Strategy for U.S. Engagement with the International Criminal Court

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We know from our own professional experiences that there are risks in both diplomatic initiatives and military operations. The most logical negotiating position, strongly supported within the Washington bureaucracy, sometimes can be challenged so successfully by other governments during international talks that a search for compromise may emerge as the wiser course. American diplomats employ the same strategy with their counterparts who arrive at the table with seemingly unbendable instructions—and yet, eventually, common ground is usually found. The greatest sin during negotiations is succumbing to dogma from extremists back home that American interests can only be protected by taking unyielding and exceptionalist positions. These may reflect politically attractive opinions (however misinformed they may be), but spell doom for achieving worthy aims and keeping the United States constructively engaged on the world stage. In the long run, critical national interests risk being sacrificed if American negotiators remain foolishly rigid and unbending.

Similarly, military leaders risk jeopardizing American service personnel and America's core foreign policy objectives if they remain stuck in the past and fail to recognize the changing dynamics both on the battlefield (including the character of warfare itself) and in post-conflict environments where stabilization, reconstruction, handling of detainees, and domestic and sometimes international justice are paramount. It is tempting to abandon the principles for which so many American soldiers courageously sacrificed their lives since the Revolutionary War when confronted with fear of the mysterious enemy or the alarmist rhetoric of our own leaders.

In this paper, we bring such perspectives to our examination of a young international institution operating since 2002, the permanent International Criminal Court (ICC), and explore how the United States might, with the advent of a new administration in Washington in January 2009, engage with the ICC and eventually participate fully in its work as a state party under its treaty, known as the Rome Statute.

America's Turbulent Relationship with the ICC

During the 1990s, when United Nations war crimes tribunals were established to determine accountability for the commission of genocide, crimes against humanity, and war crimes ("atrocity crimes") in the Balkans and Rwanda, momentum gathered quickly to create a permanent international criminal court by multilateral treaty among participating governments to address future situations in which atrocity crimes are committed, speedily and efficiently. President Bill Clinton sought the establishment of such a court by the end of the twentieth century. The United States assumed a significant lead in that endeavor through years of international negotiations. When the final text of the Rome Statute was negotiated in the summer of 1998, the U.S. delegation had the difficult and unenviable task of opposing the treaty text, primarily because theoretically it left U.S. service personnel exposed to ICC jurisdiction during the years that the United States likely would remain a nonparty to the Rome Statute before achieving its ratification in Congress. (This arguably can occur if American soldiers commit atrocity crimes on the territory of a state party to the Rome Statute.) Despite this setback, over the next two and one-half years, the United States participated in subsequent negotiations on key supplemental documents for the ICC, joined consensus in approving them, and moved closer to the possibility of ultimately joining the ICC.

On December 31, 2000, President Clinton approved U.S. signature of the Rome Statute. The fact that he waited to act until the last possible day that the Rome Statute could be signed by any government reflected both the difficulty of the decision within the U.S. government and Clinton's own habit of delaying tough decisions until the last moment. He added the caveat that the treaty should not be submitted to the Senate for ratification until remaining American concerns were satisfactorily addressed. Clinton only had twenty days left in office at that point and it was unrealistic to submit any signed treaty to the Senate for ratification within such a short period of time. The groundwork had been laid to pursue numerous U.S. proposals during additional U.N. talks in 2001, which, if adopted, would have greatly facilitated steps toward ratification.

ICC opponents in Washington reacted harshly to the signing and believed the court would either collapse under its own allegedly flawed character or

become a judicial slaughterhouse for American officials. Shortly after the United States signed the Rome Statute, the late Senator Jesse Helms, who at the time was chairman of the Senate Foreign Relations Committee, was particularly virulent in seeking to erase the U.S. signature. After the Rome Conference in 1998, he had declared, "The ICC is indeed a monster—and it is our responsibility to slay it before it grows to devour us."[1] The general criticism leveled by Bush administration officials was that the ICC was an uncontrollable tribunal that would target U.S. officials for prosecution. Following the establishment of the ICC in July 2002, however, the court has rejected efforts to investigate the United States for the Iraq war and denied all other applications implicating the United States. The ICC prosecutor has interpreted his mandate and the Rome Statute rigorously, particularly on jurisdictional issues, and he has remained focused on the most widespread atrocity crimes scarring the global landscape. The worst case scenarios, which were the lifeblood of the ICC critics, have not come to pass, and nothing suggests that they will. One can always argue the possibility of dire consequences, but so far the ICC has demonstrated the kind of professionalism and restraint that U.S. negotiators hoped would be the best case scenario for the court.[2]

Once in power, the Bush administration refused to participate in further talks, never negotiated the Clinton proposals, and, in May 2002, took the unprecedented step of deactivating the U.S. signature on the Rome Statute. President Bush then signed isolationist legislation, deceptively named the American Service-Members' Protection Act, which fed on post–September 11 fears. With one important exception that permits assistance to international efforts to bring foreign nationals to justice, the law both forbids official U.S. cooperation on ICC cases and shuts down foreign assistance to most governments that join the ICC unless they agree to immunize any U.S. citizen from surrender to the court. It also empowers the president militarily to invade any country (including the Netherlands, where the ICC is located) if an American citizen is being detained or imprisoned there for the purpose of surrendering that person to the ICC. Foreigners call it "The Hague Invasion Act." Two amendments to the law, one enacted in October 2006 and the other in January 2008, eliminated all punitive sanctions involving military assistance. These initiatives, led by Senator John Warner (R-Va.), followed pleas from the Pentagon that the punitive measures were decimating critical military relationships with other countries, particularly

in Latin America.[3] Realists at the State Department also recognized how much such measures undermined diplomatic relationships and American foreign policy aims.

The Bush administration continues officially to oppose the ICC and any U.S. participation in it, indeed predicting that there will be no U.S. ratification of the Rome Statute even long after President Bush's second term has expired. Regardless of the views of those trapped in denial, the future will be determined by the next president.

Why Should the United States Care about the ICC?

The ICC has aroused neither broad public interest nor outrage among the American people. The ICC has occupied primarily the attention of the fraternity of international lawyers, law professors, and multilateralists supporting the court and some new sovereigntists, military veterans, and conservatives who passionately oppose it as well as many other international institutions. But occasional national polls show that large majorities (ranging from 68 percent to 74 percent) of Americans, when directly asked, support U.S. participation in the ICC.[4] True to form, views on Capitol Hill and certainly within the executive branch since 2001 have traded broad public sentiment in support of the ICC for the intense anti-ICC feelings of a few. This might reflect the facts that the ICC barely arose as an issue during the national elections of 2000 or 2004, and that the polling data, though impressive, remains largely hidden from popular discourse.

Nonetheless, external realities have intruded. In recent months, the Bush administration has demonstrated a more accommodating spirit. In April 2008, the legal advisor of the State Department, John B. Bellinger III, conceded the reality of the ICC and a willingness to consider "appropriate assistance from the United States in connection with the Darfur matter . . . consistent with applicable U.S. law."

In July 2008, the United States worked hard to draft U.N. Security Council Resolution 1828, which renewed the mandate of the African Union/United Nations Hybrid operation in Darfur (UNAMID), but then abstained on the vote. The final text of Resolution 1828 includes Russian and Chinese-inspired

language undermining the ICC prosecutor's effort to obtain an arrest warrant against Sudan President Omar Hassan al-Bashir. The United States refused to accept any language designed to weaken the ICC's investigation of Bashir and the Darfur situation. It was a significant turning point for the Bush team. Several years ago the United States had strong-armed the Security Council to include language in peacekeeping renewal resolutions 1422 (2002) and 1487 (2003) in order to immunize American peacekeepers (and others from nations not party to the Rome Statute) from any surrender to the ICC regardless of their conduct on foreign territory.

The ICC cannot and must not be ignored. As noxious as it may seem to the cynics, the court is increasingly an important factor in reminding American policymakers of the criticality of the rule of law in shaping U.S. foreign and military policy. We believe that is a much-needed reminder for those who toil in the wake of the Bush legacy. The ICC also offers opportunities to rebuild America's commitment to the pursuit of international justice. But given the Bush administration's deplorable record, particularly regarding detainee abuse and torture during the so-called war on terror since September 11, the ability of the United States to influence and participate in the global assault on war criminals still hangs in the balance.

The ICC is carving out the future of atrocity law and its enforcement, which has direct impact on the U.S. military. American lawyers may interpret international humanitarian law and the law of war differently from the ICC judges and, by extension, the growing number of governments that are party to the Rome Statute. The stark reality is that global standards and rules on how to wage armed conflicts will surge ahead without direct U.S. influence. Already, the United States has lost much of its authority on human rights issues and international law on atrocities by being outside the ICC and, during the Bush administration, aggressively opposing it.

In the four African situations currently falling within the ICC's investigative jurisdiction, peace and justice sometimes compete with each other. The ICC's engagement has to be factored into the likely utility of using economic, political, and military options to confront atrocity crimes and bring stability to parts of Africa of critical concern to the United States. The U.S. government has important global interests in how conflicts in Sudan, Uganda, the Democratic Republic of the Congo, and the Central African Republic are resolved, and the

ICC is part of that equation. It is the height of folly to act as if the court has no bearing on these conflicts. This already has been demonstrated by the American involvement in Darfur and the Bush administration's grudging (but critical) support for an active ICC role in that situation.

The ICC has 108 states parties. They include almost every American treaty ally and a large number of countries friendly to the United States. While some of the nations that have joined the ICC have less than stellar records as democratic societies, most of the countries remaining outside of the ICC, with some exceptions, either are autocracies or pay mere lip service to democratic ideals. There are reasons why allies and friends in Europe (including all but two fellow NATO members), Latin America, Africa, Asia, and the Pacific have joined the ICC and consider its benefits both nationally and internationally to far outweigh its potential challenges to their own national interests. Russia, China, Egypt, Indonesia, Turkey, India, Israel, Saudi Arabia, Pakistan, and the United States are the non-ratifying heavyweights. While these certainly are very important nations, including a few American allies, is this really the non-party club (which also includes North Korea, Iran, Cuba, Sudan, Iraq, Syria, Yemen, Zimbabwe, Tunisia, and Myanmar) we want to remain with on issues of international justice? Among the non-party nations, the United States has strong military alliances only with Turkey, the Czech Republic, and Israel. In what ways are U.S. values, interests, and concerns regarding international justice more congruent with the views of most of the 84 non-ratifying governments than with those of America's traditional democratic allies and strategic friends among the 108 nations that have joined the ICC? It is significant that Japan, which remains so closely bound to the American defensive shield, might have been expected to toe the American line and oppose the ICC. Yet it acceded to the Rome Statute in 2007. Other states parties include the United Kingdom, Germany, France, Italy, Spain, Poland, Belgium, Ireland, the Nordic and East European countries, Canada, Australia, the Netherlands, Greece, New Zealand, Mexico, Argentina, Colombia, Brazil, South Africa, Nigeria, Botswana, Jordan, and South Korea.

American conduct in the so-called war on terror has made U.S. rationales for exceptionalism toward, rather than compliance with, international law ring hollow with other governments and publics. American scholars and policy practitioners experience this every time they travel overseas to legal and world affairs conferences and during informal discussions with foreign diplomats.

The recitation of U.S. policy on almost any issue of international justice is either politely ignored or openly scorned. American leverage to persuade other nations to interpret the law as we would see it is no longer what it was. Our absence from the ICC only exacerbates the decline in our own influence on the interpretation and application of rules pertaining to the use of military force, detainment and interrogation policies, and the prosecution of perpetrators of atrocity crimes. In this important endeavor, we are no longer a leading nation, nor are we a follower; we are simply an outlier with little international relevance or influence.

The Reality of the Rome Statute and the Work of the ICC

Frozen into opposition to the ICC by ideology, the Bush administration has undercut U.S. interests for more than seven years. Understandable concerns about the ICC were hijacked by the administration's aggressive assault on the court that undermined U.S. credibility and compelled other governments to stiffen their backs in opposition to the United States. Americans now need to dig themselves out of that ditch and begin to restore U.S. influence. If the next administration chooses to cooperate with or pursue U.S. membership in the ICC, it will need to develop a strategy that respects the views of liberal, moderate, conservative, and military constituencies in the United States**.**

Any path toward support of the ICC will require examining long-standing concerns about the exposure of U.S. military service personnel and American political and military leaders to the court, whether or not the United States is a state party to the Rome Statute. If the United States were to join the ICC, one would have to accept at least the theoretical possibility that American citizens (particularly political and military leaders) could be prosecuted before the ICC on charges of committing atrocity crimes. The Bush administration's highly focused concern about the risk of the ICC's holding senior civilian and military leaders accountable[5] distinguished its opposition to the ICC from the Clinton administration's broader interest to ensure that official and military personnel of all ranks (with no particular focus on leaders) would not be subject to unwarranted or politicized prosecutions by the ICC. Officials in the 1990s

stressed that American leaders and soldiers would be held strictly accountable under U.S. law regardless of how the ICC debate evolved. When one assumes high political office or military command, accountability irrevocably comes with the job description.

It is remarkable that senior Bush administration officials, some of them neck-deep in deplorable international behavior, sought to shield themselves from accountability for actions that seriously challenge U.S. constitutional and federal law.[6] One might have appreciated their concern about the ICC due to the nonparticipation of the United States in the work of the court, but the web of immunity such officials spun for themselves from judicial scrutiny at home severely undermined U.S. credibility and, frankly, embarrassed the nation.[7]

If the next administration were to show serious interest in American participation in the ICC, it should have no illusions: it would be implausible to seek total U.S. immunity from investigation and prosecution for atrocity crimes as a state party to the Rome Statute. That kind of exceptionalism argument does not fly within the realm of international justice anymore.

However, by following steps similar to those taken by its major allies, the United States could pragmatically avoid ICC prosecution of its political and military leaders. Washington would reap the benefits of joining its allies and friends to enforce international justice and shape the future of the law regulating atrocity crimes if the United States were to ratify the Rome Statute and then follow several key procedures.

First, wise political and military leadership must avoid the planning and large-scale execution of atrocity crimes. Normally, any such illegal conduct by the United States—which requires criminal intent to commit mass atrocities by leaders entrusted with foreign and military policies—would be inconceivable. But the Bush administration has challenged presumptions about the country's strict adherence to the rule of law with its highly contentious and possibly criminal conduct of facets of the so-called war on terror. It remains doubtful if any of the administration's extraordinary conduct would give rise to the high level of magnitude and criminal intent required by the Rome Statute before an ICC investigation of strictly leadership crimes could be launched. (It has always been one of the canards of critics that the ICC would pursue American soldiers just doing their duty. There are domestic courts, includ-

ing courts martial, to adjudicate alleged war crimes by combat soldiers; they would not be pursued by the ICC.)

But even if such conduct were suspected, the second key procedure—the Rome Statute's "complementarity" regime—would be available to launch strictly American investigations and, if merited, prosecutions of alleged individual perpetrators of atrocity crimes. One has to assume that the Justice Department and the military justice system have not been corrupted by political influences to avoid enforcing federal and military law in our own courts. The Bush administration has not strengthened our confidence in that respect, but one would expect future administrations to learn key lessons from the experience of the last seven years. Nonetheless, U.S. authorities have conducted a number of courts martial, for example, dealing with killing civilians. The U.S. military justice system continues to function well.

Third, Washington must take more seriously the core purpose of the ICC, which never was designed to focus on Americans but rather to bring to justice the atrocity lords wreaking death and mayhem on civilian populations in lawless regions of the world. The United States has within its power the ability to significantly shape the docket of the ICC through U.N. Security Council referrals (absent any veto) and the kind of cooperative and participatory role in the court's work that breeds respect and abiding influence. The ICC is a finite institution. It cannot take on every possible target of investigation. The longer the United States remains outside the ICC and dismissive of its potential benefits for U.S. national interests, the greater will be the risks that the court will develop new law challenging U.S. interests, or at least inconsistent with our interests. The ICC may be steered toward investigating American military operations by those seeking to out-maneuver Washington in a courtroom where no American judge or prosecutor holds forth and U.S. influence is nil.

Although a culture of deterrence will take many years to evolve, the ICC can play a key role in such a development in world affairs. The opportunity exists for the ICC to diminish the number of conflicts and atrocities requiring military interventions, particularly by the U.S. Armed Forces, to end them. Critics point to the genocidal slaughter at Srebrenica in July 1995 to try to disprove the deterrence theory. But neither Bosnian Serb President Radovan Karadzic nor General Ratko Mladic, both of whom spearheaded the Srebrenica assault, was indicted by the International Criminal Tribunal for the Former Yugoslavia

(the "Hague Tribunal") for their earlier alleged crimes in Bosnia-Herzegovina until after the Srebrenica operation had ended. The mere existence of the Hague Tribunal might have been expected to deter them from launching the Srebrenica massacres, but that reasoning expects far too much of a new tribunal alone to accomplish. At the time, the Hague Tribunal had not held any trials or reached any judgments of guilt or innocence about anyone. No court system anywhere in the world deters all crimes within its jurisdiction. The important issue is the impact an international criminal tribunal can make over the long term to help end the influence of war criminals, bring them to justice, and contribute to the aim of peace and stabilization.

We already see this occurring in Uganda, where high-level defectors from the Lord's Resistance Army (LRA) cite the ICC's jurisdiction over them as a constant topic among the militia leaders and a reason for some to lay down their arms. Joseph Kony, who heads the LRA and is a fugitive of an ICC arrest warrant, seems to spend more time now avoiding the ICC's reach than plotting more atrocities. Sudan President Bashir suddenly transformed himself into "Mr. Nice Guy" in July and traveled to Darfur on a charm offensive once the ICC prosecutor applied for an arrest warrant against him for genocide and other atrocity crimes. The ICC judges are weighing the evidence against Bashir as of this writing.

While it would be naïve to assume that international criminal tribunals can completely deter future atrocity crimes, the Hague Tribunal indictments of Slobodan Milosevic, Karadzic, and Mladic permanently removed these individuals in relatively short periods of time from any political or military roles in the Balkans and, with respect to Milosevic and Karadzic, landed them in the courtroom. (Mladic remains at large, but is powerless.) The same can be said of the Rwanda and Sierra Leone tribunals, which produced indictments of top leaders that helped strip them of their power and very credibly brought them to justice. ICC prosecutor Luis Moreno Ocampo has yet to file charges regarding atrocity crimes in Colombia, partly because the threat of such prosecution has spurred the Colombian government to treat justice issues more seriously and the threat has possibly restrained some of the Revolutionary Armed Forces of Colombia (FARC) militia's more destructive tendencies. It is always hard to prove a negative, but so far the record of international criminal tribunal deterrence of additional atrocities is not insignificant.

Since 2001, the Bush administration has refused to use its observer status to participate in the negotiations of the Special Working Group of the Crime of Aggression of the ICC Assembly of States Parties on how to define and exercise jurisdiction over the crime of aggression. Non-party nations such as Israel, Russia, China, India, and Pakistan actively participate in these talks because of the criticality for their own militaries of deciding how aggression is sorted out before the ICC. The Russian invasion of Georgia, which is a state party to the ICC, in August 2008 emphasizes the point that if Russia is at the table negotiating how to define aggression, so too should be the United States. Since the crime of aggression is one of which the United States most frequently would risk being charged (even if unfairly or frivolously) due to its military presence in so many parts of the world, it defies common sense for the United States to be absent from these negotiations. Unfortunately, as the talks have progressed, participating governments have increasingly disregarded America's formerly stated views on aggression because American diplomats are missing in action. The negotiators know that the United States is not a state party that can vote—much less wield any other kind of influence in the final negotiations—when the Assembly of States Parties takes up the issue, almost certainly at the 2010 Review Conference. This is a critical reason why accelerated efforts to join the ICC before the 2010 conference commences would be in the nation's best interests.

Constitutional Concerns about the ICC and How They Can Be Addressed

American critics of the ICC have asserted the illegality of any U.S. ratification of the Rome Statute on U.S. constitutional grounds. Their objections, however, do not withstand serious scrutiny.[8] The complementarity regime and, if they had been drafted properly by the Bush administration,[9] the Article 98(2) bilateral non-surrender agreements with other governments create firewalls against alleged constitutional deficiencies. The complementarity regime should initiate procedures of domestic investigation and prosecution before U.S. courts (with their full panoply of constitutional protections) rather than before the ICC. The defendant would be entitled to a jury trial and due process rights protected by

the Bill of Rights before a U.S. court because the Rome Statute *invites* U.S. prosecutors and courts to seize atrocity crime cases over which they have jurisdiction (particularly regarding U.S. citizens) and run with them. If the atrocity crime is committed on U.S. territory, the Sixth Amendment requirement of "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" can be achieved with good faith domestic investigation and, if merited, prosecution of any alleged perpetrator, which should extinguish ICC jurisdiction.

The Rome Statute essentially replicates due process protections for defendants found in the Constitution, even though trial by jury is not a feature of the judge-ruled ICC. There is a long history of extraditing Americans and others to non-jury criminal trials before foreign courts. In fact, the Supreme Court has often qualified the right to a jury trial even for U.S. citizens. The history of military courts martial and military commission trials also demonstrates additional caveats to the right to trial by jury.

With the exception of trial by jury, which would be impracticable on the international level, the ICC would provide a U.S. defendant with almost mirror-image due process rights as he or she would have in an American courtroom. (The possibility of such a prosecution arises only if there is a catastrophic collapse in the U.S. legal system or an administration so corrupt or unprincipled as to purposely decline to prosecute atrocity crimes.) These fundamental due process rights are found in the Rome Statute, in large part because American negotiators successfully insisted upon them. They include the right to remain silent, the presumption of innocence, the right to confront accusers and cross-examine witnesses, the right to a speedy and public trial, the right to assistance of counsel of one's own choosing, the right to a written statement of charges, the prohibition against prosecution of *ex post facto* crimes, protection against double jeopardy, freedom from warrantless arrests and searches, the right to be present at trial and the prohibition of *trials in absentia*, exclusion of illegally obtained evidence, and the right to a "Miranda" warning (even earlier than under U.S. procedures). So far the ICC's Pre-Trial Chamber and Appeals Chamber have vigorously upheld the due process rights of defendants from Africa now appearing before the court.

U.S. ratification of the Rome Statute would not contravene Article III, Section 1, of the Constitution, which governs the establishment of domestic

courts. The ICC is an independent international criminal court exercising its own international legal personality. It is bound to no single government's direction or control of its daily work, although collectively the states parties participate in the court's administration and the U.N. Security Council can intervene with the ICC. The Constitution also mandates Congress to define and punish offenses against the law of nations. When combined with the treaty-making power of the president, which relies upon Senate or congressional approval, the Define and Punish Clause of the Constitution provides the pathway for the United States to join an international criminal court established outside U.S. territory by sovereign governments pursuant to a treaty.

The way forward could look like this: a willing president who is concerned about the role of the United States on the international scene and, most importantly, with protecting U.S. troops who are forward deployed, would seek Senate consent to ratification of the Rome Statute, preceded by critically important implementing legislation that would incorporate atrocity crimes into the federal and military criminal codes and thus modernize them to permit U.S. investigation and prosecution of all of the ICC crimes. Congress also would legislate procedures for U.S. cooperation with the ICC and prohibit any official immunity for atrocity crimes falling under ICC jurisdiction. The implementing legislation would mandate U.S. exercise of the complementarity principle in the event of an ICC investigation that might target Americans and thus afford such nationals full constitutional protection in U.S. courts, with the result of avoiding ICC jurisdiction altogether.

The Rome Statute prohibits any reservations. But the United States would attach various declarations, understandings, and provisos to the instrument of ratification to address critical issues. Many ratifying nations have employed this option. For example, Australia imposed rigorous conditions for the surrender of a person to the ICC and it required that ICC crimes "will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law." France interpreted Article 8 (War Crimes) of the Rome Statute to relate solely to conventional weapons and not to prohibit the use of nuclear weapons or "impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defense." Colombia emphasized the importance of the complementarity procedures and declared "that none of the provisions of the Rome Statute alters the domestic

law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia." Switzerland, Lithuania, Liechtenstein, and Slovakia declared that they are prepared to be responsible for enforcement of sentences of imprisonment handed down by the court against their respective nationals or (excepting Lithuania) persons with permanent residence on their respective territories. No state party of the ICC has lodged any objection to these declarations.[10]

We recommend consideration of the following:

1. *An understanding stipulating that procedures similar to extradition rules would be applied to surrender requests from the ICC, but that the secretary of state would have to meet further rigorous criteria in making the final determination on surrender of a U.S. citizen to the ICC if that step is finally required under the Rome Statute*. Among such criteria would be receipt from a distinguished group of outside legal experts, including retired military lawyers, of a determination that the United States had failed to meet the complementarity test of the treaty for exclusive and permanent domestic jurisdiction in the particular case, and that compliance with the ICC's surrender request would be justifiable under such circumstances. The understanding also would state the U.S. view that its Status of Forces Agreements (SOFAs) with scores of governments worldwide would henceforth be regarded as constituting Rome Statute Article 98(2) non-surrender agreements, but only to the extent the SOFAs can be fairly interpreted as covering the atrocity crimes of the treaty. Under a SOFA, atrocity crime cases typically would be funneled into the military justice system.
2. *A proviso of the type used previously in treaty ratification practice stating "the U.S. intention that nothing in the Rome Statute requires or authorizes legislation, or other action, by the United States that is prohibited by the U.S. Constitution as interpreted by the United States."* This would annoy some of our allies, but Congress probably would insist upon it, just as it did for U.S. ratification of the International Covenant on Civil and Political Rights.
3. *A declaration explaining that any U.S. national subject to an arrest warrant approved by the ICC, particularly for an atrocity crime committed in the United States, would be immediately investigated and, if merited,*

prosecuted before a U.S. court by jury trial or court martial. Further, if the alleged U.S. citizen perpetrator is outside the United States, the U.S. government would seek to exercise its complementarity right in coordination with other governments and bring such person to justice before U.S. courts.

4. *A declaration reciting the constitutional procedures for impeachment proceedings and noting their availability to the U.S. Congress in the event the president, vice president, or other civil officer is suspected of committing atrocity crimes.* The declaration would describe such procedures by the United States as part of its complementarity privilege under the Rome Statute, recognizing that criminal proceedings against any such official may still be required in U.S. courts following impeachment proceedings in order to comply with complementarity principles.
5. *A declaration confirming that the ICC's jurisdictional reach over the United States and its nationals commences on the first day of the month after the sixtieth day following U.S. ratification, which would accord with the strict terms of the temporal jurisdiction of the Rome Statute.* The U.S. Senate (or Congress) would serve notice that the ICC must not seek to investigate U.S. citizens for events occurring prior to U.S. participation in the ICC as a state party. It would confirm the constitutional prohibition against *ex post facto* crimes.
6. *A declaration stating the U.S. intention to withdraw from the treaty, as it would have the right to do under the Rome Statute, if any one of four situations occur:* (i) the ICC imprisons an American citizen, convicted by the ICC, in a foreign country (rather than in the United States) without U.S. consent or acquiescence; (ii) the Rome Statute is amended to permit the death penalty (very unlikely to happen); (iii) ICC judges are systematically and irreversibly denying fundamental due process rights guaranteed under the Rome Statute; or (iv) ICC judges or the ICC prosecutor have become so politically biased or corrupted in the performance of their duties that the United States has lost confidence in the independence, objectivity, and credibility of the ICC as a judicial body and has determined that such violations of the Rome Statute cannot be remedied within a reasonable period of time.

A New Administration's Strategy

The new administration, Republican or Democratic, that enters office on January 20, 2009, probably will not exhibit the animus toward the ICC that the Bush administration and its allies in Congress have had for so many years. Even if the new administration were to be open to developing a cooperative relationship with the ICC, it likely would not rush toward U.S. ratification of the Rome Statute. There will be many priorities for the new administration, and ratification of the Rome Statute is likely to be regarded even by sympathetic officials as low on the totem pole. However, we believe the critical issues before the 2010 Review Conference argue strongly in favor of an accelerated path toward U.S. ratification so that our country can participate as a state party in that conference and exercise maximum influence there. We also know that U.S. membership in the ICC would be a significant boost to American credibility and influence throughout the world. Put simply, the ICC really is that important a symbol for other nations of American commitment to the rule of law and human rights.

Whether or not the pace is stepped up, there are some initiatives that even a conservative administration could take to enhance cooperation with the ICC and thus serve the best interests of the United States.

First, *the United States should be more forthright in assisting the ICC with its investigations of atrocity crimes, be they in Africa, Latin America, or elsewhere.* While there are hints of a back-channel link between Washington and The Hague, a more open and transparent relationship should be developed.

Second, *the new president and Congress should repeal certain particularly noxious provisions of the American Service-Members' Protection Act, following up the recent elimination of punitive measures on military aid.* The invasion provision should be the first to go, thus removing that unnecessary irritant in our foreign relations. The president should use his waiver authority under the law more aggressively in order (i) to remove the stain of the remaining economic punitive measures from U.S. relationships with other countries, and (ii) to open up more channels for cooperation with the ICC and thus advance the first initiative stated above. An internationalist president and concerned Congress should recognize that, as the law's primary purposes are

to prohibit cooperation on cases with the ICC and to punish nations participating in the ICC, repeal of the entire law would be common sense and do wonders for U.S. credibility overseas.

Third, *the new president and Congress should amend the federal criminal code and the Uniform Code of Military Justice so as to ensure that federal and military prosecutors and courts can investigate and prosecute the full range of atrocity crimes in the Rome Statute.* This will be essential if the United States, even as a non-party to the treaty, is to take full advantage of the complementarity privileges under it. That modernizing process should have high priority in Congress so as to ensure that the United States is not a sanctuary for war criminals. Even the harshest critics of the ICC should see value in shoring up federal and military capabilities in atrocity crimes prosecution so as to always demonstrate U.S. ability to avoid ICC investigations of Americans regardless of whether the United States joins the Court.

A progressively minded new president should take additional steps that would prepare the ground work for possible ratification.

First, *the next president should convene an advisory group of officials and lawyers from the Departments of Defense (including the Judge Advocates General), State, and Justice, as well as members from the intelligence community, the National Security Council, and key congressional leaders to work through remaining areas of concern and the political and legislative road map for cooperation and possible ratification.* We believe it will be essential for the next president to send a clear signal to the advisory group of his overall intention to seek a constructive and bipartisan pathway to cooperation with the ICC and possible ratification of the Rome Statute. The world has changed since 1998, indeed since 2001, and the next president needs to modernize America's approach to international justice.

Second, *the new president should send a fresh letter to the United Nations informing it that the United States withdraws the letter filed by the Bush administration with the United Nations on May 6, 2002, which deactivated the U.S. signature on the Rome Statute and formally launched the anti-ICC campaign by the Bush team.* The new letter would confirm that the United States henceforth resumes its responsibilities as a signatory state (which primarily means it will not act to undermine the Rome Statute). This would be an easy confidence-building step with our allies and friends that are already committed to the ICC.

Third, with steps one and two accomplished, *the new administration should accelerate implementing legislation and plan for ratification in late 2009 or early 2010 so that the United States can participate actively in the forthcoming 2010 Review Conference of the Rome Statute.* The reasons are paramount: states parties will consider the first round of amendments to the Rome Statute, the most important being incorporation of a definition and trigger mechanism for the crime of aggression. U.S. influence is imperative for any consideration of the "crime of all crimes" drawn from the heritage of Nuremberg, which means the new administration should immediately send its representative as an observer to the special working group negotiations on the crime of aggression prior to the Review Conference. If the United States achieves state party status by the time of the Review Conference, then its influence doubtless will be considerable for the final outcome of this significant amendment. Further, as a state party, the United States could weigh in heavily on other critical issues that might be raised at the conference, such as whether or not Article 124 of the Rome Statute, which permits a seven-year opt-out on war crimes charges for any new state party, will be repealed, and whether certain weapons (such as cluster bombs, phosphorous munitions, and anti-personnel landmines) will be added to the treaty as prohibited weapons.

At the Review Conference, the United States, assuming it were to become a state party to the Rome Statute, could press for amendments that should appeal to a broad spectrum of other nations. One amendment could strengthen the complementarity regime by fortifying Article 19(1) of the Rome Statute so as to require ICC judges to undertake an admissibility review immediately prior to surrender of a charged suspect to The Hague. Another amendment could add the crime of large-scale corruption in the U.N. system or among individuals and public agencies on the margins of a U.N. program (a possibility suggested by the Oil-for-Food Program scandal) as a prosecutable crime before the ICC.

A third amendment could seek to achieve what many governments, including the United States, had sought in 1998 but lost to horse-trading tactics at the Rome Conference: adding as prohibited weapons to the treaty all chemical weapons identified in the Chemical Weapons Convention. Further, the United States could seek a protocol to the Rome Statute that would create a highly skilled apprehension team that could be deployed to track and arrest

fugitives from ICC justice, but only with the prior consent of the nation(s) where any such fugitive is believed to be hiding.

Conclusion

The ICC remains a contentious issue in policy circles and a largely unspoken one among the general public. Therefore, any strategy that seeks to shift the United States into a closer relationship with the ICC entails risks and uncertainties that can be resolved only through a reduction in rhetoric and a better understanding of the ICC. The benefits of support of the ICC far outweigh the presumed costs, particularly in American credibility and leadership in its foreign policy and its commitment to the rule of law globally. This is especially true for the U.S. Armed Forces, which have far more to gain from participating in bringing leading perpetrators of atrocity crimes to justice than from continued U.S. opposition to the ICC and absence from its vital work. Maintaining the status quo would only strengthen the will of atrocity lords to act with impunity and endanger the lives of U.S. service personnel sent abroad to stop their carnage and restore the peace.

Notes

1. Jesse Helms, "We Must Slay this Monster," *Financial Times*, July 30, 1998.

2. However, there are other perspectives about this restraint. In a recent article sharply critical of the ICC, Columbia University professor of government Mahmood Mamdani accuses the ICC of closing its eyes to U.S. abuses out of "pragmatism" and "turning into a Western court to try African crimes against humanity." *See* Mahmood Mamdani, "The New Humanitarian Order," *The Nation*, September 29, 2008, available online at www.thenation.com/doc/20080929/mamdani.

3. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 1210, 120 Stat. 2083 (amending the American Service-Members' Protection Act to remove International Military Education and Training [IMET] restrictions); National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1212, 122 Stat. 3 (amending the American Service-Members' Protection Act to eliminate restrictions on Foreign Military Financing [FMF] assistance laws). President George W. Bush also has liberally used his waiver authority under the American Service-Members' Protection Act to exclude a number of countries from the punitive measures. For a summary of this practice, see The American Non-Governmental Organizations Coalition for the International Criminal Court, "Congressional Update," available online at http://www.amicc.org/usinfo/congressional.html#aspa.

4. See Chicago Council on Global Affairs, *Global Views 2006: The United States and the Rise of China and India: Results of a 2006 Multination Survey of Public Opinion* (2006), pp. 5, 19, 20, 29, and 78 (71 percent of Americans support the United States participating in the ICC), available online at http://www.amicc.org/docs/GlobalViews06Final.pdf; WorldPublicOpinion.org and Knowledge Networks, Americans on International Courts and Their Jurisdiction over the U.S., 2006, pp. 8–9 (74 percent of Americans support the United States participating in the ICC), available online at http://www.amicc.org/docs/PIPA%20Poll%20May%202006.pdf. The latest poll of the Chicago Council on Global Affairs (released on September 22, 2008 and available online at www.thechicagocouncil.org/dynamic_page.php?id=76) records Americans' support for U.S. participation in the ICC at 68 percent. For a summary of relevant surveys, see The American Non-Governmental Organizations Coalition for the International Criminal Court, Public Opinion Polls, available online at www.amicc.org/usinfo/opinion_pollshtml.

5. See, for example, John Bolton, Under Secretary for Arms Control and International Security, "The United States and the International Criminal Court," Remarks to the Federalist Society, November 14, 2002, available online at www.state.gov/t/us/rm/15158.htm ("Our principal concern is for our country's top civilian and military leaders, those responsible for our defense and foreign policy"). Bush administration fears of accountability before the ICC also were articulated by L. Bloomfield, Assistant Secretary of State for International Organization Affairs, in "The U.S. Government and the International Criminal Court," Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, New York, September 12, 2003, available online at http://www.amicc.org/docs/Bloomfield9_03.pdf.

6. See, for example, how the Justice Department repeatedly challenged accountability principles for government conduct in the series of detainee cases reviewed by the Supreme Court and largely decided against the Bush Administration: *Rasul v. Bush,* 542 U.S. 466 (2004), *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. ____ (2008). See also how the Bush administration achieved, with the support of a Republican-controlled Congress, immunity from prosecution for alleged past war crimes

in The Military Commissions Act of 2006, Pub. L. 109-366, §§ Sections 5, 6(b)(2), & 7(b), 120 Stat. 2600.

7. Detailed accounts of how Bush administration officials approached legal issues in this respect can be found in Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave, 2008); Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W. W. Norton, 2007); and Jordan Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (New York: Cambridge University Press, 2007).

8. See David Scheffer and Ashley Cox, "The Constitutionality of the Rome Statute of the International Criminal Court," *The Journal of Criminal Law and Criminology* 98 (2008): 983–1068, from which certain of the ideas and language of Parts IV and V are derived.

9. See David Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent," *Journal of International Criminal Justice* 3, no. 2 (2005): 333–53.

10. See William A. Schabas, *An Introduction to the International Criminal Court,* 3d ed. (New York: Cambridge University Press, 2007), pp. 470–86.

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