



## *THE OBAMA ADMINISTRATION'S EVOLVING POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT*

The Obama Administration has not announced a comprehensive US policy toward the International Criminal Court (ICC). However, several actions and statements by the Administration indicate elements of such a policy, while other areas remain unclear. A formal US policy may result from an official review that the Administration launched in 2009.<sup>1</sup> This paper compiles public actions and statements to indicate the current shape of the US policy.

### Engagement in the Assembly of States Parties

The Administration decided in 2009 to participate as an observer in sessions of the Assembly of States Parties (ASP), the ICC's governing body, following an eight-year absence from ICC meetings.<sup>2</sup> US delegations have since participated in several sessions.<sup>3</sup> The Administration declared that this strategy of "principled engagement" with the ICC has been a success.<sup>4</sup> Likewise, the Administration in its first National Security Strategy defined its presence in the ASP as both a moral and security imperative.<sup>5</sup> The Administration will likely continue to attend future ASP meetings, and to take an active role in the shaping of ASP policy.<sup>6</sup>

The Administration sent a large delegation drawn from all of main participants in policymaking on the ICC within the American government to the Review Conference in Kampala, Uganda in May and June of 2010.<sup>7</sup> The final outcome from Kampala included a successful assessment of the Rome Statute system of international justice of which the ICC is at the center, the adoption of amendments on war crimes and the crime of aggression, and the announcement of numerous formal pledges by countries to assist the Court. The US announced two pledges at Kampala, and was the only non-State Party to make a pledge.<sup>8</sup> The US formally committed to building the legal capacity of certain countries to prosecute atrocity crimes themselves, and to assisting the ICC in its investigation and prosecution of leaders of the Lord's Resistance Army (LRA) now wanted by the ICC.<sup>9</sup> The US also co-sponsored a side event with Norway and the Democratic Republic of the Congo (DRC) on building the capacity of the DRC's judicial system to address atrocity crimes.

The conference adopted two sets of amendments. The Administration believes that the outcome on both is in accord with important US interests.<sup>10</sup> First, the Conference adopted a definition for the crime of aggression, the conditions under which it would exercise jurisdiction, and a roadmap for the eventual activation of jurisdiction after January 1, 2017. The US initially raised concerns about the definition, but accepted it after other countries agreed to attach a set of detailed understandings to the resolution adopting the amendments.<sup>11</sup> The jurisdiction

<sup>1</sup> <http://geneva.usmission.gov/2010/01/22/stephen-rapp/>

<sup>2</sup> <http://www.reuters.com/article/idUSTRE5AF30A20091116>

<sup>3</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/133316.htm](http://www.state.gov/s/wci/us_releases/remarks/133316.htm); <http://usun.state.gov/briefing/statements/2010/139000.htm>

<sup>4</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm)

<sup>5</sup> [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)

<sup>6</sup> <http://www.state.gov/s/l/releases/remarks/150497.htm>

<sup>7</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm)

<sup>8</sup> [http://amicc.org/docs/Review\\_Conference\\_Pledges\\_by\\_the\\_US.pdf](http://amicc.org/docs/Review_Conference_Pledges_by_the_US.pdf)

<sup>9</sup> <http://amicc.org/docs/Uganda%20arrest%20warrants.pdf>

<sup>10</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm)

<sup>11</sup> <http://www.state.gov/s/l/releases/remarks/143218.htm>





granted to the Court over the crime of aggression would only apply to the citizens and territories of those countries that accept the amendments or in situations referred to the ICC by a Security Council resolution. Absent a Security Council referral, the ICC will be unable to prosecute citizens of countries that do not consent to the crime of aggression, including US nationals. The Conference also approved war crimes amendments that will only apply to the citizens and territories of those countries that accept the amendments.

Speaking about the past and future of US-ICC relations in light of the Review Conference, Legal Adviser Koh recently declared that “after 12 years, I think we have reset the default on the U.S. relationship with the Court from hostility to positive engagement. In this case, principled engagement worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill.”<sup>12</sup>

### Cooperation

The Administration has expressed its desire to engage in effective cooperation with the ICC and to support all of the ICC’s investigations and prosecutions.<sup>13</sup> It also announced its intention to meet with the Prosecutor and other ICC officials to discuss possible US assistance.<sup>14</sup> It affirmed these commitments at the Review Conference<sup>15</sup> and in other fora.<sup>16</sup> In April 2010, the Prosecutor met with the US Ambassador-at-Large for War Crimes Issues Stephen Rapp and Legal Adviser Koh regarding US assistance in the prosecution of sexual violence in the DRC and to stop atrocities by the LRA.<sup>17</sup> In May 2010, President Obama recognized the ICC’s role in dealing with LRA atrocities when signing into law legislation about US policy on them<sup>18</sup> and reaffirmed support for the ICC in its November 2010 LRA strategy.<sup>19</sup> The US supports the ICC’s actions on Darfur,<sup>20</sup> and has said that it sees no reason for the Security Council to suspend them.<sup>21</sup> President Obama also urged the government of Sudan to cooperate with the ICC following the issuance of a second arrest warrant for Omar Al Bashir, president of Sudan, on genocide charges.<sup>22</sup> The US has indicated that it supports and is open to cooperating on the situation in Kenya.<sup>23</sup> The US also co-sponsored and voted in favor of Resolution 1970, adopted unanimously by the UN Security Council, referring the Libya situation to the ICC, and supports the Court’s investigation<sup>24</sup> as well as the arrest warrants issued for Muammar Gaddafi and other leaders.<sup>25</sup> The US

<sup>12</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm)

<sup>13</sup> <http://www.state.gov/s/gwi/rls/rem/2009/130211.htm>; <http://www.state.gov/r/pa/prs/ps/2010/10/149362.htm>;

<http://www.state.gov/s/l/releases/remarks/150497.htm>; [http://www.state.gov/s/wci/us\\_releases/remarks/151884.htm](http://www.state.gov/s/wci/us_releases/remarks/151884.htm)

<sup>14</sup> <http://usun.state.gov/briefing/statements/2010/138999.htm>

<sup>15</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/142520.htm](http://www.state.gov/s/wci/us_releases/remarks/142520.htm)

<sup>16</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/165257.htm](http://www.state.gov/s/wci/us_releases/remarks/165257.htm)

<sup>17</sup> <http://www.icc-cpi.int/Menu/Go?id=228a4af7-448c-4f84-b8ed-faab58753f95&lan=en-GB>

<sup>18</sup> <http://www.whitehouse.gov/the-press-office/statement-president-signing-lords-resistance-army-disarmament-and-northern-uganda-r>

<sup>19</sup> <http://www.whitehouse.gov/the-press-office/2010/11/24/letter-president-strategy-support-disarmament-lords-resistance-army>;

[http://pulitzercenter.org/sites/default/files/WhiteHouseLRAStrategy\\_opt.pdf](http://pulitzercenter.org/sites/default/files/WhiteHouseLRAStrategy_opt.pdf)

<sup>20</sup> <http://usun.state.gov/briefing/statements/2009/march/126539.htm>

<sup>21</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/08/AR2009020802191.html>

<sup>22</sup> <http://www.whitehouse.gov/the-press-office/interview-president-south-african-broadcasting-corporation>

<sup>23</sup> <http://www1.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html>;

<http://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement>

<sup>24</sup> <http://usun.state.gov/briefing/statements/2011/157195.htm>; <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html>;

<http://www.state.gov/secretary/rm/2011/06/166369.htm>

<sup>25</sup> <http://www.state.gov/r/pa/prs/dpb/2011/06/167162.htm#LIBYA>





abstained from voting on the only other Security Council referral to the Court, Resolution 1593 (2005) on Darfur.

The US also has a policy of opposing invitations, facilitations and support for travel by individuals indicted by the ICC as well as a longstanding policy of strongly urging other nations to do the same.<sup>26</sup>

## Bilateral Immunity Agreements (BIAs)

The US, since 2002, has concluded agreements with 102 countries to control the transfer of US nationals and others to the ICC.<sup>27</sup> The last BIA was concluded in 2007. There is no indication that the Administration plans to pursue additional BIAs in the future. In addition, the US Congress has repealed all legislation which punished other nations for refusing to enter into BIAs with the US.<sup>28</sup> The Obama administration has also reaffirmed that the US respects the right of every country to join the ICC.<sup>29</sup>

## Signature and Ratification of the Rome Statute

The Administration's approach toward the ICC is under review.<sup>30</sup> The Administration has not yet stated whether it will reactivate the US signature of the Rome Statute. The US in 2002 informed the UN Secretary-General that it did not intend to ratify the Rome Statute,<sup>31</sup> thus relieving it of its signatory obligations not to defeat the object and purpose of the treaty. Secretary of State Hillary Clinton expressed her regret that the US is not part of the ICC.<sup>32</sup> Ambassador Rapp has said that the US has not yet decided whether it will ratify the Rome Statute and that it will not do so in the near future.<sup>33</sup> As a presidential candidate Senator Barack Obama stated that he would consult extensively with military and other leaders before concluding a final policy on the ICC.<sup>34</sup>

*Researched and drafted by Douglas Dunbar  
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<sup>26</sup> <http://www.state.gov/r/pa/prs/dpb/2011/06/167162.htm#CHINA>

<sup>27</sup> [http://www.amicc.org/usinfo/administration\\_policy\\_BIAs.html](http://www.amicc.org/usinfo/administration_policy_BIAs.html); [http://www.ll.georgetown.edu/guides/article\\_98.cfm](http://www.ll.georgetown.edu/guides/article_98.cfm)

<sup>28</sup> <http://www.amicc.org/docs/Nethercutt2009.pdf>

<sup>29</sup> [http://www.state.gov/s/wci/us\\_releases/remarks/165257.htm](http://www.state.gov/s/wci/us_releases/remarks/165257.htm)

<sup>30</sup> <http://www.state.gov/s/gwi/rls/rem/2009/130211.htm>

<sup>31</sup> <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>

<sup>32</sup> <http://www.reuters.com/article/idUSTRE5751ZF20090806>

<sup>33</sup> <http://jurist.law.pitt.edu/paperchase/2010/01/us-war-crimes-ambassador-says-us.php>;

[http://www.state.gov/s/wci/us\\_releases/remarks/165257.htm](http://www.state.gov/s/wci/us_releases/remarks/165257.htm)

<sup>34</sup> <http://globalsolutions.org/08orbust/quotes/2007/10/31/quote484>

