



From Anxiety to Complacency: Prospects for the US-ICC relationship

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Introduction

US behavior towards the International Criminal Court (ICC) has changed. Once counted as a fierce opponent of the Court, the US is now committed to the success of the ICC – both in its current work and as an institution. In light of its good experience at the ICC Review Conference in Kampala, the US is set to continue to be an active observer in the work of the Assembly of States Parties and also to deepen and intensify its relations with the Court. However, the US currently has no formal and detailed policy about the ICC to guide its movement toward the Court.

Since coming into office in January 2009, the Obama administration has sought to distinguish its approach to the ICC from that of the Bush administration and to include the Court in its extensive new engagement in multilateral diplomacy. Under the Obama Administration, an inter-agency review team began formulating a US-ICC policy that would be broad enough to guide the US in its future interactions with the Court and to enable the US to respond to unexpected contingencies. The result was supposed to appear in a detailed policy paper. Following the Kampala conference, however, the US appears to have abandoned the goal of a formal policy toward the ICC.

This paper has two purposes. First, it will assess the distance covered over the past year and a half in the US relationship with the ICC. Such a review will give a full understanding of US activities relating to the ICC, and provide an insight into ongoing efforts to promote sustained positive US engagement with the ICC. However, the paper will also highlight a growing sense of American complacency in its approach to the ICC. A completed US review process to produce a detailed ICC policy document would set the relationship on a solid and predictable path. Yet the future of the US-ICC relationship is by no means certain if previous American feelings of anxiety are replaced by American complacency.

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The National Security Goals of an Incoming Administration

American anxiety towards the ICC influenced US foreign policy for nearly a decade. Policymakers evaluated – inaccurately – the ICC as a potential threat to national security interests. As a candidate for the US presidency, then Senator Obama declared that “the US should cooperate with ICC investigations in a way that reflects American sovereignty and promotes our national security interests.”¹ Therefore an early articulation of the Obama Administration’s views on national security was critical to the success of any policy of engagement with the ICC. NGO supporters of the Court were told early on during discussions with Administration officials that US engagement with the ICC would not occur without a formal policy in place following an inter-agency review. This review process would establish clear guidelines for future Administration engagement. It would also be indirectly influenced by another review process occurring simultaneously. This other review process was tasked with producing a National Security Strategy (NSS) for the new Administration. NSSs are broad formulations of US foreign policy objectives in response to current international environmental factors which serve as guidance for many US foreign policy decisions. These documents occur rarely, for instance there were only two under the previous Bush Administration. The broad, inter-agency strategies include a clear delineation of US security interests.

In May 2010, the Administration released its NSS. The NSS commits the US to pursuing engagement with multilateral institutions and mechanisms such as the UN Human Rights Council, the UN Convention on the Law of the Sea, and the ICC. In particular, engaging with international criminal tribunals such as the ICC is recognized as not only a moral imperative, but as a security imperative as well.²

Ultimately, the Administration did not wait for either process to complete itself before engagement began with the ICC. This was likely due to two factors: the unexpected length of the processes and the upcoming discussions on the crime of aggression surrounding the Review Conference in the early summer of 2010. Regardless of the need or reason, a steady process of engagement began without an overarching, detailed ICC policy document to guide it.

¹ Statements of U.S. Presidential Candidates on the International Criminal Court, AMICC (August 2008). Available at <http://www.amicc.org/docs/2008%20Candidates%20on%20ICC.pdf?tr=y&auid=3003692>.

² National Security Strategy - May 2010, 48. Available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

Step-by-Step Engagement

The first significant step towards the Obama Administration's engagement with the ICC was the dramatic appearance of a US delegation at the Eighth Assembly of States Parties (ASP) in The Hague in November 2009.³ The delegation consisted of individuals from all of the relevant departments within the Administration, and was co-led by two top State Department officials.

The purpose of the participation was, in the words of the delegation, to "listen and learn."⁴ This statement seemed to acknowledge the fact that, after a seven years absence, the US was unaccustomed to the procedures and culture of the sessions and would need to engage in a transitional learning phase. The US representatives in fact learned quickly and, in the end, the appearance of the American delegation allowed both the US and other states and participants to become comfortable with each other. This, however, did not prevent the US from stating its opinion on the crime of aggression. In a speech during the session, US Ambassador-at-Large for War Crimes Issues Stephen Rapp emphasized the US belief that ICC jurisdiction over aggression ought to only be activated following a Security Council referral on the matter.⁵

The US also sent a large delegation to the resumed ASP session in March 2010. State Department Legal Advisor Harold Koh addressed the ASP with a detailed list of US criticisms to certain proposals on the crime of aggression.⁶ Ambassador Rapp also spoke to declare a renewed US commitment to supporting the ICC.⁷ This included carrying out arrest warrants, giving information when it is requested, and supporting the broader Rome Statute system by helping to build the capacities of domestic legal system to handle atrocities crimes. The Rapp speech showed that the Obama Administration had begun to move towards increased cooperation with the ICC before completing its policy review.

The positive welcome for the US at the eighth ASP and at its resumed session convinced many within the Administration to continue with engagement and with the ongoing development of a proactive ICC policy.

³ In March of 2009, the US Congress passed its annual omnibus appropriations bill which had in previous years included the Nethercutt amendment. The Nethercutt amendment cut off, subject to Presidential waiver, specific types of US economic aid to countries that joined the ICC but did not sign a Bilateral Immunity Agreement protecting US soldiers and other non-military persons from delivery to the ICC. This brought to a close the era began by the American Service-Members' Protection Act 2002, in which the US would use the threat of withdrawing aid (at times both military and economic) to influence countries to sign Bilateral Immunity Agreements.

⁴ Stephen Rapp, Address to Assembly of States Parties (November 2009). Available at http://www.state.gov/s/wci/us_releases/remarks/133316.htm.

⁵ Ibid.

⁶ Harold Koh, Statement by Harold Koh, Legal Advisor, US Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the ASP of the ICC (March 2010). Available at <http://usun.state.gov/briefing/statements/2010/139000.htm>.

⁷ Stephen Rapp, Statement by Stephen Rapp, US Ambassador-at-Large for War Crimes, Regarding Stocktaking at the Resumed Eighth Session of the ASP of the ICC (March 2010). Available at <http://usun.state.gov/briefing/statements/2010/138999.htm>.

The Crucible of the ICC Review Conference

Even after the success of the two ASP sessions, the Administration had not finalized its ICC policy review, and it had become apparent that it would not do so before the Review Conference in Kampala in May and June of 2010. This resulted in a shift towards the creation of a specific Review Conference strategy, and effectively put the ongoing review process on hold until after the results on aggression were known.

While the US wanted to continue to support the Court's investigations and prosecutions, the Administration felt that US foreign policy interests and national security were implicated in the negotiations on the crime of aggression.⁸ The phase of mostly listening and learning would necessarily have to end with vigorous US engagement in the amendment negotiations of the upcoming Review Conference. This transition would involve the US participating to a greater degree in ASP negotiations, and there was uncertainty within the Administration over the reaction this would receive from other countries. Therefore the US strategy going into the Review Conference was to prevent the adoption of the crime of aggression in the near future and to conduct US participation in the event so as to achieve a positive reaction from the other countries present.

The US had one of the largest country delegations in Kampala. Its members represented diverse interested elements of the US government. It was well organized and supported by a comprehensive set of instructions that had been worked out beforehand, along with a clear line of communications back to Washington D.C. in order to respond to unanticipated developments.⁹

In the first week, the US delegation worked alongside others to build goodwill among the Conference participants. During the stocktaking segment of the Conference, which occupied the first week and looked at the performance of the Rome Statute system over the past seven years, the US co-sponsored a side event with Norway and the Democratic Republic of the Congo (DRC). This well-received event considered how to build the capacity of the DRC's judicial system to address atrocity crimes. The US also announced two formal pledges at Kampala, and represented the only non-State Party to make a pledge.¹⁰ These pledges contained firm commitments to build the domestic legal capacity of certain countries to

⁸ While a minority still feared political prosecutions for the other three categories of crimes under the Rome Statute, it was obvious that the Administration had come to the conclusion that such fears were based on an over-cautious calculation of risk.

⁹ Harold Koh and Stephen Rapp, *The U.S. and the International Criminal Court: Report From the Kampala Review Conference*, ASIL/CFR Seminar (June 2010), 4. Available at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

¹⁰ Pledges by the United States of America, AMICC (June 2010). Available at http://amicc.org/docs/Review_Conference_Pledges_by_the_US.pdf.

prosecute atrocity crimes, and to assist the Court in its investigation and prosecution of the leaders of the Lord's Resistance Army then subject to arrest warrants by the ICC.¹¹

During the second half of the Review Conference, the US fully engaged in the negotiations on the crime of aggression. At times working with like-minded countries and at times asserting itself individually, the US moved towards its twin goals of delayed activation of the crime of aggression and the generation of goodwill about American participation in the ASP. The most important result coming out of the Review Conference was the consensus resolution on the crime of aggression. The US was among those who accepted the definition of the crime of aggression,¹² the conditions under which the ICC would exercise jurisdiction, and a roadmap for the eventual activation of jurisdiction after January 1, 2017. The US was particularly gratified that these provisions would allow it to escape ICC jurisdiction over the crime of aggression, whether now as a non-State Party or in the future as a party to the Rome Statute. Moreover, despite its vigorous pursuit of the US objectives regarding the crime of aggression, other countries appeared to welcome the return of a fully involved US.¹³ The long US absence since the ICC's Preparatory Commission of 1998-2002 was conclusively broken.¹⁴

The Review Conference left the Administration pleased about its successful integration into the ICC process. Following Kampala, US representatives made several statements about supporting the ICC as an institution. Ambassador Rapp stated in late June of 2010:

[...][W]e...have to be committed to the success of this court in cases involving mass atrocities. We want it to work, and we made a very clear decision that we are prepared to support it.

Now, how to do that... information sharing, work on the protection of witnesses, political and diplomatic support to ensure arrests and transfers and cooperation...those same issues are on the table again with this court.¹⁵

Upon his return from Kampala, Department of State Legal Adviser Harold Koh also spoke positively about the new phase of relations between the US and the ICC:

¹¹ Eva Nudd, First Arrest Warrants Issued for Lord's Resistance Army, updated by Katherine Scovner, AMICC (February 2006). Available at <http://amicc.org/docs/Uganda%20arrest%20warrants.pdf>.

¹² Attached to the Conference resolution were Understandings to aid the ICC judges and others in the interpretation of the definition of aggression. This constituted a hard-won compromise from the other countries present after the US initially raised concerns about the definition.

¹³ Harold Koh and Stephen Rapp, Briefing on the International Criminal Court Conference in Kampala, Uganda (June 2010). Available at http://www.state.gov/s/wci/us_releases/remarks/142585.htm.

¹⁴ The US had ceased participating in the Preparatory Commission after its final appearance in September 2001. See Benjamin N. Schiff, *Building the International Criminal Court* (2008), 104.

¹⁵ Harold Koh and Stephen Rapp, *The U.S. and the International Criminal Court: Report From the Kampala Review Conference*, ASIL/CFR Seminar (June 2010), 13. Available at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

After twelve 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.¹⁶

The Review Conference clearly permitted a public change in the foreign policy stance of the US Administration towards the ICC.

A Movement towards Complacency?

With a successful result at Kampala, the Administration has taken the decision not to complete the policy review on its relationship with the ICC. This is an unfortunate decision as well as a potentially serious problem for the future of the US in the ASP.

Before Kampala, the review process had been temporarily halted to allow time for US policymakers to incorporate lessons from the upcoming Review Conference. The process had not completed work before Kampala due to prolonged inter-agency negotiations, particularly between the departments of State and Defense, and therefore it made sense to wait until after Kampala to resolve the outstanding issues.

After the Review Conference, however, rather than build upon the positive US experience in Kampala to finish the review process and produce a policy, the process was effectively stopped. The Review Conference had shown that “principled engagement can protect and advance [US] interests...and make for a better court.”¹⁷ But these achievements, which would argue in favor of concluding a formal policy, resulted in a growing threat of complacency.

As the US continues to cooperate with the ICC more extensively and becomes more actively involved in the working of the ASP, the US runs the risk of being surprised by developing events. Without the inter-agency quick consultation arrangements that would result from a formal policy, the US will necessarily react to these events by pursuing a lowest-common-denominator, last-minute response. This type of approach will be detrimental to US relations with the ICC and to the effectiveness of US foreign policy generally. For instance, the US would feel the absence of a detailed policy in the event that the Office of the Prosecutor initiates an investigation within the territory of a US strategic partner.

¹⁶ Stephen Rapp and Harold Koh, U.S. Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference (June 2010). Available at http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

¹⁷ Ibid.

US Support for the ICC in Action

While the US Administration now publicly supports the ICC, it must be acknowledged that the US has, for some time, discreetly offered various forms of assistance to the ICC. It is often overlooked that the US approves of ICC jurisdiction over all the situations currently under investigation.¹⁸ In addition to the well-known support of prosecutions for the atrocities in Darfur, Sudan,¹⁹ the US has welcomed the ICC's involvement in the DRC, the Central African Republic, Uganda, and, recently, Kenya.²⁰

The US has previously announced its intention to meet with the Prosecutor and other ICC officials to discuss the possibility of future US assistance.²¹ In April 2010, US officials discussed with the Prosecutor the prosecution of sexual violence in the DRC and stopping atrocities by the LRA.²² This approval has been backed up with recent offers to the ICC of material and logistical support to enable the swift and fair application of justice.²³ And while US cooperation is subject to certain domestic legal restrictions, including the American Service-Members' Protection Act, this does not prevent case-by-case assistance of the types offered.²⁴

Conclusion

The US and the ICC share similar values and goals. The rule of law and accountability for those who commit atrocity crimes have formed the foundation of several international criminal tribunals that have enjoyed the full support of the US. It was short-sighted for the US to attempt to undermine an international criminal court built upon the legacies of Nuremberg, the ICTY, and the ICTR – institutions that today are almost universally praised by the American government and public.

¹⁸ Stephen Rapp, Statement by Stephen Rapp, US Ambassador-at-Large for War Crimes, Regarding Stocktaking at the Resumed Eighth Session of the ASP of the ICC (March 2010), paragraphs 2-4. Available at <http://usun.state.gov/briefing/statements/2010/138999.htm>. And Stephen Rapp, Statement to the Review Conference of the International Criminal Court (June 2010). Available at http://www.state.gov/s/wci/us_releases/remarks/142520.htm.

¹⁹ Susan Rice, Statement by Ambassador Susan Rice, U.S. Permanent Representative to the United Nations, on the ICC's Arrest Warrant for Sudanese President Bashir (March 2009). Available at <http://usun.state.gov/briefing/statements/2009/march/126539.htm>.

²⁰ Alan Boswell, US to Help Protect Kenyan Violence Witnesses, VOA News (February 2010). Available at <http://www1.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html>.

²¹ Stephen Rapp, Statement by Stephen Rapp, US Ambassador-at-Large for War Crimes, Regarding Stocktaking at the Resumed Eighth Session of the ASP of the ICC (March 2010), paragraph 3. Available at <http://usun.state.gov/briefing/statements/2010/138999.htm>.

²² Office of the Prosecutor, OTP Weekly Briefing, Issue 33 (13-19 April), 4. Available at <http://www.icc-cpi.int/Menu/Go?id=228a4af7-448c-4f84-b8ed-faab58753f95&lan=en-GB>.

²³ See Harold Koh and Stephen Rapp, The U.S. and the International Criminal Court: Report From the Kampala Review Conference, ASIL/CFR Seminar (June 2010), 13. Available at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

²⁴ Ibid.

Now that the US is taking a new approach to the ICC, it has the opportunity to complete its policy process. As the US goes forward it can assist the Court through direct case-by-case support, through diplomatic and moral support in its bilateral relations and at the United Nations, and through the promotion of positive complementarity and the broader Rome Statute system. However, this foundation of support will be prone to damaging upheaval from developing events in the absence of a clear policy to sustain it. American civil society is committed to using its access to and credibility with policymakers to urge them to create a formal and comprehensive supportive policy. It will support them in policymaking with its expertise, experience and international reach.