United States arrived with the firm belief that those who perpetrate genocide, crimes against humanity, and war crimes must be held accountable — and that horrendous deeds must not go unpunished.

The United States has been a world leader in promoting the rule of law. From our pioneering leadership in the creation of tribunals in Nuremberg, the Far East, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United States has been in the forefront of promoting international justice. We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world — and perhaps one day such a court will come into being.

A Flawed Outcome

But the International Criminal Court that emerged from the Rome negotiations, and which will begin functioning on July 1 will not effectively advance these worthy goals.

First, we believe the ICC is an institution of unchecked power. In the United States, our system of government is founded on the principle that, in the words of John Adams, "power must never be trusted without a check." Unchecked power, our founders understood, is open to abuse, even with the good intentions of those who establish it.

But in the rush to create a powerful and independent court in Rome, there was a refusal to constrain the Court's powers in any meaningful way. Proposals put forward by the United States to place what we believed were proper checks and balances on the Court were rejected. In the end, despite the best efforts of the U.S. delegation, the final treaty had so many defects that the United States simply could not vote for it.

Take one example: the role of the UN Security Council. Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.

In Rome, the United States said that placing this kind of unchecked power in the hands of the prosecutor would lead to controversy, politicized prosecutions, and confusion. Instead, the U.S.

argued that the Security Council should maintain its responsibility to check any possible excesses of the ICC prosecutor. Our arguments were rejected; the role of the Security Council was usurped.

Second, the treaty approved in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned.

The treaty creates an as-yet-to-be defined crime of "aggression," and again empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime. This was done despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression. Yet the ICC, free of any oversight from the Security Council, could make this judgment.

Third, the treaty threatens the sovereignty of the United States. The Court, as constituted today, claims the authority to detain and try American citizens, even though our democratically-elected representatives have not agreed to be bound by the treaty. While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate.

Fourth, the current structure of the International Criminal Court undermines the democratic rights of our people and could erode the fundamental elements of the United Nations Charter, specifically the right to self defense.

With the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests.

This power must sometimes be projected. The principled projection of force by the world's democracies is critical to protecting human rights — to stopping genocide or changing regimes like the Taliban, which abuse their people and promote terror against the world.

Fifth, we believe that by putting U.S. officials, and our men and women in uniform, at risk of politicized prosecutions, the ICC will complicate U.S. military cooperation with many friends and allies who will now have a treaty obligation to hand over U.S. nationals to the Court — even over U.S. objections.

The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world conducting peacekeeping and humanitarian operations and fighting inhumanity.

We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our President is committed to a robust American engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

Our Efforts

The President did not take his decision lightly.

After the United States voted against the treaty in Rome, the U.S. remained committed and engaged—working for two years to help shape the court and to seek the necessary safeguards to prevent a politicization of the process. U.S. officials negotiated to address many of the concerns we saw in hopes of salvaging the treaty. The U.S. brought international law experts to the preparatory commissions and took a leadership role in drafting the elements of crimes and the procedures for the operation of the court.

While we were able to make some improvements during our active participation in the UN Preparatory Commission meetings in New York, we were ultimately unable obtain the remedies necessary to overcome our fundamental concerns.

On December 31, 2000, the previous administration signed the Rome Treaty. In signing President Clinton reiterated "our concerns about the significant flaws in the treaty," but hoped the U.S. signature would provide us influence in the future and assist our effort to fix this treaty. Unfortunately, this did not prove to be the case.

On April 11, 2002, the ICC was ratified by enough countries to bring it into force on July 1 of this year. Now we find ourselves at the end of the process. Today, the treaty contains the same significant flaws President Clinton highlighted.

Our Philosophy

While we oppose the ICC we share a common goal with its supporters - the promotion of the rule of law. Our differences are in approach and philosophy. In order for the rule of law to have true meaning, societies must accept their responsibilities and be able to direct their future and come to terms with their past. An unchecked international body should not be able to interfere in this delicate process.

For example: When a society makes the transition from oppression to democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should not be made by the ICC.

If the state chooses as a result of a democratic and legal process not to prosecute fully, and instead to grant conditional amnesty, as was done in difficult case of South Africa, this democratic decision should be respected.

Whenever a state accepts the challenges and responsibilities associated with enforcing the rule of law, the rule of law is strengthened and a barrier to impunity is erected. It is this barrier that will create the lasting goals the ICC seeks to attain. This responsibility should not be taken away from states.

International practice should promote domestic accountability and encourage sovereign states to seek reconciliation where feasible.

The existence of credible domestic legal systems is vital to ensuring conditions do not deteriorate

to the point that the international community is required to intercede.

In situations where violations are grave and the political will of the sovereign state is weak, we should work, using any influence we have, to strengthen that will. In situations where violations are so grave as to amount to a breach of international peace and security, and the political will to address these violations is non-existent, the international community may, and if necessary should, intercede through the UN Security Council as we did in Bosnia and Rwanda.

Unfortunately, the current framework of the Rome treaty threatens these basic principles.

We Will Continue To Lead

Notwithstanding our disagreements with the Rome Treaty, 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.

So, despite this difference, we must work together to promote real justice after July 1, when the Rome Statute enters into force.

The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.

The United States will:

- Work together with countries to avoid any disruptions caused by the Treaty, particularly those complications in US military cooperation with friends and allies that are parties to the treaty.
- Continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.
- Continue to play a leadership role to right these wrongs.
- The armed forces of the United States will obey the law of war, while our international policies are and will remain completely consistent with these norms.
- Continue to discipline our own when appropriate.
- We will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.
- We will support politically, financially, technically, and logistically any post-conflict state that seeks to credibly pursue domestic humanitarian law.
- We will support creative ad-hoc mechanisms such as the hybrid process in Sierra Leone – where there is a division of labor between the sovereign state and the international community–as well as alternative justice mechanisms such as truth and reconciliation commissions.
- We will work with Congress to obtain the necessary resources to support this global effort.
- We will seek to mobilize the private sector to see how and where they can contribute.
- We will seek to create a pool of experienced judges and prosecutors who would be willing to work on these projects on short-notice.

- We will take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.

And when violations occur that are so grave and that they breach international peace and security, the United States will use its position in the UN Security Council to act in support of justice.

We believe that there is common ground, and ask those nations who have decided to join the Rome Treaty to meet us there. Encouraging states to come to face the past while moving into the future is a goal that no one can dispute. Enhancing the capacity of domestic judiciaries is an aim to which we can all agree. The United States believes that justice would be best served in creating an environment that will have a lasting and beneficial impact on all nations across the globe. Empowering states to address these challenges will lead us to a more just and peaceful world. Because, in the end, the best way to prevent genocide, crimes against humanity, and war crimes is through the spread of democracy, transparency and rule of law. Nations with accountable, democratic governments do not abuse their own people or wage wars of conquest and terror. A world of self-governing democracies is our best hope for a world without inhumanity.

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