

AN ASSESSMENT OF US POLICY AND ACTION IN RELATION TO THE INTERNATIONAL CRIMINAL COURT DURING THE BUSH ADMINISTRATION, 2001-2009, AND PROSPECTS FOR THE OBAMA ADMINISTRATION'S ICC POLICY

The Bush administration never formally retracted its policy of disengagement and hostility toward the International Criminal Court (ICC). It did, however, make a significant shift toward improved relations and cooperation with the Court. This shift in practice is apparent when comparing US relations with the Court at the end of the Bush administration with its hard-line policy earlier. The shift can be seen from several angles: firstly, from the original US policy and practice, such as disengagement from the Court, including the suspension of the US signature to the Rome Statute; secondly in the history of legislative responses to the ICC, such as the American Servicemembers' Protection Act (ASPA); and finally through the US role in international cooperation and peacekeeping, such as the outcomes of US votes on Security Council resolutions on issues involving the ICC. The situation in Darfur, Sudan falls into this last category and is one of the clearest indications of a shift in US practice toward the Court. The offer of cooperation to the Court has been noted by members of the Obama administration. Secretary of State Hillary Clinton commended the Bush administration's "willingness to cooperate with the ICC in the Darfur investigation." Clinton added that she shares President Obama's view that the US "should support the ICC's investigations, including its pursuit of perpetrators of genocide in Darfur."¹

Formal Policy: Disengagement from the Court and the Suspension of the Signature

Opposition to the ICC was an early feature of the Bush administration's foreign policy. On May 6, 2002 Marc Grossman, Undersecretary of State for Political Affairs, laid out the Administration's policy about, and objections to, the Court and consequently stated that the US could "no longer be a party to the process."² The same morning John Bolton, then Undersecretary of State for Arms Control and International Security, sent a note to then-UN Secretary-General Kofi Annan stating that "the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature." Under the Vienna Convention on the Law of Treaties, the suspension of the signature means that US is no longer bound by the obligations of a signatory and in particular the obligation not to take action which defeats the object and purpose of the treaty (article 18).

At the same time, the signature is deactivated, not destroyed, so the US can reactivate it by sending another note to the UN Secretary-General saying that the US is once again ready to resume the obligations of a signatory. Furthermore the US signature of the Final Act in Rome entitles the US to observer status at ICC meetings. Therefore, US representatives may participate in the Assembly of States Parties (ASP) meetings with all rights but voting, and without any additional obligations for the US. The decision not to use this right to participate in ASP meetings as an observer is a reflection of the policy set out in the Grossman statement designed to actively distance the US from the Court.

¹ Senator Richard G. Lugar, Questions for the Record, Nomination of Hillary Rodham Clinton, January 13, 2009.

² Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington DC, May 6, 2002.





Grossman stated that, although the Bush administration shared the ultimate goals of the ICC, the Court did not advance American interests for four reasons; firstly, the administration believed that the ICC undermined the role of the UN Security Council. Both the ICC and the Security Council will inherently have a role to play in some conflict situations. There was a concern that an overlap of responsibilities would lead to the ICC taking on a role traditionally held by the Security Council. However, these two bodies have entirely different roles in a conflict situation. The Security Council's mandate is to ensure international peace and security, while the Court's mandate is to bring perpetrators of the most serious crimes to justice. Provisions in the Rome Statute detail the steps that the Security Council can take with respect to the ICC when there appears to be a conflict between the two mandates. The Security Council can, under Chapter VII of the UN Charter, refer a case to the Prosecutor, which he may accept or reject; it can also suspend an ICC investigation for renewable periods of 12 months.³

Some US policymakers are troubled that the Court is not fully accountable to the Security Council, where the United States has a veto, but to its own Assembly of States Parties (ASP). Although other permanent members of the Security Council may share this concern, their policies generally are to work with the Court.⁴ It would seem that the US cannot be completely separate from the Court and at the same time fully promote shared goals with the Court. Grossman stated that the US would “[c]ontinue [its] longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law” and “[c]ontinue to play a leadership role to right these wrongs.” As the Court considers only the most serious crimes in the world, wherever the ICC is conducting investigations the US will also have interests at stake. Later, the Bush administration recognized the limits of unilateralism with the situation in Darfur, and so as to advance common interests, the US decided that it should work with the Court.

The second reason put forth by Grossman was that the Rome Statute “creates a prosecutorial system that is an unchecked power.” However, the Rome Statute contains numerous checks on actors in the ICC. The checks include: the provision for multiple judges; no two judges may be from the same state; the Prosecutor cannot pursue an investigation not referred by a State or the UN Security Council without the approval of at least two judges; if there are doubts about impartiality, the judges, the Prosecutor, or an accused can ask that either a judge or the Prosecutor be disqualified; and the UN Security Council can prevent the Court from proceeding with specified investigations or prosecutions for renewable periods of 12 months. Furthermore, it is the ASP, made up of member states, which has ultimate oversight authority over the Court. For example, if a judge or the Prosecutor acts inappropriately, the Assembly can remove him or her. In addition to these checks, it is likely that an independent oversight mechanism will soon be in place to “help to detect and prevent waste, fraud and abuse at the Court and help it deal quickly and effectively with major misconduct by ICC staff and officials.”⁵

³ The ICC is not an organ of the United Nations; it is a judicial body. The Security Council only has power over states and not international organizations. Therefore, the Security Council would not inherently have power over the ICC. Nevertheless provisions in the Rome Statute detail the two steps that the Security Council can take with respect to the ICC.

⁴ The United Kingdom and France have ratified the Rome Statute, Russia, has signed it and, while China has not signed the Rome Statute, its delegates attend and participate in ASP meetings.

⁵ AMICC, Report on the Second Resumption of the Seventh Session of the Assembly of States Parties, February 19, 2009, available at <http://www.amicc.org/docs/ASP7r2.pdf>.





The concern over an “unaccountable” and potentially “over-active” prosecutor remains a key concern of those in the US who are opposed to the Court. Christine Chung, former ICC prosecutor and US Assistant District Attorney, has said that at this point there is not a lot of room to re-adjust the role of the Prosecutor. She stated that, ultimately, the process involved in being a prosecutor will always have an element of discretion. Chung adds that even if it was possible to remove all discretion, this is not the standard the US holds to its prosecutors and in fact it would be undesirable to achieve such complete control over the ICC Prosecutor. She argues that, because of the Prosecutor’s inevitable discretion, it is important to ensure a highly competent person is elected to the post and, therefore, it is even more vital for the US to be involved in the Court’s process of choosing the prosecutors.⁶

Nevertheless, many of those opposed to the Court for fear of an “over-active” prosecutor have conceded that, so far, the prosecutor has been far from over-active. Chief Prosecutor Luis Moreno-Ocampo has yet to initiate an investigation on his own, and remained well within his restrictive mandate. Chung has stated that everything the ICC does is in a “fish bowl.”⁷ In its highly scrutinized first years, she contends that the ICC’s Prosecutor has done well, most notably in being very careful to stay within the “gravity” threshold. The Congress Research Service Report of 2006 entitled *US Policy Regarding the ICC* supports this:

A recent determination by the ICC’s Chief Prosecutor seems to demonstrate a reluctance to launch an investigation against the United States based on allegations regarding its conduct in Iraq. On February 9, 2006, the Chief Prosecutor issued a letter explaining his reasons for declining to launch an investigation despite multiple submissions by private groups urging action against the United States.... [T]he Prosecutor noted that the allegations about US nationals’ behavior during the Iraq occupation were “of a different order than the number of victims found in other situations under investigation,” and concluded that the allegations were of insufficient gravity to warrant an investigation.

The progress of the Court was noted by Hillary Clinton who stated in response to questions for the purpose of her confirmation as Secretary of State by the Senate, “Now that it is operational, we are learning more about how the ICC functions. Thus far, the ICC has operated with professionalism and fairness – pursuing perpetrators of truly serious crimes.”⁸

The third reason Grossman outlined in his policy statement is that the “ICC asserts jurisdiction over citizens of states that have not ratified the treaty” and that this, he argues, threatens US sovereignty. Since states have jurisdiction over crimes committed in their territories, it is their sovereign right to allow the ICC to try these crimes if they fall within its jurisdiction. In this way, non-state-party individuals could be brought before the Court. There is nothing here which inherently extends the powers of the ICC over non-State Parties themselves; the process reflects the sovereign rights that states have to bring to justice individuals within their territory. Nonetheless, David Scheffer, head of the US Delegation to the Rome Conference and the United Nations

⁶ Christine Chung, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

⁷ Ibid.

⁸ Senator Richard G. Lugar, Questions for the Record, Nomination of Hillary Rodham Clinton, January 13, 2009.





Preparatory Commission for the International Criminal Court, said that “our fundamental concern is, in the absence of a Security Council referral, the court asserting jurisdiction over non-party nationals.”⁹ This indicated that concerns about US citizens coming under the jurisdiction of the Court stem from a desire to protect US nationals rather than fears of impinged national sovereignty.

The fourth and final reason Grossman put forth for the US disengagement from the Court, was the claim which summarizes the administration’s view that the ICC is “built on a flawed foundation” which can lead to “exploitation and politically motivated prosecutions.” The ICC has inherent checks against politically motivated prosecutions; these include the previously mentioned checks such as multiple judges and the ASP. It also includes jurisdictional checks. The gravity threshold, for example, limits the Court to dealing with those responsible for the most serious crimes which are of concern to the international community. This makes it difficult to envisage, for example, a situation where one US soldier in a peacekeeping mission is brought before the ICC.

Clint Williamson, US Ambassador-at-Large for War Crimes Issues, stated in October 2008 that, while odds of a politicized prosecution are low, as that would be a “foolish” act, it nonetheless remains the greatest concern in the US about the ICC.¹⁰ Some have pointed to the communications received by the ICC to consider actions of US and British soldiers in Iraq as indicative of how the Court might deal with other situations concerning the US. If a US national were investigated by the Court, the strong US domestic system of internal checks on military action, like that of the United Kingdom, would most likely satisfy the ICC’s complementarity test under which the Court can only exercise jurisdiction if the national courts are unwilling or unable to act. This, coupled with the consideration that must be made about the gravity of the offence, would most likely preclude purely political prosecutions of US nationals by the Courts.

The Grossman statement reveals that the Bush administration’s policy, while reluctantly accepting the Court’s existence, did not permit a cooperative relationship with the ICC. “[T]he 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.... The US 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.”¹¹ Shortly after Grossman’s remarks, US policy developed to further limit cooperation with the Court. These developments are reflected in a 2005 statement by US Deputy Permanent Representative to the UN, Anne Wood Patterson, in which she stated, “For the United States, we are restricted by United States statutes that reflect deep concerns about the Court from providing assistance and support to the ICC.”¹²

⁹ David J. Scheffer, Ambassador-at-large for War Crimes Issues, Remarks before the 6th Committee of the 53rd General Assembly, October 21, 1998.

¹⁰ Clint Williamson, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

¹¹ Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington DC, May 6, 2002.

¹² Anne Wood Patterson, US Deputy Permanent Representative to the UN, United Nations Security Council, 5158th meeting, March 31, 2005.





Legal Responses to the ICC: ASPA and Nethercutt

The Bush administration manifested its initial hostility toward the Court in a series of legal efforts that were intended to undermine the Court's scope, and arguably even the Court itself.¹³ John B. Bellinger III, State Department legal adviser during the second term of the Bush administration, has disputed the claim that US efforts were intended to undermine the Court by asserting that some people in the Bush administration would have liked to kill the ICC but that the decision went to President Bush who ultimately rejected it. He stated that the decision was in the form of a choice: (a) do we try block Rome Statute and kill the ICC? Or (b) acquiesce with reality and say "respect our decision." Bellinger claimed that President Bush chose (b) and that the Grossman statement reflects that opinion.¹⁴

The first anti-ICC law was the American Servicemembers' Protection Act (ASPA) passed in August 2002. The legislation is also known as the "Hague Invasion Act" because, among other things, it grants the President authority to use "any means necessary" to free US citizens and allies from ICC custody in The Hague.¹⁵ Moreover, ASPA withheld US international military education and training (IMET) aid as well as foreign military financing (FMF) from countries that refused to enter into bilateral agreements which required consent to hand each other's nationals over to the Court. ASPA also restricts direct US cooperation with the ICC, subject to waivers and exceptions.¹⁶ For example, there are provisions which prohibit direct or indirect transfer of classified national security information, including law enforcement information, to the ICC.¹⁷ There are also further provisions which make US support of peacekeeping missions largely contingent on ensuring the non-surrender of US personnel to the ICC.¹⁸

The second legislation hostile to the Court was the Nethercutt Amendment, adopted by Congress in December 2004 for Fiscal Year 2005 as part of the US Foreign Appropriations Bill. This provision authorized the loss of Economic Support Funds (ESF) to countries, including many key non-NATO US allies, which refused a bilateral immunity agreement with the US. This provision posed the threat of broad cuts in foreign assistance, including funds for cooperation in international security and terrorism, economic and democratic development, human rights, and promoting peace processes. Nethercutt required annual renewal; it was renewed for Fiscal Year 2006, lapsed for Fiscal Year 2007 and returned for Fiscal Year 2008.

Protection for US nationals and others from potential prosecutions at the ICC has been sought through what are known as bilateral immunity agreements (BIAs) or "Article 98" agreements. US officials sought mutual agreements that provide that American citizens, and certain other persons, regardless of nationality, are not

¹³ Both Richard Dicker, Director, International Justice Program, Human Rights Watch, and Clint Williamson, US Ambassador-at-Large for War Crimes Issues, stated that there was a clear effort to kill the Court in the early years of the Bush administration. Remarks at the American Branch of the International Law Association's International Law Weekend, October 17, 2008, notes on file with the author.

¹⁴ John B. Bellinger III, Remarks at the American Branch of the International Law Association's International Law Weekend, October 17, 2008, notes on file with the author.

¹⁵ American Servicemembers' Protection Act, Section 2008.

¹⁶ American Servicemembers' Protection Act, Section 2004.

¹⁷ American Servicemembers' Protection Act, Section 2006.

¹⁸ American Servicemembers' Protection Act, Section 2005.





transferred to the jurisdiction of the ICC. The US under Bush interpreted Article 98 of the Rome Statute to permit these agreements. Article 98 states that Parties need not waive diplomatic immunity or surrender certain individuals if it would be inconsistent with international law obligations toward another State in response to an ICC request, unless that State agrees to cooperate. Article 98(1) was introduced in response to the concerns of states about conflicting obligations should the Court seek an arrest warrant for someone who, for example, was protected under the Vienna Convention on Diplomatic Relations. Article 98(2) deals with individuals in a state territory following the existence of a “sending state” relationship, such as found in Status of Forces and Status of Mission agreements (SOFAs and SOMAs). The *Commentary on the Rome Statute of the ICC*, edited by Otto Triffterer, states that article 98 “recognizes protections flowing from international obligations ... arising from an agreement such as Status of Forces agreements.” BIAs proposed by the US expressed a blanket protection over Americans, some without any reference to the sending state relationship.¹⁹ Individuals covered by BIAs include anyone on the territory of the state that signed the BIA who works or has worked for the US government and also US citizens in general. This could include non-US citizens²⁰ and therefore, citizens of the state that signed the BIA could also be covered by the blanket immunity. This would effectively prevent that state from cooperating with the court in relation to its own citizens.

There has been significant international opposition to the controversial policy of seeking BIAs. Governments, NGOs and international law experts have argued that these agreements go beyond the scope of Article 98 of the Rome Statute, which intended to address conflicts with international agreements and was not intended to place any one country’s citizens above the reach of international law. Legal experts have further contended that States Parties that sign a BIA are in breach of international law.²¹

Some US officials complained about ASPA as well. David J. Scheffer in his statement before the House International Relations Committee, Washington, DC, in July 2000 declared that, as proposed, “many of the provisions of [ASPA] achieve exactly the opposite of the result intended, and would seriously harm our own national security and foreign policy interests. The legislation would cripple our negotiating leverage to achieve the common objective of protection of American service members from surrender to the ICC.”²² In testimony to a congressional panel in 2005, US Army General Bantz Craddock said enforcement of ASPA had made it impossible for him to fulfill his duties as head of the Southern Command, in charge of US forces in Latin America. He stated that several countries in Latin America had refused to sign BIAs and as a result, certain foreign aid for these countries has been held up. These statements were ultimately reflected in Secretary of State Condoleezza Rice’s conclusion that the BIA policy had been “sort of the same as shooting ourselves in the foot.”²³

¹⁹ Coalition for the International Criminal Court, US Bilateral Immunity Agreements or So-Called ‘Article 98’ Agreements, August 23, 2006.

²⁰ Coalition for the International Criminal Court, Status of US Bilateral Immunity Agreements by region, December 14, 2006.

²¹ The Council of the European Union stated that US non-surrender agreements do not fall under Article 98 and that it would be illegal for States Parties to the ICC to sign such agreements. September 30, 2002.

²² David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the US Delegation to the United Nations Preparatory Commission for the International Criminal Court, Statement before the House International Relations Committee, Washington DC, July 26, 2000.

²³ Clare M. Ribando, Analyst in Latin American Affairs Foreign Affairs, Defense, and Trade Division, Article 98 Agreements and Sanctions on US Foreign Aid to Latin America, CRS Report for Congress, April 10, 2006.





The Bush administration imposed military cuts on 35 countries in 2002, the first year of ASPA, and more than 100 countries eventually signed the agreements.²⁴ Of these, less than half are with ICC States Parties. Over 50 countries have publicly refused to sign BIAs and in Fiscal Year 2005, 24 States Parties lost US aid. The last BIA publicly disclosed was with Montenegro in 2007²⁵ and it now appears that efforts to get states to sign BIAs have petered out.²⁶

On September 16, 2008 Chairman of the House Foreign Affairs Subcommittee on the Western Hemisphere, Eliot L. Engel, urged the US to eliminate its “failed policy” of Article 98 restrictions “once and for all.”²⁷ John Bellinger has also conceded that the policy had failed.²⁸ Within the context of stating that there is no point in pressuring the US to ratify the Rome Statute, he added that “similarly”²⁹ the US has seen that there is no point in trying to stop other countries from joining. By September 30, 2008 all of the ASPA sanction provisions had been repealed and Nethercutt had expired and was not renewed for Fiscal Year 2009.³⁰

Amendments, waivers and renewal issues had increasingly limited the scope of ASPA and Nethercutt in reaction to the negative impacts of the Acts. Both ASPA and Nethercutt include waiver provisions that made their provisions non-binding. Provisions in ASPA are limited by presidential exercise of power as Commander in Chief (Section 2011) and the international efforts assistance exception (Section 2015, also known as the Dodd Amendment.) Nethercutt contained waivers under Section 671; including Section 671(b) which allowed the President to waive sanctions for members of NATO. The first ASPA aid waivers were issued by President Bush in November of 2003. These waived the military aid cuts for several countries; some were introduced for interests related to NATO, others for the countries which aided the US in the conflicts in Afghanistan and Iraq.³¹ During his second term, President Bush used waivers to reinstate both the military aid and economic aid to dozens of countries. This was intended for strategically important allies who were targeted by the legislation. Ultimately, between 2003 and 2007 President Bush issued permanent ASPA waivers for 55 nations and a further eight nations received limited or temporary waivers.

Congress also pressed amendments to ASPA which were signed into law by President Bush and removed all sanctions provisions. The first amendment to ASPA, in October 2006, removed all IMET sanctions on nations who refused to sign BIAs. The second amendment, in January 2008, further amended ASPA to remove Foreign

²⁴ Ibid. The report states: “As of 11 December 2006, the US State Department reports 102 agreements; 100 are listed here.”

²⁵ The American NGO Coalition for the International Criminal Court, *Bilateral Immunity Agreements*, available at http://www.amicc.org/usinfo/administration_policy_BIAs.html.

²⁶ Coalition for the International Criminal Court, *Status of US Bilateral Immunity Agreements by region*, December 14, 2006.

²⁷ Eliot L. Engel, Opening Statement Chairman House Foreign Affairs Subcommittee on the Western Hemisphere, Foreign Assistance in the Americas, September 16, 2008.

²⁸ John B. Bellinger III, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

²⁹ Ibid.

³⁰ One Hundred Seventh Congress of the United States of America, HR 4775, Public Law 107-206 (as amended by the John Warner National Defense Authorization Act for Fiscal Year 2007, HR 5122, S.2766, signed into law October 17, 2006; HR 4986, the National Defense Authorization Act for Fiscal Year 2008, signed into law January 28, 2008); Public Law 111-8, signed into law March 12, 2009, which did not renew Nethercutt for FY 2009.

³¹ William C. Mann, *US policy on international court unlikely to shift*, Associated Press October 14, 2008.





Military Funds (FMF) restrictions. For Nethercutt, President Bush used his authority to waive the provisions of the Nethercutt Amendment in 2007³² and 2008³³ with respect to 14 countries and 2009³⁴ with respect to 16 nations whose ESF aid had previously been cut.³⁵ On the other hand, Brazil and Venezuela, for example, may have lost a total of approximately \$15 million in ESF aid.³⁶ However Nethercutt expired on September 30, 2008 and the Fiscal Year 2009 omnibus appropriations bill did not include Nethercutt. This suggests it is unlikely to be reinstated in the future.

Cooperation with the ICC is not strictly prohibited by domestic law. ASPA allows the President to cooperate with the Court under the Dodd amendment³⁷ which states:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

US Policy Toward the Court in the United Nations Security Council

After a terrorist bomb killed 22 UN workers in Baghdad in 2003, the Security Council attempted to pass a resolution to protect humanitarian aid workers. The United States vetoed the resolution because it referred indirectly to prohibitions under international law which mentioned that the ICC had criminalized such attacks. Ultimately, a watered-down version, Resolution 1502, was passed that did not mention the Court. Further to this, the US had arguably “strong armed”³⁸ the Security Council into using language in peacekeeping renewal resolutions 1422 (2002)³⁹ and 1487 (2003) in order to immunize American peacekeepers from any surrender to the ICC. This had to be renewed every 12 months and in 2004, after information was released about US troops abusing Iraqi prisoners in Abu Ghraib, the US withdrew this demand after the Security Council refused to renew it. Peacekeeping resolutions that were passed in 2004 were done so with clear statements from US officials that the resolutions were supported due to “sufficient bilateral protections”⁴⁰ – BIAs with the aim of protecting US troops from the ICC.⁴¹ Additionally, in December 2004, the US agreed to support a resolution⁴²

³² Memorandum for the Secretary of State, Office of the Press Secretary, November 28, 2006.

³³ Memorandum for the Secretary of State, Presidential Determination No. 2008-21, June 20, 2008.

³⁴ Memorandum for the Secretary of State, Presidential Determination No. 2009-14, January 16, 2009.

³⁵ The American NGO Coalition for the International Criminal Court, Presidential Waivers Granted, available at http://www.amicc.org/usinfo/administration_policy_BIAs.html.

³⁶ Coalition for the International Criminal Court, Nethercutt Amendment, available at <http://www.iccnw.org/?mod=nethercutt>.

³⁷ Section 2015 of ASPA, introduced in July 2002.

³⁸ David Scheffer and John Hutson, Strategy for the US Engagement with the International Criminal Court, A Century Foundation Report, October 21, 2008.

³⁹ On June 30, 2002, in a vote of 13 in favor and one against, the US vetoed the Security Council resolution extending the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH). On July 12, 2002, members of the Security Council achieved compromise language and adopted an omnibus peacekeeping resolution, Resolution 1422, which attempts to prospectively prevent the ICC from taking up any case against an entire class of persons.

⁴⁰ Ambassador Danforth, UN Press Release, SC/8187, September 17, 2004 (regarding Resolution 1561 extending the UN Mission in Liberia until mid-September 2005 and the immunity agreement between the Government of Liberia and the US).

⁴¹ Other instances include US support of Resolution 1565 in October 2004, extending MONUC in the Democratic Republic of Congo. Ambassador Stuart Holliday stated that “the US has an Article 98 agreement ... that would prohibit it from surrendering US personnel





extending the United Nations Operation in Burundi only after language was removed which encouraged and authorized UN investigators to cooperate with the ICC.

A less hostile approach to UN Security Council resolutions emerged in President Bush's second term. Bellinger has stated that there had been a more nuanced approach toward the Court under Secretary of State Condoleezza Rice, claiming that there was no longer a question of trying to "throttle the baby in its infancy."⁴³ When Condoleezza Rice chaired the Security Council on June 19, 2008 she introduced resolution 1820 which contained provisions to deal with a range of sexual offences in the same way as they are set out in the Rome Statute.⁴⁴ US policy toward the ICC in the Security Council became much more accepting of the Court since addressing the situation in Darfur has become a priority for the US.

Change in Practice due to Darfur

On March 31, 2005 UN Security Council passed resolution 1593 which referred the investigation of killings and other crimes in Sudan's Darfur region to the ICC. As set out in Article 13(b) of the Rome Statute, the Security Council can confer jurisdiction to the Court over an area such as Darfur, even though Sudan has not ratified the Rome Statute. The US, departing from the previous approach toward Security Council resolutions, abstained rather than vetoed this resolution. Officials stated that the reasoning for the abstention was due to the need to end impunity in Sudan.⁴⁵ In June 2008 Zalmay Khalilzad, US Permanent Representative to the UN, stated that "[t]he United States strongly believes that those responsible for the acts of genocide, war crimes and crimes against humanity committed in Darfur must be held accountable and be brought to justice. We look forward to continuing to work with other members of the Council on necessary steps, including working with Costa Rica on a draft presidential statement to achieve that important objective."⁴⁶ A presidential statement, under the leadership of the US, was on June 16, 2008.⁴⁷

On July 31, 2008 the US abstained from voting on Security Council Resolution 1828 to renew Darfur peacekeeping. This time the abstention was said to be due to the wording of the resolution which strongly suggested that considerations for the deployment of further peacekeeping forces should be tied together with considerations of an Article 16 deferral of the case in Darfur.⁴⁸ The US stated that the "language added to the resolution would send the wrong signal to Sudanese President Bashir and undermine efforts to bring him and

to the ICC" The same month the US supported resolution 1568, extending UNFICYP in Cyprus. A US representative stated that "it is the policy of the United States Government to ensure that members of the armed forces of the United States of America participating in UN peace operations are protected from criminal prosecution or other assertion of jurisdiction by the International Criminal Court." USUN Press Release 203 (04), October 22, 2004.

⁴² UNSC Resolution 1577, December 1, 2004.

⁴³ John B. Bellinger III, Remarks at the American Branch of the International Law Association's International Law Weekend, October 17, 2008, notes on file with the author.

⁴⁴ Security Council, 5916th Meeting, "Rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide," June 19, 2008.

⁴⁵ Robert Zoellick, Deputy Secretary of State, Press Briefing on Sudan, May 27, 2005.

⁴⁶ United Nations Security Council, 5905th meeting, June 5, 2008.

⁴⁷ Available at <http://www.amicc.org/docs/PRST16June2008.pdf>.

⁴⁸ The resolution referred to concerns of some states about the Prosecutor's application and their "intention to consider these matters further."





others to justice.”⁴⁹ Richard Dicker, director of the International Justice Program at Human Rights Watch added that “[t]he US decision to abstain is clearly a vote against giving President al-Bashir a get-out-of-jail-free card.”⁵⁰ John Bellinger and Clint Williamson both stated that if the resolution had not mentioned the possibility of deferring investigations from the ICC, the US would have given an affirmative vote on the resolution.⁵¹ Clint Williamson added that this vote represented “a huge change from where we were two years ago, or five years ago, where we would have abstained or vetoed a resolution because it merely made mention of the ICC.”⁵² David Scheffer and John Hutson have similarly said that Resolution 1828 marked a “significant turning point for the Bush team”⁵³ as compared to previous peacekeeping renewal resolutions. By this time the Bush administration had openly endorsed the prosecution by the ICC of people involved in the Darfur violence.

In Darfur, government-sponsored Arab militias led attacks on civilians, resulting in hundreds of thousands of deaths since 2003. Following the referral of the case to the ICC, Prosecutor Luis Moreno-Ocampo opened a formal investigation into the situation in Darfur. In May 2007, the judges of Pre-Trial Chamber I issued arrest warrants for Ahmad Muhammad Harun, the former Minister of State for the Interior of the Government of Sudan, and Ali Kushayb, a janjaweed militia leader. In December 2007, the Office of the Prosecutor revealed that it had started two new cases: the first investigating attacks against civilians, particularly in camps for the displaced, and the second focusing on attacks against humanitarian personnel. In July 2008 the Prosecutor sought an arrest warrant for Sudan’s President Omar Hassan Ahmad al-Bashir on ten charges of crimes against humanity, war crimes and genocide. In November 2008 the Prosecutor presented evidence to the judges in relation to rebel commanders for their alleged responsibility for crimes committed against African Union peacekeepers in Haskanita camp.⁵⁴ The first arrest warrant from the new cases was issued on March 4, 2009. Pre-Trial Chamber I issued the arrest warrant for President Bashir for five counts of crimes against humanity and two counts of war crimes.⁵⁵ This is the ICC’s first arrest warrant issued for a sitting head of state. The Government of Sudan refuses to cooperate with the Court and none of the individuals have been brought into custody.

The US has been one of the most outspoken nations on bringing the issue of the Darfur to the forefront of the humanitarian agenda. In September 2004, President Bush officially labeled the conflict as genocide. Still, the international community has been unable to implement peace enforcement or fully implement peacekeeping agreements.

⁴⁹ Statement of Alejandro Wolff, US Deputy Ambassador, *UN extends Darfur peace mission*, BBC News, August 1, 2008.

⁵⁰ Human Rights Watch, *US Abstains in Support of ICC Case Against Sudan’s President*, July 31, 2008.

⁵¹ John B. Bellinger III and Clint Williamson, *Remarks at the American Branch of the International Law Association’s International Law Weekend*, October 17, 2008, notes on file with the author.

⁵² Clint Williamson, *Remarks at The Century Foundation and the Friedrich Ebert Stiftung Event, Reassessing the International Criminal Court: Ten Years Past Rome*, January 13, 2009, Transcript available at: <http://www.tcf.org/publications/internationalaffairs/ICC%20Transcript.pdf>.

⁵³ David Scheffer and John Hutson, *Strategy for US Engagement with the International Criminal Court*, A Century Foundation Report, October 21, 2008.

⁵⁴ International Criminal Court, *Press Release, “Attacks on peacekeepers will not be tolerated”*. ICC Prosecutor presents evidence in third case in Darfur, November 20, 2008.

⁵⁵ International Criminal Court, *Press Release, ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan*, March 4, 2008.





Some remain skeptical of the influence of the situation in Darfur on US relations with the ICC. Jerry Fowler, president of the Save Darfur Coalition, says that Darfur and the ICC are seen as two different problems for many Americans. He stated that many senators who remain supporters of ASPA also support accountability in Darfur, yet they see the logic of interest in Darfur leading to a closer relationship with the ICC as a non sequitur.⁵⁶ Clint Williamson agrees with this view, but argued that the situation in Darfur has nonetheless created a grassroots warming to ICC. He further stated in 2008 that if the referral of the situation came up then, the US would not abstain from the vote, but give an affirmative vote.⁵⁷

Information cooperation and US support for the ICC in relation to Darfur

Jendayi Frazer, US Assistant Secretary of State for African Affairs, said in November 2005 that “Deputy Secretary Zoellick has made very clear that if we were asked by the ICC for our help, we would try to make sure that this gets pursued fully. To use his words, because we don’t want to see impunity for any of these actors. So they haven’t asked, but if they did, we stand ready to assist.”⁵⁸ Similar statements from US officials continued to emerge into 2006.⁵⁹ In December of 2005, however, Prosecutor Luis Moreno-Ocampo was asked in an interview about whether the ICC investigations had received any assistance from the US. He replied that “in the Security Council meeting they informed us that they are not ready to cooperate. In any case, we are not requesting any cooperation that would be a problem for the United States.”⁶⁰ It appears at this time that the US policy was to state that it would cooperate with investigations if asked, while at the same time not encouraging cooperation requests.

During this time, evidence of support for action in Darfur began to emerge. In March 2005 former Senator Jon Corzine and Senator Sam Brownback introduced the Darfur Accountability Act.⁶¹ The Act called for steps to be taken within the Security Council “to ensure prompt prosecution and adjudication of those named by the UN Commission in a competent international court of justice.” The Act passed in the Senate, but due to pressure from the White House was stripped from the final bill.⁶² Additionally, individuals such as John McCain and Bob Dole also came out with statements in support of the Court’s work in Sudan. They stated that the US “should publicly remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur and that Sudanese leaders will be held personally accountable for attacks on civilians.”⁶³

⁵⁶ Jerry Fowler, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

⁵⁷ Ibid.

⁵⁸ Jendayi E. Frazer, US Assistant Secretary of State for African Affairs, House Subcommittee on Africa, Global Human Rights and International Operations, International Relations Committee, November 1, 2005.

⁵⁹ See, e.g., Robert Zoellick, The Brookings Institution, Washington, D.C. April 13, 2006 (“if they ask for information and help, we try to provide that help ... we will fully cooperate with it and pursue those actions as related to the genocide in Darfur”).

⁶⁰ Interview with ICC Prosecutor Luis Moreno-Ocampo, United States Holocaust Memorial Museum, December 22, 2005, available at <http://blogs.ushmm.org/index.php/COC2/9/>.

⁶¹ The Darfur Accountability Act, S. 495, introduced March 2, 2005. While the bill did not pass, it helped pave the way for further legislation on the situation.

⁶² Darfur Peace and Accountability Act, S. 1462, signed into law on October 13, 2006.

⁶³ John McCain and Bob Dole, *Rescue Darfur Now*, Washington Post, September 10, 2006.





By June 2006, John Bellinger stated that the US acknowledges that the ICC “has a role to play in the overall system of international justice.”⁶⁴ The statement is seen to represent a “rhetorical turnabout”⁶⁵ in stated policy toward the ICC. Both supporters and opponents of the Court regard the administration’s change as reflecting both a greater flexibility by the administration in Bush’s second term and the President’s personal investment in bringing to justice the perpetrators of grave crimes in Darfur. Bellinger said that, as there was no local option for justice within Sudan, the US “supported the use of the ICC for the trials for those responsible for the atrocities in Darfur. We worked on the UN Security Council Resolution and did not block it despite our concerns about the ICC.”⁶⁶ In December 2006 he added, “At least as a matter of policy, not only do we not oppose the ICC’s investigation and prosecutions in Sudan but we support its investigation and prosecution of those atrocities.”⁶⁷ Such support was heard again on February 5, 2007 when the Senate Subcommittee on Human Rights and the Law issued a statement saying that they were discussing “the status of the International Criminal Court’s Darfur investigation, and whether the federal government is doing everything it can to facilitate that investigation.”⁶⁸

Since the 2006 Darfur referral, further official statements promoted the idea of international accountability. In May 2007, White House Press Secretary Tony Snow stated: “We very strongly support accountability for those who are responsible for Darfur, and we expect the government of Sudan to comply with the obligations ... to cooperate with the ICC.”⁶⁹ In a speech in 2007, Bellinger echoed earlier statements by Zoellick and Frazer explicitly opening the possibility that the United States might assist the Court in its Darfur investigation provided that the help does not conflict with US law or protection of US soldiers abroad.⁷⁰ In April 2008 Bellinger further emphasized the restrictions on assistance in US law; referring to a potential request for assistance in the Darfur situation Bellinger stated that there “are restrictions in US law on assistance to the ICC, including under the American Servicemembers’ Protection Act.... But Darfur is nonetheless a good example of an area where ... there may be opportunities for constructive cooperation.”⁷¹ By July 2008, in a press briefing, State Department Spokesman Sean McCormack stated, “We are constantly looking at what information we have on our own that might help hold accountable those individuals responsible for genocide and other atrocities ... there has been a request for information from the ICC and we had pledged that we would look at that request.”⁷² Thus, as the situation in Darfur worsened and attracted greater attention, the US appeared to become more willing to share information with the ICC became increasingly cooperative. That willingness to cooperate departs from the initial position of full disengagement and at the time when ASPA and Nethercutt were introduced, from actions which expressed a strong distrust of the Court and a US policy which would not support it.

⁶⁴ Jess Bravin, *US warms to Hague Tribunal*, The Wall Street Journal, June 14, 2006.

⁶⁵ Jess Bravin, *US Accepts International Criminal Court*, The Wall Street Journal, April 26, 2008.

⁶⁶ John Bellinger III, 29th Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, September 8, 2006.

⁶⁷ Desmond Butler, *Bush administration hesitates to fully collaborate with ICC*, Associated Press, December 27, 2006.

⁶⁸ Senator Richard J. Durbin, Statement United States Senate Committee on the Judiciary Genocide and the Rule of Law, February 5, 2007.

⁶⁹ Tony Snow, Press Secretary, White House Press Briefing, May 3, 2007.

⁷⁰ John B. Bellinger III, US Department of State Legal Adviser, The Atlantic Commission, The Hague, The Netherlands, June 6, 2007.

⁷¹ John Bellinger III, US Department of State Legal Adviser, Midwest Regional Conference on International Justice, April 25, 2008.

⁷² Sean McCormack, US Department of State Daily Press Briefing, July 14, 2008.





US Support for the Court in the Face of an Effort to Defer Prosecutions

The Prosecutor's request for an arrest warrant for President Bashir has spurred Sudan, with the support from some African, Arab and Islamic leaders, to seek a Security Council resolution deferring the prosecution. Two main concerns are whether Sudan would block relief workers from doing their jobs in Darfur, and a fear that an arrest warrant would interfere with efforts to strike a peace deal in the region. However, it has been argued that peace cannot exist without justice and that the Security Council should not be blackmailed into postponing an arrest warrant due to threats of retaliation on UN peacekeepers. The Bush administration was an unlikely defender of these arguments in the face of efforts by Sudan and others to derail the prosecution. David Scheffer said, "It would appear the Bush administration does see the value in the ICC actually investigating and perhaps ultimately prosecuting atrocities in Darfur."⁷³

The US under Bush took one of the strongest positions against an Article 16 deferral before the issuance of the arrest warrant for Omar Al Bashir, president of Sudan. In 2008, Secretary of State Condoleezza Rice and President Bush's special envoy for Sudan, Richard S. Williamson, made clear to senior Sudanese officials that the Bush administration would veto a proposed UN Security Council resolution deferring the prosecution by one year unless Sudan significantly improves its humanitarian practices and takes tangible steps toward peace in Darfur.⁷⁴ Clint Williamson, US Ambassador-at-Large for War Crimes Issues, stated that he has been surprised to see that the US has been more supportive of the ICC in the Darfur situation than any other nation on the Security Council.⁷⁵ This can be contrasted to the statement by the former Bush administration Undersecretary of State for Arms Control, John R. Bolton, who said that he was "disturbed" by the Bush administration's tacit support for the Court's Darfur investigation. He stated: "If you allow this to happen, you legitimize the ICC. My preferred policy is to isolate it and hope it will eventually wither."⁷⁶

The Obama administration also appears to oppose efforts for a deferral. A spokesman for President Obama's national security adviser, US Marine General James L. Jones, stated, "We support the ICC and its pursuit of those who've perpetrated war crimes. We see no reason to support deferral [of the indictment] at this time."⁷⁷ After President Bashir expelled aid workers from Darfur in March 2009, there were renewed questions of an Article 16 deferral.⁷⁸ In response, Susan Rice, the US Ambassador to the United Nations, stated "I do not believe that a deferral is justified or constructive."⁷⁹ US Secretary of State Hillary Clinton further emphasized the Obama administration's commitment to accountability stating that "[t]he real question is what kind of pressure can be brought to bear on President Bashir and the government in Khartoum [to get them] to understand that they will be held responsible for every single death that occurs in those camps."⁸⁰

⁷³ Michael Abramowitz and Colum Lynch, *Darfur Killings Soften Bush's Opposition to International Court*, Washington Post, October 12, 2008.

⁷⁴ Ibid.

⁷⁵ Clint Williamson, Remarks at the American Branch of the International Law Association's International Law Weekend, October 17, 2008, notes on file with the author.

⁷⁶ Michael Abramowitz and Colum Lynch, *Darfur Killings Soften Bush's Opposition to International Court*, Washington Post, October 12, 2008.

⁷⁷ Ben Chang, Spokesman for President Obama's National Security Adviser, February 5, 2009.

⁷⁸ David Gollust, *Clinton Says Bashir Will Be Held Responsible for Darfur Deaths*, Voice of America, March 17, 2009.

⁷⁹ NPR News, *Sudan's Expulsion of Aid Groups Escalates Crisis*, All Things Considered, March 6, 2009.

⁸⁰ David Gollust, *Clinton Says Bashir Will Be Held Responsible for Darfur Deaths*, Voice of America, March 17, 2009.





Where Will We Go Next?

US signature

During his first term, President Bush, with the support of the Republican Congress, actively sought to shield US nationals from the Court. Michael Mattler, Minority Counsel for the Senate Foreign Relations Committee, stated that the “unsigned” of the Rome Statute itself helped paint an image of a hostile policy.⁸¹ President Bush’s vigorous opposition toward the Court, however, softened most notably at the start of his second term. The introduction of waivers to ASPA and Nethercutt was an early signal of this. The most solid evidence, however, came when the United States abstained rather than vetoed a UN resolution that referred situation in Sudan’s Darfur region to the ICC. The administration gradually softened its approach toward the Court in the wake of the atrocities in the Darfur, to the extent that the administration openly endorsed the prosecution by the ICC of individuals responsible for the Darfur violence.⁸²

The evidence that the Bush administration increasingly accepted the Court as an actor in international justice suggests that this has opened the way for the Obama administration to reinstate the US signature as a next step in relations with the Court. The Obama administration appears to endorse a policy of cooperation internationally for peace and justice. Reinstating the signature would be a proactive step in this direction and so could be a reality in the near future. Additionally, as stated previously, such action could take place very simply and would not impose unprecedented obligations on the US.

Cooperation

Bellinger stated that the substantive concerns relating to the Court, and especially about the balance between international justice and sovereignty, have been consistent from the Clinton administration until now.⁸³ Others have argued that there was an inconsistency which was reflected in political and legal actions as the Clinton administration decided to sign the Rome Statute and attend ICC diplomatic meetings, whereas the Bush administration tried to undermine the Court.⁸⁴ Clint Williamson has stated that there has been an “evolution ... in practice.... A quiet change. No statement that policy was changing, and certainly no admission that the initial approach to the ICC was in any way wrong.”⁸⁵ Considering the Obama administration’s strong interest in justice for Darfur, as well as the Bush administration’s willingness to consider requests for cooperation, cooperation with the Court is a strong possibility. Secretary of State Hillary Clinton has stated that President Obama “believes as do I that we should support the ICC’s investigations, including its pursuit of perpetrators of genocide in Darfur. Along these lines, the Bush administration has indicated a willingness to cooperate with the ICC in the Darfur investigation, a position the new Administration will support.”⁸⁶

⁸¹ Michael Mattler, Minority Counsel for the Senate Foreign Relations Committee, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

⁸² Ibid.

⁸³ John B. Bellinger III, US Department of State Legal Adviser, Remarks at the Fletcher School of Law and Diplomacy, Medford, Massachusetts, November 14, 2008.

⁸⁴ Prof. Roger S. Clark, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

⁸⁵ Clint Williamson, Remarks at The Century Foundation and the Friedrich Ebert Stiftung Event, Reassessing the International Criminal Court: Ten Years Past Rome, January 13, 2009. Transcript available at: <http://www.tcf.org/publications/internationalaffairs/ICC%20Transcript.pdf>.

⁸⁶ Senator Richard G. Lugar, Questions for the Record, Nomination of Hillary Rodham Clinton, January 13, 2009.





Assembly of States Parties and Review Conference

Many supporters and opponents of the Court have argued that the Bush administration's gradual divergence from long-held and fierce opposition to the ICC will be in the interest of national security. Aside from the negative effects of the anti-ICC legislation, the Court itself is effective in its work internationally, and if the US is to further influence the early stages of the ICC, the time is running out. Bellinger has said that the US undoubtedly has an interest in ensuring a good definition of "aggression," for example. He has, however, argued that it might not be in the interest of the US to become involved in the deliberations on aggression as he feared if the US were to become involved others would believe the US was trying to come up with a "Trojan horse"⁸⁷ definition which would be rejected. Clint Williamson, US Ambassador-at-Large for War Crimes Issues, agreed with this to the extent that he argued that the Obama administration would have to deal with perception problems. Christine Chung rejected these views, arguing that the US played a large role in Rome, and many would welcome the US back. Additionally, she stated that such fears would be missing the point when ultimately the US has a lot to gain from attending the Review Conference in 2010. David Scheffer and John Hutson, in their report, focus on the crime of aggression, stating that "[n]on-party nations such as Israel, Russia, China, India and Pakistan actively participate in [crime of aggression] talks because of the criticality for their own militaries." Scheffer and Hutson argue that influence over the crime of aggression in the Review Conference "is a critical reason why accelerated efforts to join the ICC before the 2010 conferences commences would be in the nation's best interest."⁸⁸ A more intermediate step is put forth by the American Society for International Law's (ASIL) Task Force on the ICC, which recommends participation in the 2010 Review Conference as an observer.⁸⁹

Ratification

For full engagement with the Court it would be necessary to ratify the treaty since this would require the US to accept all the obligations imposed by the Statute and also give it full rights in participating in ICC meetings. John Bellinger cites the failure of President Clinton to submit the Rome Statute to the Senate for advice and consent to ratification as evidence that, politically, in Washington neither Republicans nor Democrats would ratify the treaty soon. Bellinger noted the need for affirmative votes of two-thirds of the Senate and, as with the Law of the Sea Treaty, the fact that changes can be made and the Senate may still not approve it. This concern was echoed by Thomas Franck, Honorary Vice President of the American Branch of the International Law Association, who stated that the requirement of advice and consent for ratification of the Statute by two-thirds of the Senate will be an impediment to full US participation in a cooperative international legal system. While ratification may be an ultimate goal, it is not politically realistic to assume this would occur as one of the Obama administration's early actions. It is more realistic to view ratification as a long-term goal, with reinstatement of the signature and participation in and support for the Court's meetings and activities as first steps.

⁸⁷ John B. Bellinger III, Remarks at the American Branch of the International Law Association's International Law Weekend, October 17, 2008, notes on file with the author.

⁸⁸ David Scheffer and John Hutson, Strategy for US Engagement with the International Criminal Court, A Century Foundation Report, October 21, 2008.

⁸⁹ American Society of International Law's Task Force on US Policy Toward the International Criminal Court, Statement of Policy Recommendations, February 2, 2009.





Conclusion

Considering the current US position toward the Court, the next question will be what approach the Obama administration should take. On one side of the spectrum, John Bellinger argues that ratification is not a reality for the near future and general participation with the Court may be counterproductive.⁹⁰ On the other side, David Scheffer argues that the US would benefit from ratifying the Rome Statute as soon as possible, with certain declarations and understandings, and then to go to the Review Conference of 2010 with a vote. A more intermediate view, taken by Chung and others, is that ratification is unlikely to happen for some time. However, she argues that when one considers how quickly the Court has become an international player, the importance of engaging with the Court is evident. She stated that the Court has become an international leverage point and in its first years it has preserved its ideals. If it continues to do so, and the US strives to take a role in promoting the rule of law, the US and the ICC will need, at minimum, to know and understand each others actions. Ambassador Susan Rice similarly recognised the important role of the Court stating that the ICC “looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur.”⁹¹

There has been a trend of increased cooperation with the ICC beginning at the start of Bush’s second term with the restrictions on ASPA, for example, and ultimately with relations with the Court on the situation in Darfur. There is nothing inherent in US law which prevents aiding international tribunals. There have been several precedents, such as the Nuremberg and Tokyo trials and in the ICTY and the ICTR as well as more recent US support of the use of ICC facilities for the trial of Charles Taylor in 2007. While US legislation against the Court still exists, US cooperation with the ICC is no longer entirely limited by domestic law. Clint Williamson said that he meets with Prosecutor Moreno-Ocampo often and, while the ICC cannot say who gets its assistance from, Williamson said that the US has a good working relationship which will continue, but which will fall short of joining the ICC.⁹²

In a speech at the conference commemorating the 10th anniversary of the Rome Statute in April 2008, John Bellinger said the US will cooperate with the Court only to the extent of advancing common goals. He said the US relationship with the Court will depend on “the extent to which the United States and ICC supporters can agree to disagree.”⁹³ Nonetheless, the Bush administration’s softening in practice will allow for a more forthcoming if still careful policy by the Obama administration.

The American Society for International Law (ASIL) issued a statement in February 2009 recommending that President Obama announce a policy of positive engagement with the ICC. It stated that the ASIL Task Force “takes note of the desirable evolution in the de facto policy of the United States toward the Court in the last few years.” The Task Force recommends a stated policy of support of the object and purpose of the Rome Statute

⁹⁰ John B. Bellinger III, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

⁹¹ Ambassador Susan E. Rice, US Permanent Representative to the UN, Security Council, January 29, 2009.

⁹² Clint Williamson, Remarks at the American Branch of the International Law Association’s International Law Weekend, October 17, 2008, notes on file with the author.

⁹³ John B. Bellinger III, The United States and the International Criminal Court: Where We’ve Been and Where We’re Going, remarks to the DePaul University College of Law in Chicago, IL, April 25, 2008.





“notwithstanding” the Grossman statement.⁹⁴ While Barack Obama has only been cautiously positive in his statements about of the Court, it can be reasonably seen that he does not share the outright hostility to the Court that was seen at the start of the Bush administration. Secretary of State Hillary Clinton has stated that “whether we work toward joining or not, we will end the hostility toward the ICC, and look for opportunities to encourage effective ICC action in ways that promote US interests by bringing war criminals to justice.”⁹⁵

Obama has said that the “Court has pursued charges only in cases of the most serious and systemic crimes and it is in America’s interests that these most heinous of criminals, like the perpetrators of the genocide in Darfur, are held accountable.” However he has not explicitly stated a view on the extent to which the US would be involved with the Court stating that he “will consult thoroughly with our military commanders and also examine the track record of the Court before reaching a decision on whether the US should become a State Party to the ICC.”⁹⁶ In the run up to the election, Mark Lippert, a foreign affairs adviser for Obama said that he “has a wait-and-see, go-slow approach. The policy is unchanged from where he has been.”⁹⁷ The reactivation of the US signature remains a viable option for the Obama administration, which could take place at any time, probably without significant repercussions. Furthermore, if the Obama administration should choose to provide information to the Court, attend ASP meetings and the Review Conference this would, in fact, not be a huge divergence from the practice at the end of the Bush administration but it would indicate a movement further in the direction of a wider and deeper relationship with the Court.

*Researched and drafted by Veronica Glick
Updated April 20, 2009*

⁹⁴ American Society of International Law’s Task Force on US Policy Toward the International Criminal Court, Statement of Policy Recommendations, February 2, 2009.

⁹⁵ Senator Richard G. Lugar, Questions for the Record, Nomination of Hillary Rodham Clinton, January 13, 2009.

⁹⁶ Senator Barack Obama, Response to Citizens for Global Solutions questionnaire, October 6, 2007, available at <http://globalsolutions.org/08orbust/quotes/2007/10/31/quote484>.

⁹⁷ William C. Mann, *US policy on international court unlikely to shift*, Associated Press, October 14, 2008.

